Said v Issack & 3 others (Environment and Land Case Civil Suit 101 of 2022) [2023] KEELC 19217 (KLR) (27 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19217 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND CASE CIVIL SUIT 101 OF 2022

LL NAIKUNI, J

JULY 27, 2023

BETWEEN

MAYMUNA SWALEH SAID ..... PLAINTIFF

AND

WARSAME BISHAR ISSACK ..... 1ST DEFENDANT

NOOR SALIM SAID ..... 2ND DEFENDANT

GAMAL ASHUR AWADH ..... 3RD DEFENDANT

LAND REGISTRAR,MOMBASA ..... 4TH DEFENDANT

RULING

I. Introduction

1. The ruling before this Honorable Court is for the determination on the Notice of Motion application dated 8th September, 2022. It was brought under a Certificate of urgency by the Plaintiff/Applicant herein, Maymuna Swaleh Said. The application was against 1st, 2nd, 3rd & 4th Defendants/Respondents herein. It was premised on the provisions of the Registered Titles Act Cap. 282 (now Repealed), Sections 1A, IB, 3A, 63 (e) of the *Civil Procedure Act*, Cap. 21, Orders 40 Rules 1, 2, 3, 4, 8 and Order 51 of the Civil Procedure Rules, 2010.

2. Upon service, the 1st, 2nd, 3rd & 4th Defendants/Respondents herein filed their responses according. Pursuant to that, the Honorable Court direct that the application be disposed off by way of written submissions hereof. From the very onset, its instructive to note that based on the lengthy pleadings, this ruling has become equally long in as much as the Court has endeavored to summarize it as much as possible.

II. The Plaintiff/Applicant's case

3. The Plaintiff/Applicant sought for the following orders:-

    a. Spent.

    b. Spent.

    c. A Conservatory Order of Injunction be issued restraining the Respondents by themselves, their servants, agents and whomsoever, howsoever from in any manner dealing and interfering with Title No. Mombasa/Block XVII/261 till hearing and final determination of the Suit herein.

    d. Costs be awarded to the Plaintiff.

4. The application was premised on the grounds, testimonial facts and the averments made out under the 16 Paragraphed Supporting Affidavit of Maymuna Swaleh Said together with annextures marked as "MSS" annexed thereto. The Deponent averred that:

    a. The Deponent herein is the Plaintiff/Applicant herein and hence duly competent and authorized to swear this affidavit on his own behalf.

    b. The Suit Premises herein is known as "Mombasa/Block XVII/261 [Hereinafter referred "The Suit Property"];

    c. On 16th March, 2007 the father to the Plaintiff one by the name Saleh Salim Said alias Swaleh Salim said was one of the registered owner of the Suit Property;

    d. The Plaintiff was the duly appointed Legal Administrator of the Estate of the late Saleh Salim Said vide Letter of Administration granted on 18th August, 2022 in Kadhi's Succession Cause No. E180 of 2022;

    e. A new Land Title was re - issued on 29th September, 2016;

    f. Further, on 6th September, 2018 a new Title Deed was issued by the 4th Defendant in the names of only Noor Salim Said and Sheikha Salim but no Transfer was ever signed by the Plaintiff's Father in favour of the two [2] new owners hence making the transaction illegal and unlawful;

    g. On 30th July, 2021 a new Title Deed was once again issued in favour of Noor Salim Said and Gamal Ashsur Awadh as the Legal Administrator of the Estate of Sheikha Salim Said;

    h. On 10th September,2021 the said Noor Salim Said and Gamal Ashur Awadh purported to sell to Warsame Bishar Issack the Suit Property and a Transfer was effected on 29th September, 2021;

    i. In August and September, 2014 the 2nd Defendant and 3rd Defendants' Father were duly notified of a Restriction which had been registered against the Title and they were informed if they had any issues they would have to seek for a Court Orders to have said restriction lifted;

    j. The Deponent emphasized that on 6th September, 2018, the 2nd, 3rd and 4th Defendants illegally, unlawfully and fraudulently removed the Plaintiff Father's name from the title to the suit property and purported to transfer the Suit Property into the names of Noor Salim Said and Sheikha Salim Said only;

k. On 29th September, 2021 the 2nd and 3rd Defendants illegally and unlawfully proceeded to sell and transfer the Suit Property to the 1st Defendant whereas they were aware that their Title Deed was not genuine having illegally and unlawfully removed the names of the father to the Plaintiff on 6th September, 2018. Ideally, therefore, they had no genuine Title to Transfer to the 1st Defendant and thus making transfer invalid, null and void. It ought to be cancelled and the 2nd and 3rd Defendants be ordered to refund the 1st Defendant the amount they had received.

l. In spite of the request made to the 4th Defendant to supply copies of all parcel documents for the suit Property including the Transfers of 29th September, 2016, 6th September, 2018 and 30th July, 2021 respectively, the said 4th Defendant failed to oblige. For that reason, it was deemed that the documents were not available. Even if they were available, it meant they were in favour of the Plaintiff. He deposed that all those purported transactions were illegal, null and void.

m. The Estate of the Deceased that was Saleh Salim Said, had lost a Share of a prime Property without compensation and since the transactions surrounding the Transfers was invalid, null and void all entries done by the 4th Defendant to the Suit Property Title under Entries Nos.3, 4, 5, 6, 7,8 and 9 in the Green Card ought to be cancelled forthwith and in the meantime all transactions and dealings in respect to the Title be halted forthwith.

n. The Plaintiff was apprehensive that the Defendants would be colluding to be hiding documents from her with an intention to further dispose/transfer the suit Property;

o. The Plaintiff stood to suffer irreparable loss and damages unless an Injunction was granted;

p. The balance of convenience tilted in favour of granting the Injunction since the Property was unoccupied and not in use.

III. The responses by the 1st Defendant's/Respondent

5. On 4th October, 2022, the 1st Defendant filed a 34 Paragraphed Replying Affidavit dated 28th September, 2022 on the following grounds: -

a. He was interested in Plot No. Mombasa/Block XVII/261 and he was given a copy of the title deed issued on 6th September 2018 to undertake a due diligence exercise as was the norm.

b. He instructed his advocates on record Messrs. Timamy & Co Advocates to apply for an Official Search, which they did and the results confirmed that the 2nd Respondent and the Late Sheikha Salim Said (mother of the 3rd Respondent) were the registered owners of the suit property.

c. The Late Sheikha Salim Said died on the 3rd January 2020 and he insisted that for the transaction to proceed. The family had to Petition the Courts and an administrator was to be appointed.

d. By a Consent Judgment dated 9th October, 2020 the Hon Kadhi-Sheikh Al Muhdhar. A.S Hussein appointed the 3rd Respondent as a Legal Administrator of the Estate of Late Sheikha Salim Said by consent of all the beneficiaries therein. A decree dated 29th July, 2021 arising from the consent Judgment was extracted.

e. As per the Consent Judgement, the half (1/2) share in the suit property was vested in the name of the 3rd Respondent herein. Consequently, the half (1/2) share in the suit property was transferred to the 3rd Respondent herein. He was given a copy of the Title Deed issued on the 30th July, 2021.

f. He instructed his advocate on record Messrs. Timamy & Co Advocates to apply for an Official Search, which they did and the results confirmed that the 2nd Respondent and 3rd Respondent were the registered owners of the suit property.

g. His advocates on record also confirmed that the records from the County offices indicated that the 2nd and 3rd Respondent were the Owners of the suit property.

h. Being satisfied with the result of the due diligence, he purchased the suit property from the 2nd and 3rd Respondent at a price of a sum Kenya Shillings Million (Kshs. 16,000,000/=) vide a Sale Agreement dated 2nd March 2021 in good faith.

i. He paid the stamp duty of a sum Kenya Shilling Six Fourty Thousand and Fourty (Kshs. 640,040/=) which was based on the consideration he paid of a sum Kenya Shillings Million (Kshs 16,000,000/=.)

j. The transaction was duly completed and thereafter he instructed his Advocates to lodge the Transfer that was part of the completion documents.

k. Following the lodgment of documents for registration, the suit property was registered in his name and he was issued with a Title Deed dated 29th September 2021 and an Official Search of 6th October 2021 confirmed that position.

l. He had been advised by his advocates on record, which advice he verily believed to be true that his title to the suit property was absolute and indefeasible.

m. Prior to the purchase and issuance of the Title Deed dated 29th September 2021 in his name he was not aware of the fraudulent dealings of the 2nd and 3rd Respondents, if any.

n. Following the issuance of the Title Deed dated 29th September 2021, the Plaintiff/Applicant's Advocates-Mogaka, Omwenga & Mabeya Advocates wrote to his Advocates a letter dated 12th November, 2021 and received on 15th November, 2021 alleging that the Transfer of the title deed to him was null and void on the basis of fraud and forgery and that the 2nd and 3rd Respondent had not had a clean title to transfer the suit property to him.

o. This was way after the transaction was concluded and the Title Deed dated 29th September 2021 issued in his name.

p. He had no knowledge of the alleged fraud nor was he a party of any alleged fraud if any.

q. He was a bonafide purchaser, that is he was an innocent purchaser for value without notice.

r. Based on the forgoing the Plaintiff/Applicant had failed to demonstrate a prima facie case against the 1st Defendant/Respondent which had a probability of success.

s. The above notwithstanding, the Sale Agreement annexed as Exhibit by the Plaintiff/Applicant herein (pages 5 to 8) was an instrument chargeable with stamp duty under the provisions of the *Stamp Duty Act* (Cap. 480) and the same had not been stamped.

t. The sale agreement annexed by the Plaintiff/Applicant was not admissible. The Deponent had been further advised that the Court should at all times strictly refrain from accepting unstamped instruments to be used in evidence pursuant to the provision of Section 19 of *Stamp Duty Act*.

u. A party who sought to use any unstamped instrument must demonstrate that the omission or neglect to stamp as required did not arise from any intention to evade payment of duty or otherwise defraud. The Plaintiff/Applicant had not demonstrated any intention to have the sale Agreements annexed herein to be stamped. Therefore, the said Agreement could not be used in evidence as a basis for the case and application.

v. Without prejudice to the foregoing, the Plaintiff/Applicant alleged that her father was party to a formal Agreement dated 9th March 2007 and it was on this basis of that the Plaintiff had brought the suit herein. However, the Plaintiff/Applicant also stated that her father died on 4th December 2001 and had annexed the Certificate of death to prove the same. This could not be the correct position as Agreement was made after his death.

w. Its absurd and illogical that the Plaintiff's father executed the Agreement on 9th March 2007 where he died on 4th December 2001.

x. An injunction was an equitable remedy and equity demands that "he who comes to equity must come with clean hands" and that he who comes to seek equity must do so in manner that his/her action are not tainted by an illegality. The Agreement for Sale dated 9th March 2007 which was the basis upon which the Plaintiff sought the equitable remedy was fraudulent.

y. The Plaintiff/Applicant was seeking an equitable remedy when her actions and conduct was irked with illegalities and hence unclean hands. Based on the foregoing the Plaintiff/Applicant had failed to demonstrate "a prima facie case" which had a probability of success against him. It was his position that the Plaintiff had not made full disclosure of material facts to this case. Thus, the interim order granted needed to be vacated forthwith.

z. He stood to suffer grave prejudice if the orders sought for in the subject application were granted. With the huge financial investment of purchasing the suit property; the same would be sunken costs at his expense. It was inaccurate to state that the he would not be prejudiced.

aa. The Plaintiff/Applicant herein would not suffer an irreparable loss which may not be compensated by way of damages. The value of the suit property had been determined and the Applicant could be compensated in the unlikely event that her suit succeeded.

ab. On a balance of convenience tilted in his favour.

ac. Without prejudice to the foregoing, the Plaintiff's Application dated 8th September 2022 was devoid of merit and should be dismissed since the grounds set therein and the issues deponed by the Plaintiff/Applicant was untrue, baseless and a fabrication geared towards painting him as an accomplice to fraud and forgery.

ad. The Application was in opposition to the Notice of Motion dated 8th September, 2022. He prayed that the Plaintiff's subject application be dismissed with costs.

IV. The Response by the 2nd and 3rd Defendants.

6. On 5th October, 2022 the 2nd and 3rd Defendant's filed their 23 Paragraphed Replying Affidavit sworn by Noor Salim Said And Gamal Ashur Awadh sworn on the same date. They averred that:

a. With regards to the contents of Paragraphs 1 and 2 of the said Affidavit averred that the Order annexed in the said Affidavit only appointed the Plaintiff as a Legal Administrator of the Estate of Swaleh Salim Said alias Saleh Salim Said for purposes of distributing the said Estate to its

heirs according to Islamic Shariah thus the Plaintiff herein lacked the capacity to bring the suit herein as such the suit as well as the said Application was a non - starter.

b. As for the contents Paragraph 3 of the said Affidavit they averred that:

   i. It was not disputed that the Suit Property belonged to the late Salim Said Abdisheikh who died sometime in the year 1970s and left the suit property, as a gift, to his 8 children, namely: Swaleh (the Plaintiff's father), Ahmed, Said, Abdalla, Noor (the 2nd Defendant herein), Sheikha (the 3rd Defendant's mother), Khadiye and Salame.

   ii. As such and based on the said document the heirs named hereinabove were entitled to equal share of the suit property, that is an 1/2 for each person.

   iii. The Agreement dated 9th March, 2007 relied by the Plaintiff was a forgery as from the Certificate of Death issued by the Plaintiff herself (in paragraph 2 of the said Affidavit) it was indicated that the Plaintiff's father, Swaleh Salim-one of the purchaser's therein, died on 4th December, 2001 and the vendor, the late Salim Said Abdisheikh had passed on sometime in the 1970s. As such the said Agreement and the subsequent Transfer were invalid and void.

c. In response to paragraph 4 of the said Affidavit and by virtue of the foregoing the Title Deed given on 16th March,2007 and which was relied upon heavily by the Plaintiff herein was obtained fraudulently, illegally and/or unlawfully since no Letters of Administration had been taken out in respect of the Estates of Salim Said Abdisheih and that of Swaleh Salim.

d. Clearly, the contents of paragraph 5 of the said Affidavit was made in bad faith as the letters dated 29th August, 2014 and 16th September, 2014 as annexed touched on suspicions of ownership (despite all Salim Said Abdisheikh heirs being registered) and not illegal and unlawful transfer to the 2nd Defendant and the 3rd Defendant's father as alleged and the complainant therein was Abdulghany Ahmed the son of Ahmed Salim.

e. Further and as luck had it and by virtue of the illegality discussed hereinabove the Title Deed given on 16th March, 2007 was cancelled as evidenced by Entry no. 2 in the Green Card.

f. By virtue of the foregoing, Paragraph 6 of the said Affidavit ought to be disregarded as:

   i. It was in every family members knowledge that after the Title Deed given on 16th March, 2007 was cancelled the family held meetings and every heir's family was duly represented, as hereunder:

      Direct Heir Representative

      Swaleh Salim Hassan Swaleh (the Plaintiff's brother).

      Ahmed Salim Abdulghany Ahmed.

      Said Salim Ali Said/Hussein Said.

      Abdalla Salim Anwar Abdalla.

      Noor Salim (the 2nd Defendant) - Herself & Hassan Jumaan.

      Sheikha Salim herself(till her demise) & the 3rd Defendant.

      Salame Salim Twalib Salim.

ii. Subsequent to the said cancellation the family sat and agreed to have the suit property registered in the names of the heirs who were alive then; that is Noor Salim, Sheikha Salim,Saleh Salim, Abdalla Salim and Ahmed Salim; and that was how Entry no. 3 was entered in the Green Card.

iii. Further, from the meeting of 30th October, 2017 the family was notified that the approximate area indicated on the said title document, i.e. 0.014 Ha, was very small as compared to the actual area on the ground. It was then agreed that a Survey be done by the 3rd Defendant to determine the correct size and that since the 2nd Defendant and the 3rd Defendant's mother were the only surviving heirs then the Title to be reissued in their names on behalf of the others-hence Entries no.4 and 5 on the Green Card.

iv. As a result of the beneficiaries' agreement, from the meeting held on 30th October, 2017 the Title document was registered in the names of the only surviving beneficiaries that is Sheikha (the 3rd Defendant's mother) and Noor, the 2nd Defendant.

v. Pursuant to Sheikha Salim's death, he ,Gamal Ashur Awadh, obtained a Decree from the Kadhi's Court which was registered against the Title as such entry 6 and 7 of the Green Card.

g. As for paragraph 7 of the said Affidavit, they averred that:

i. Ever since they could remember, all family members had been in agreement to have the suit property sold and the monies received therefrom be divided to all the heirs' families.

ii. By virtue of the said consensus, they entered into an Agreement with the 1st Defendant herein on 2nd March, 2021.

iii. Upon receipt of the purchase price, they divided the same equally to all the 8 families, save for the family of Ahmed Salim which was being owed rent as evidenced by the minutes annexed.

iv. Majority of the beneficiaries collected their share of the purchase price-save for the Plaintiff's family, whereby the Plaintiff had brought the suit herein, and that of Said Salim(for reasons known best to them but which monies are still available for them to collect at the office of the 1st Defendant's Advocates).

v. As such the Plaintiff's Letter of 12th November,2021 to Timamy & Company Advocates was made in bad faith and was an afterthought as the Plaintiff was well aware of the sale and her family even consented to the same and by virtue of the families being represented during the family meetings the Plaintiff, her family and/or any other beneficiary are estopped by law to claim ignorance and/or non-involvement in the same.

h. Clearly and from the foregoing paragraph 8 of the said Affidavit was misconstrued as the only invalid entry on the Green Card was Entry no. 1 (for reasons we expressed hereinabove) which was since regularized.

i. The Plaintiff's mischief could be seen in Paragraphs 9 and 10 of the said Affidavit as the Plaintiff only sought to frustrate the 1st Defendant who, as they were informed by their Advocates on record and which information they verily believed to be true that he was entitled to quiet and

peaceful possession of the suit property and as such be it as it may and without prejudice to the foregoing the Plaintiff was only but a trespasser of the suit property.

j. With regards to paragraphs 11 and 12 of the said Affidavit the same were malicious and aimed at misdirecting this Honorable Court as neither the Plaintiff nor her family had been residing on the suit property but rather it was Ahmed Salim's family who resided thereat but vacated the suit property sometime in May 2019.

k. Additionally, the suit property had been vacant ever since May 2019 until when the 1st Defendant took possession of the same.

l. Thus there was no doubt that the Plaintiff made deliberate misrepresentation that misdirected this Honorable Court to give the Order issued on 15th September, 2022. As such, it could be concluded that the said Order had been obtained fraudulently as it was clear that the Plaintiff made false statements and concealed from this Honorable Court material facts concerning the issues herein.

m. It was clear from the foregoing that the said Affidavit was full of falsehood and that the Plaintiff was not afraid of committing perjury and was taking this Honorable Court for granted. As such they urged this Honorable Court not to permit itself to be subjected to such an offence time and again and to commit the Plaintiff on account of the same.

n. Based on paragraphs 13 and 14 therein they wished to state that:

   i. The Plaintiff was malicious as she was well aware of the matters in issue herein.

   ii. They were further advised by their said Advocates which advice they verily believed to be true that the Plaintiff came to this Honorable Court with unclean hands contrary to the maxims that who comes to equity must come with clean hands and he who seeks equity must do equity.

o. Thus it was clear that the suit and said Application disclosed no cause of action as the Plaintiff was simply using this Honorable Court to settle her indifferences with the rest of the family.

p. From the foregoing and in response to Paragraph 15 of the said Affidavit they averred that the said Application was therefore scandalous, frivolous or vexatious and otherwise an abuse of the due process of the Court and should be dismissed with costs.

q. It was just and fair in the circumstance as well as in the best interests of justice for the said Application to be struck out with costs to the 2nd and 3rd Defendants.

r. The documents in the said Affidavit had not been annexed to the said Affidavit nor marked and the same went contrary to the Civil Procedure Rules and Rule 9 of the Oaths and Statutory Declarations Rules. Thus, they urged this Honorable Court to expunge the same.

s. The said Application lacked merit and was frivolous, vexatious and an abuse of the Court process only brought to delay justice. As such they urged this Honorable Court to dismiss the said Application with costs.

V. The Supplementary affidavit by the Plaintiff

7. On 25th October, 2022 the Plaintiff filed an 18th Paragraphed Supplementary Affidavit in support of the Application dated 24th October, 2022. She averred that:

   a. There had been no plausible reason as to why:

i. Entry No.2 - was the Title cancelled? If yes, was the cancellation signed for? If yes, by who and what were the reasons for cancellation and what were the supporting documents for cancellation?

ii. Between 16th March 2007 and 29th September, 2016 which Title was in place? In whose names was that title deed?

iii. Entry No.3 - In whose names was the new Land Title Deed re-issued on 29th September, 2016?

iv. Entry No.4 - What were the supporting documents used to issue a title deed on 06th September, 2018 in two [2] names? When were the other three [3] names on Entry No.1 dropped?

v. Entry No.6 on page 13 - Were the mandatory Form LRA 42 and LRA 50 ever used to have the Decree of 09th October, 2020 entered in the Register? If yes, where were those forms?

b. She wondered if the 1st Defendant received a clean title in light of the above. She averred that without the 4th Defendant filing any Replying Affidavit it was necessary that the orders sought be granted pending the hearing and final determination of the suit.

c. From the exhibits of the 1st Defendant that is exhibits number "WB1-2" to "WB 1-5" it was very clear that the 1st Defendant was not a purchaser for value without notice because when searching into the history of suit property and indeed exhibit marked as "WB1 – 4" contradicted the averments contained in Paragraph 5 (a) & (b) of the 2nd and 3rd Respondents' Replying Affidavit because the suit property was owned equally by the eight [8] children of the late Salim Said Abdi Sheikh. Each of the eight [8] children had 1/8 share each and the order that half 1/2 of suit property as per the Consent Judgment (marked as Exhibit "WB1 – 4") was owned by Gamal Ashur Awadh was wrong and misleading.

d. In light of the averment of made out under Paragraph 5 (a) & (b) of the 2nd and 3rd Defendants' Replying Affidavit it was mandatory that all the heirs of the eight [8] children were required to give their written consent and authority to sell the suit property. But however, she was aware that the twenty-one [21] heirs (Dependants) never gave their written consent to sell the property and indeed they had never received their share of the purported sale.

e. At no time did she ever sign as a secretary the alleged Minutes of the Meetings which were produced as exhibits marked as 'NSS - 4" . She averred that the same were fake and tailor made for this suit.

f. There was no meeting held in the presence of all the heirs whereby they all agreed and signed to have the suit property sold for a sum of Kenya Shillings Sixteen Million (Kshs.16, 000, 000.00/=) to the 1st Defendant. In fact the three [3] families who had never taken their shares of sale averred that they were never given any opportunity to purchase the property and they were ready and willing to pay a sum of Kenya Shillings Ten Million (Kshs.10,000,000/=) and retain their sum of Kenya Shillings Two Million (Kshs. 2, 000, 000.00/=) per family as their share. They were ready to refund a sum of Kenya Shillings Seven Twenty Thousand Five Ninety Four Hundred and Twenty five cents (Kshs. 720,594.25/=) taken by the two [2] family members but the 21 of them who never took any of their shares amounting to a sum of Kenya Shillings Five Million Two Seventy Nine Thousand Four Hundred & Five Seventy Five cents (Kshs. 5,279,405.75/=) were ready to purchase the suit property.

g. Filing of this suit was part and parcel of his administrative duties on behalf of the Estate of the Late Swaleh Salim Said alias Saleth Salim Said. Hence there could be no distribution of the Estate until she ensured that the heirs received the lawful shares and reason for filing of this suit. It should be noted that the 2nd, 3rd and 4th Defendants have not produced any evidence in terms of documents how her father's name was removed from the Title Deed. Thus, the 1st Defendant never obtained a clean Title Deed and there be need to grant orders sought till full and final determination of this matter.

h. There was no document produced by the 2nd and 3rd Defendants to confirm that they were given written authority by all the heirs to sell the suit property. Clearly then the exhibit marked as "NSS - 4" was fake and not genuine since the Secretary denied to have prepared and signed the same.

i. The particulars of exhibits marked as "NSS - 6" contradicted the Clauses Nos.1:1 (0)8, 4:5 and others Clause of the exhibit marked as "NSS - 5" and indeed at no time did any of the heirs ever sign any document to allow the sale of the suit property.

j. It was very clear that all the Defendants knew that the Entries in the Green Card had issues and indeed the 4th Defendant in its letters found on pages 16 and 17 of her supporting affidavit clearly showed that the Title Deed which was being held had issues and they needed to be resolved and a restriction was put by the 4th Defendant way back on 16th September, 2014. However it had not been explained how the same was removed.

k. As it would be noted it was the Affidavits of the Defendant which were indeed contracting each other. Therefore, there was need to preserve suit property until matter was fully heard on its own merit.

l. The contents of the joint Affidavits of the 2nd and 3rd Defendants offended the rules of drafting affidavits and the same should be struck out as being incompetent and defective.

m. The 1st Defendant was fully aware of the fraudulent dealings of the 2nd and 3rd Defendants because of his investigations done into the previous Titles of the suit property and further by his Advocates retaining the monies and paying several persons the purchase amount and still retaining some other amounts with his Advocates towards purchase price which clearly showed that the 1st Defendant was not a bonafide purchaser without notice.

n. By virtue of the names of her father being in the 1st Entry to the Title of the suit property which Title was on Pages 9 to 12 of her Supporting Affidavit and Entry No.1 on Pages 14 of her exhibit, it was very clear she had every right to sue on behalf of the Estate of her father. Indeed no Succession was done in respect to his Estate before his name was removed and hence Entries No. 3 to 9 were null and void.

o. The 1st Defendant could never be taken to have been a bona fide purchaser or innocent purchaser for value without notice taking into account of exhibits marked as "WB1-1" to "WB1-4" and "NSS – 6". All these documents never showed that he was fully aware that the Vendors were not the only parties who owned the suit property and indeed they had not at all given their written consent to sell and transfer the property.

p. She attached the analysis of the payments made after the sale of the suit property. From the analysis it was clear that:-

    i. Her family had received nil from the sale;

ii. Abdallah Salim,Salame Salim Nuru Suluma and Khadija families had each received a sum of Kenya Shillings One Million Eight Seventy Eight Thousand Nine Sixty Four Hundred Thirty Five cents (Kshs.1,878,964.35).

iii. Amin Badi received only a sum of Kenya Shillings Three Seventy Eight Thousand Nine Sixty Four Hundred Thirty Five Cents (Kshs. 378, 964.35/-) and was ready to refund the amount.

iv. Amin Said received only a sum of Kenya Shillings Three Fourty One Thousand Six Twenty Nine hundred Ninety Cents (Kshs. 341, 629.90/-) and was ready to refund the amount.

v. Shikha Suluma 3rd Defendant received a total of a sum of Kenya Shillings Two Million One Sixty Thousand (Kshs.2,160,000/=) and his 4 siblings received a total of a sum of Kenya Shillings One Million Five Thousand and Three One Sixty Eight Hundred & Ninety Cents (Kshs.1,503,168.90). Hence a total sum of Kenya Shillings Three Million Six Sixty Three Thousand One Sixty Nine Hundred & eighty cents (Kshs. 3,663,169.80)

vi. Each family was to receive a sum of Kenya Shillings Two Million (Kshs. 2,000,000/=) that is a 1/2 Share.

vii. No evidence of payment of Capital Gain Tax of a sum of Kenya Shillings Three and Eight Thousand Six Twenty One Hundred (Kshs.308,621/=)

viii. No evidence why a sum of Kenya Shillings Three and Five Thousand Two Eighty Five Hundred (Kshs.305,285/=) was deducted.

ix. No reason why 3rd Defendant alone received a sum of Kenya Shillings Two Million One Sixty Thousand Kshs.2,160,000/=and his family sum of Kenya Shillings Three Million Six Sixty Three Thousand One Sixty Nine Hundred & eighty cents (Kshs.3,663,169.80) and not a sum of Kenya Shillings Two Million (Kshs. 2,000,000/=)

x. Why there was only a balance of a sum of Kenya Shillings Three Million Four Sixty Five Three Fifty Three Thousand & Ninety Five cents (Kshs.3, 465, 353.95/=) which was still owned and not a sum of Kenya Shillings Five Million Two Seventy Nine Thousand Four Ninety Five Hundred & Seventy Five cents (Kshs.5,279,495.75. Who was paid the difference of a sum of Kenya Shillings One Million Eight Fourteen Thousand and Fifty One Eighty Cents/= (Kshs.1,814,051.80)?

xi. That from the above averments it was very clear that the orders she was seeking in the Application of 8th September, 2022 ought to be allowed pending the hearing and determination of this matter inter - partes.

VI. Submissions

8. On October 2022 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 8th September, 2022 be disposed of by way of written submissions. Pursuant to that, all the parties complied. Thereafter, the Honorable Court reserved a ruling date on notice accordingly.

A. The Written Submissions by the Plaintiff

9. On 26th October, 2022, the Learned Counsel for the Plaintiff through the Law firm of Messrs. Mogaka Omwenga & Mabeya Advocates filed their written submissions dated 24th October, 2022. Mr. Omwenga Advocate commenced the submission by stating that the submissions were in respect of her Application dated 8th September, 2022 which inter alia sought the orders/Prayers as already stated herein above. He indicated that the Plaintiff's Application was supported by the grounds on the body of the Application, the Supporting Affidavit of the Plaintiff sworn on the 08th September, 2022, the Supplementary Affidavit sworn on the 24th October, 2022 plus the Exhibits thereto.The 1st Defendant/ Respondent opposed the Application by filing a Replying Affidavit sworn by him on 28th September, 2022 plus the Exhibits thereto. Equally, the Counsel stated that the 2nd and 3rd Defendants/Responents also filed "a joint Replying Affidavit" sworn on 05th October, 2022 together with the Exhibits thereto. Lastly the 4th Defendant/Respondent only filed a Statement of Defence with no Replying Affidavit and/or grounds of Opposition to the Plaintiff's Application of 08th September, 2022.

10. Briefly, and in summary, the Learned Counsel recounted on all the grounds that both the Plaintiff and the Defendants averred to from their pleadings. He noted that the 4th Defendant never filed any documents as at the time of writing this Submissions. It should be presumed that they were not opposing the Application. For the Honorable Court to determine the Plaintiff's Application of 08th September, 2022 they proposed that they would have to deal with the following three (3) issues:-

    a. Whether the Plaintiff had demonstrated a cause of action as against the Defendants which was capable of being adjudicated at the full trial or not and hence the need to order a temporary Injunction to preserve the Suit Property pending the hearing and determination of the Suit?

    b. Whether the Plaintiff/Applicant had met all the requirements to be granted Order of Temporary/Conservatory Injunctive Orders as per Order 40 of the Civil Procedure Rules?

    c. Who would bear the costs of the Application?

11. Firstly, on the issue No. "a". It was the Learned Counsel's contention that the Plaintiff had demonstrated that indeed that her Father was one of the registered owners of the Suit Property as at 16th March, 2007 till 06th September, 2018 when her Father's name was removed and the Property was now in the name of the 2nd and 3rd Defendants' parents. On that ground alone she had demonstrated that she had a cause of action on behalf of the Estate of her Father which warrants here to get the Interim Relief Sought. She had demonstrated that she had a cause of action as against the Defendants guided by those facts and the case Laws. To buttress his point, the Learned Counsel relied on the case of Nairobi Civil Appeal No. 44 of 2014 Naftali Ruthi Kinyua – Versus - Patrick Thuita Gachure & Anor [2015] eKLR where the Court held that:

> " the Learned Judge erred in law and in fact in holding that the appellant had not proved that he is the owner of the land despite the uncontested documents and evidence tendered before her;
>
> the Learned Judge erred in law and in fact in failing to find that although the 2nd Defendant had not issued the title document, it had already issued the deed plan to the Appellant thus on a balance of probability the appellant's claim of owner ship of the suit land was more probable than that of the 1st Respondent;
>
> the Learned Judge erred in law and in fact in failing to consider the principle of first in time in that the Appellant had purchased the property known as Land reference number

8285/1522 (previously known as Plot Number 133 Kariobangi Light Industries) in 1980 whereas the 1st respondent's claim of the land is of the year 2011;

the learned judge erred in law and in fact in failing to consider the appellant's submissions on the doctrine of Lis Pendens thereby failing to order the preservation of the land under the doctrine;

the Learned Judge erred in law and in fact in failing to exercise her discretion in making an order for preservation of the suit land pending the hearing and determination of the suit;

the Learned Judge erred in law and in fact in holding that the appellant did not have a genuine and arguable case;

the Learned Judge erred in law and in fact in failing to consider all the issues raised by the Appellant in both the written and oral submissions made before her;

the Learned Judge misdirected herself in law and in fact in the ruling the way that she did.

When the appeal came up for hearing, Mr. King'ara, Learned Counsel for the Appellant submitted in respect of grounds 1, 2 and 3 that the learned Judge was wrong in declining to grant the injunction, as the record showed that the appellant had entered into a sale agreement with Peter Muthaura which agreement had not been disputed by either the 1st or the 2nd Respondent. The documents also showed that the appellant paid the 2nd respondent stand premiums and ground rent in March 2007, and the survey and conveyance fees on 28th January 2009. Counsel submitted that, the appellant's allocation was not at any time withdrawn by the 2nd Respondent, which it was at liberty to do, and it had not denied the validity of the Appellant's ownership documents. In contrast, there was no letter of allotment issued to Samuel Onyango Osowo, in the 1st Respondent's documents, and since the 1st Respondent's payments of stand premium, survey fees, ground rent and beacon certificate fees, were made to the 2nd Respondent after 3rd August 2011, counsel submitted that the first in time claim should prevail. The Learned Judge should have concluded that the suit property had already passed to the appellant, and that the 2nd respondent did not have any authority to reallocate the suit property to the 1st respondent.

On ground 2, Counsel submitted that the Learned Judge should not have hesitated to make orders to preserve the suit property under the doctrine of lis pendens, and on this basis should have issued injunctive orders restraining any further dealings with the suit property until the suit was heard and determined.

With respect to grounds 5 to 8, Counsel submitted that the Learned Judge failed to exercise her discretion judiciously, as the ruling was contradictory, and, it was for the very reason that neither the Appellant nor the 1st Respondent had a perfected title, that the injunctive orders should have been issued to preserve the suit property. Counsel prayed that this Court does set aside the order of the lower court and issue an injunction as prayed.

On his part, Mr. Matwere holding brief for Mr. Okindo, Learned Counsel for the 1st Respondent, opposed the appeal, and submitted that, the Learned Judge rightly found that the Appellant did not make out a prima facie case, as the Appellant was not in possession of a perfected title conferring ownership rights over the suit property upon him. The Appellant was allotted the suit property in 1980, but did nothing to secure the title documents. Counsel further submitted that, the record showed that the 1st Respondent purchased the suit property from one Samuel Onyango Osowo, as a purchaser for value without notice. On the doctrine of lis pendens, counsel contended that this can only be invoked where there

is a perfected title, and not where the title had not been perfected. Counsel concluded that, since the documents of ownership of the suit property were similar, preservation of the suit property was unnecessary, particularly as the court was not satisfied that the Appellant had established a prima facie case. Counsel urged the Court to dismiss the appeal with costs.

Mr. Sitati, Learned Counsel for the 2nd Respondent, informed the Court that the 2nd Respondent had not admitted to the proprietorship of the suit property by either the Appellant or the 1st Respondent, but conceded that the 2nd Respondent supported the decision of the High Court.

In reply Mr. King'ara reiterated that the 2nd Respondent had not supported the appellant nor the 1st Respondent in the High Court, and did not file any documents to clarify the position of ownership of the suit property.

In this appeal we must remind ourselves that this Court is neither minded to interfere with the findings of fact by the trial court unless they are not based on evidence or are a misapprehension of the evidence or that the trial judge is shown to have acted on a wrong principle in arriving at the findings. See Ephantus Mwangi & Another – Versus - Duncan Mwangi Wambugu (1982-88) 1 KAR 278.

Taking into consideration the application, the grounds on the face thereof and the parties' submissions, we take the view that the issues for determination are as follows:

Was the court wrong in finding that the Appellant was unable to prove his ownership of the suit property, particularly having regard to the principle of first in time?

Was the Learned Judge wrong in failing to order an injunction on the basis of the doctrine of lis pendens?

Did the Learned Judge fail to exercise her discretion judiciously, and misdirect herself in law and in fact in her ruling?

We will begin with the issue of whether the High Court was wrong in finding that the Appellant had not established a prima facie case as he had been unable to prove ownership of the suit property.

The principles of injunctions are to be found in the case of Giella – Versus - Cassman Brown Co. Ltd 1973] EA 358 where it was held that in order to grant the injunction as prayed the court must be satisfied that,

The Applicant had established a prima facie case with probability of success;

The Applicant stood to suffer irreparable loss which could not be compensated by an award of damages; and

If the court was in doubt, the application would be determined on a balance of convenience.

With reference to the establishment of a prima facie case, Lord Diplock in the case of American Cyanamid – Versus - Ethicon Limited [1975] AC 396 stated thus,

> "If there is no prima facie case on the point essential to entitle the Plaintiff to complain of the Defendant's proposed activities, that is the end of any claim to interlocutory relief."

The High Court concluded that the Appellant had not established a prima facie case, having failed to produce a perfected document of title to prove that he owned the suit property.

Furthermore, when the learned judge compared the Appellant's documents claiming ownership with that of the 1st Respondent, she concluded that, given their similarity, the issue of ownership of the suit property could not be determined conclusively.

It is well established that, in order to secure the injunctive relief sought, the Appellant must first establish a prima facie case with a high chance of success. In this case, the Appellant must show that he owned the suit property, or had a valid claim, which would be capable of defeating a third party claim in respect of the same property.

The documents show that the Appellant acquired the suit property from one Peter Muthaura in 1980. On 16th December 2008, the 2nd Respondent confirmed to the Appellant that, Peter Muthaura was the initial allottee of the suit property. It is not disputed that a payment in part for ground rent and stand premium was paid by the appellant to the 2nd Respondent on 9th March 2007, and later survey fees and conveyance fees were paid on 28th January 2009. Therefore the Appellant expected the 2nd Respondent to finalise processing of the title in his favour.

The 1st Respondent's documents on the other hand show that he purchased the suit property from one Samuel Onyango Osowo ID No. 13597177 on 10th August 2011. From the correspondence, the 2nd Respondent issued a demand on 3rd August 2011 to Sammy Onyango for ground rent of Kshs. 5,530 and stand premium of Kshs. 36,840 effective 1st January 2004. The 1st respondent paid the stand premium of Kshs.36,870, and further sums of Kshs.15,000 each for Survey Fees and conveyance fees. All payments were made on 10th August 2011.

When the Appellant's documents are compared with those of the 1st Respondent, what is apparent is that the Appellant's attempts to secure proprietorship of the suit property were earlier in time than that of the 1st Respondent. It is also instructive that, the appellant's documents explain that the Appellant acquired the 2nd Respondent's land from an allottee who had been initially allocated the suit property by the 2nd Respondent. In the 1st respondent's case, no explanation has been provided by either the 1st or 2nd Respondents as to how Samuel Onyango Osowo acquired the suit property in the first instance, or whether it was the Appellant who sold the suit property to Samuel Onyango Osowo, who in turn sold it to the 1st respondent. It was not also shown that the Appellant's allocation was revoked, and a fresh allocation issued to Samuel Onyango Osowo, who in turn sold it to the 1st Respondent.

What is clear is that, neither the appellant nor the 1st Respondent were in possession of a title document in respect of the suit property. This being the case, it is evident that the dispute between the parties is a contest as to whose claim over the suit property was superior to the other and, it was incumbent upon the parties to produce such documents as would support their claim in respect of the suit property, to the exclusion of the other.

There is no doubt that both the appellant and the 1st Respondent produced various documents in support of their respective claims. The Appellant's documents show that he had attempted to register his interest well before the 1st respondent sought to register his interest. Additionally, there is nothing to show that the Appellant's allocation was ever withdrawn or cancelled by the 2nd Respondent. Bearing this in mind, we consider that it was incumbent upon the Learned Judge to discern on a balance of probabilities, whether, based on the documents that were before the court, the appellant had established a prima facie case with a probability of success.

In our view, there was sufficient documentation to show that Appellant maintained a claim in respect of the suit property, which claim was valid and continued to subsist until otherwise determined. In saying so, we find that the Appellant has established a prima facie case with chances of success.

Having found that a prima facie case was established, we must consider whether the other prerequisites in Giella - Versus - Cassman Brown Co. Ltd (supra) were met, which is, whether the Appellant would suffer irreparable loss if the injunction sought was denied and where the balance of convenience lay, in the event that the court was doubtful whether the two conditions had been satisfied.

The Appellant submitted that since at all material times he was the lawful allottee of the suit property from 1980, he stood to suffer irreparable loss if the defendant was not restrained from taking over. We agree. If at all any doubt existed in the trial Judge's mind as to whether the two tests above had been met, the application ought to have been determined on a balance of convenience, which, in view, dictated that the suit property be maintained as it was pending hearing and determination of the suit. That could only be done by granting the orders of injunction as sought.

In the suit before the High Court, there remains the question as to whose claim between that of the Appellant and the 1st Respondent was superior or superseded the other. We are however satisfied that on the basis of the documents and evidence on record, the Appellant demonstrated a prima facie with a likelihood of success. He also established that damages would not be adequate compensation unless the orders sought were granted. As a consequence, we deem it necessary to grant the injunctive relief sought, which we hereby do.

We turn next to the issue of failure by the learned judge to consider the appellant's submissions on the doctrine of lis pendens, so as to preserve the suit property.

Despite the appellant having submitted that, the doctrine of lis pendens should be applied to this case so as to restrain the Respondents from disposing or otherwise dealing in the suit property until the suit was heard and determined, there is no reference to these submissions in the ruling, as the court did not at any time address the issue. In their reply, the 1st and 2nd Respondents took the view that the doctrine has no relevance following the enactment of the current Lands legislation.

Black's Law Dictionary 9th edition, defines lis pendens as the jurisdictional, power or control acquired by a court over property while a legal action is pending.

Lis pendens is a common law principle that was enacted into statute by section 52 Indian Transfer of Property Act (ITPA)-now repealed. While addressing the purpose of the principle of lis pendens, Turner L. J, in Bellamy vs Sabine [1857] 1 De J 566 held as follows:-

> "It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings."

In the case of Mawji – Versus - US International University & another [1976] KLR 185, Madan, J.A. stated thus:-

> " The doctrine of lis pendens under Section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other..."

In the same case at page it was observed inter alia that:-

> " Every man is presumed to be attentive to what passes in the courts of justice of the State or sovereignty where he resides. Therefore purchase made of a property actually in litigation pendete lite for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit."

See also the considered views of Nambuye J, (as she then was) in Bernadette Wangare Muriu – Versus - National Social Security Fund Board of Trustees & 2 Others [2012] eKLR.

The necessity of the doctrine of lis pendens in the adjudication of land matters pending before the court cannot be gainsaid, particularly for its expediency, as well as the orderly and efficacious disposal of justice. Having said that, with the repeal of Section 52 of the ITPA by the *Land Registration Act* (LRA) Number 3 of 2013, the question arises as to whether the doctrine remains applicable to the circumstances of the present case. We consider that its applicability must be considered in the light of Section 107 (1) of the LRA which provides the saving and transitional provisions of this Act, and which stipulates,

> " Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act."

The effect of this provision is to allow for the continued applicability of the rights and interests ensuing from legislation that governed titles of properties established prior to the repeal of such legislation. Given that the concerned property involved land eligible for registration under the Registration of Titles Act (now repealed), having regard to section 107 (1) of the LRA, it is evident the rights flowing from section 52 of the ITPA including those under doctrine of lis pendens would remain applicable to the circumstances of this case.

Furthermore, lis pendens is a common law principle, and in addressing the relevance of common law principles within the Kenyan context, Section 3 (1) of the *Judicature Act* Cap 8 stipulates that,

> " The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with- *the Constitution*;

> subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;
>
> subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date:
>
> Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary."

Similarly, in the light of this provision, the doctrine of lis pendens would remain applicable to this case.

As to whether the requirements of the principles of lis pendens were met, there is no doubt that the instant case concerns a contested property dispute, where the rights to the suit property are in serious contention.

Given these circumstances, it goes without saying that, the learned judge should not have disregarded the adjudicative support of the doctrine of lis pendens in considering the injunctive relief sought, if for no other reason, than for the preservation of the suit property until the suit herein was finally heard and determined. We find that the learned judge fell into error when she failed to consider and apply the doctrine of lis pendens to grant the injunctive relief sought.

The final issue is whether the Learned Judge exercised her discretion judiciously. The position on the exercise of a Judge's discretion was stated in the case of Mbogo & Another – Versus - Shah [1968] EA where, Sir Clement de Lestang, V.P. at page 94 stated thus,

> "I think it is well settled that a court will not interfere with the exercise of its discretion of an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or it failed to take into consideration which it should have taken into consideration and in so doing arrived at the wrong conclusion."

Upon applying these principles, we find that the High Court misdirected itself, in declining to grant the injunction, as to begin with, the Learned Judge reached the wrong conclusion that the Appellant had not established a prima facie case. Yet, clearly, the dispute concerned the competing interests of the Appellant and the 1st Respondent over the suit property, and whose claim superseded the other in the light of the existing documentation. Had the Learned Judge considered the dispute in the light of the two competing interests, she would have come to the conclusion that, based on the appellant's documentation before the court, a prima facie case had been made out in respect of his claim. Secondly, the learned judge misdirected herself in failing to consider and apply the doctrine of lis pendens, to preserve the suit property pending the hearing and determination of the suit.

In the circumstances, we find it necessary to interfere with the learned judge's discretion. We allow the appeal and set aside the ruling delivered by the High Court on 17th May, 2013. The Appellant shall bear the costs of the appeal."

12. The Learned Counsel submitted that in Mombasa Civil Appeal No. 92 of 2017 Co - operative Bank of Kenya Limited – Versus - Catherine Kanini Kioko & 2 Others where the Court held that:

> They therefore moved to the Environment and Land Court (ELC) vide Civil Suit No. 159 of 2016 seeking three orders as hereunder:-
>
> (a) An injunction to restrain the Defendants by themselves or their servants or agents from selling or in any other manner whatsoever interfering with plot No.9071/I1/MN and plot No. 9086/1/MN.
>
> 15. We note that, as held by this Court in the Nguruman case (supra).the 3 principles are sequential. We however note that the 3principle of balance of convenience only comes in "When in doubt". Would there be any doubt if the first 2 principles were crystal clear? The answer is no. The doubt arises when the court is doubtful as to whether or not the 2 principles have been proved. In this case, it was evident that it was doubtful whether or not irreparable loss had been established and that is why the learned Judge fell on the 3w principle of 'balance of convenience'. We do not fault the learned Judge at all for finding that the property in question needed to be preserved pending hearing and determination of the suit. Declining the order of interim injunction would have rendered the rest of the case moot as the respondents' property would have been sold when the circumstances surrounding the matter would dictate that the same be preserved pending the weighty issues raised in the main suit. We agree with the learned authors of Halsbury's Laws of England, 4" Edition at paragraph 953 where they state:-
>
> > " It is not necessary that the courts should find a case which would entitle the plaintiff to relief at all events. It is quite sufficient for it to find a case which shows that there is a substantial question to be investigated and the status quo should be preserved until that question can be disposed of...An interlocutory injunction (a quia timet injunction) will be granted to restrain an apprehended or threatened injury where the injury is certain or very imminent or where mischief of an overwhelming nature is likely to be done."
>
> 16. We do not find any misdirection on the part of the learned Judge in the manner she arrived at the decision to preserve the property. We are not therefore persuaded that the order should be vacated in its entirety. we find that this appeal succeeds in part. We find no reason to vacate the order of injunction.

13. The Learned Counsel argued that guided by the above Court of Appeal decision, they invited the Court to find in favour of the Plaintiff/Applicant as regards Issue No."a". Likewise, on the same point, the Learned Counsel was guided by the Honourable Court's Authorities in similar matters. This Case Law are as follows:- In the case of "Bamburi Supermarket Limited – Versus - Rupa Gupta & 3 others [2021] eKLR, this Honorable Court stated as follows:

> " On the 19th August,2021, the Plaintiff/Applicant brought this application under Certificate of Urgency and during the High Court Vacation under Section 10 (2) & (3) of *High Court (Organization and Administration) Act*, Rules 16 & 17 (1) & (2) of the High Court (Organization and Administration) (General) Rules 2016 Rules 3 (1) and (2) of the High

Court Practice and procedure Rules) *Judicature Act* (Cap 8). Sections 26 (1) and (2) of the *Environment and Land Court Act* 2011.

Further the said application was brought under the Provisions of Order 40 Rules 1, 2, and 3 of the Civil Procedure Rules 2010 and Sections 1A and 3A of the *Civil Procedure Act* Cap. 21 of the Laws of Kenya. The Plaintiffs/Applicants sought for the following Order:-

(a) Spend

(b) That pending hearing and determination of this application there be and is hereby issued an order for injunction restraining the Defendants either by themselves or through their agents, assigns, employees, guards, officers, tenants or any other person authorized by and/or the Defendants from accessing occupying, using managing running, leasing, sub-leasing selling charging transferring or in any other manner interfering with the suit property known as Land Reference. No. 3413 sections I mainland North on which is erected a building known as Gupta Complex.

In order to arrive at an informed decision, I have framed the following salient issues to guide me accordingly Whether the Plaintiff meets the requirement of being granted temporary injunction under the provision of Order 40 Rule 1 & 2 of the Civil Procedure Rules.

Whether the Plaintiff meets the requirement of being granted temporary injunction under the provision of Order 40 Rule 1 & 2 of the Civil Procedure Rules.

Ideally, the purpose of a temporary injunction as stated in Order 40 Rule 1 of the Civil Procedure Rules, 2010 is to stay and prevent the wasting, damaging, alienation, the sale, removal or disposition of the suit property. The principles which guide the court in deciding whether or not to grant an interlocutory injunction are well settled in the now famous "Giella – Versus - Cassman Brown (supra) as follows:

i. prima facie with a probability of success,

ii. the applicant might otherwise might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages, and

iii. if the court is in doubt on the existence or otherwise of a prima facie case, it will decide the application on the balance of convenience.

The first requirement the applicants is required to establish a prima facie case. The Prima facie case was defined by the Court of Appeal in MRAO Ltd – Versus - First American Bank of Kenya Ltd & 2 others (2003) eKLR "so what is "a prima facie case" I would say that in civil cases it is a case in which on the material presented to the court or tribunal properly directly itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter." When examining

whether the Applicants have established a prima facie case, court ought not to indulge into examining the merits and demerits of the case as it was stated by Odunga J in Peter Kasimba & 219 others – Versus - Kwetu Savings & Credit Co-operative Society Limited & 11 others (2020) eKLR, stated that "at an interlocutory stage, the court is not required and indeed forbidden to purport to decide with finality the various relevant "facts" urged by the parties."

The Plaintiff has sought temporary injunction orders against the 1st ,2nd and 3rd Defendants restraining them from interfering with the management, ownership and ruling of the

affairs of the building known as GUPTA COMPLEX PREMISED on the Land Ref. No. 3413/1/MN especially the tenants herein who had been managed by the deceased Prem Lal Ramnath and the Plaintiff (now the legal Administrator of the estate of the deceased)pending the hearing and determination of the application "inter-partes".The Defendants are pushing to be accorded what they are claiming to be their or deceased's rightful shares in the Bamburi Supermarket Limited and they are alleging are being fraudulently taken away or disinherited.

37. From the documents placed on record. it seems the Plaintiff has a Certificate of Title which is an indication that the land is legally and absolute registered in its names. Nonetheless, these are issues to be adjudicated during the full trial. In the meantime, the Plaintiff/Applicant has satisfied the ingredient founded under the now famous case of "Giella- Versus - Cassman Brown" of having established a prime facie case with a high chance of success. These are matters to be heard and rightfully determined before the High Court and Environment Land Court. There is no conflict are at as they are very distinct and separate subject matters.

38. The second requirement is for the Plaintiffs/Applicants to prove to court that they might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. The Plaintiffs/Applicants have stated the Defendants had wrongfully leased it out to tenants and were currently collecting and receiving rent on account of the suit property at the expense of the Plaintiff. Additionally, that the Defendants had barred the Plaintiff and its Directors from accessing the suit land. As a result, the Plaintiff was losing rental income and had adamantly declined to account for and submit it to rental tax to the Kenya Revenue Authority (KRA) and hence exposing the Plaintiff for being charged on allegation or offence for tax evasion and related tax offence. From these facts, he submitted that they were suffering irreparable loss and damage which could not be compensated by way of damage. They contended that if court was in doubt the balance of convenience tilted in favour of the Plaintiff who undoubtedly the legal owner to the suit land.

39. In the given circumstances, I concur that the Plaintiffs/Applicants stand to lose immensely. The provision of Order 40 Rules 1 & 2 of the Civil Procedure Rules, 2020 empowers court to grant an order of temporary injunction to restrain such acts and to prevent the wasting. damaging, alienation, sale, removal or disposition of the suit property. The Plaintiffs/Applicants stand to suffer irreparable injury that cannot be quantified by damages. On this preposition, I fully associate myself with the ratio in the Court of Appeal in Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others (2014) eKLR "in conclusion, we stress that it must always be borne in mind that the very foundation of the jurisdiction to issue orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of multiplicity of suits and where facts are not shown to bring the case within these conditions the relief of injunction is not available."

    When court is in doubt, it examines on which side the balance of convenience tilts to. In this case, the balance of convenience tilts in favour of preserving the suit property during the hearing and determination of the suit.

45. Based on the fore going analysis, I do proceed to make the following directions/orders:-

    a) That the Notice of Motion dated 19th August, 2021 by the Plaintiff/Applicant be and is hereby allowed.

14. In the case of:- "Katana Nzaro Nguwa & 52 others – Versus - Najma Ali Ahmed [2021] eKLR, this Honourable Court held that:

> " In order to arrive at an informed and just decision, I have framed the following issues for consideration. These are:
>
> a. Whether the Defendant/Applicant has met all the requirements to be granted orders of temporary Injunction as stated out under the provisions of the Civil Procedure Rules, 2010?
>
> 10. Ideally, at the an interlocutory application, the dispute between the parties is pending, the court is careful not to venture into making definitive findings on facts of law or facts. The power of court in an application for an interlocutory injunction is discretional, that will be judicially exercised on the basis of law and evidence. The conditions for granting a temporary injunction are well known. Firstly, the applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.
>
> 11. In the instant case, there some issues which may require in depth interrogation, these are the Defendant/Applicant has annexed a certificate of title, not in her name but rather in the name of the transferor. She claims ownership to the suit property. The Plaintiffs are in occupation as squatters. The applicant's claim of ownership of the suit property is an arguable case that raises a serious question that ought to be tried by court during a full trial. A prima facie case was defined in the case of Mrao Limited- Versus- First American Bank of Kenya Ltd & 2 others (2003)KLR 125 "So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite person as to call for an explanation or rebuttal from the latter. "The material that has been placed before me, is sufficient enough to find that the applicant has an interest in the suit property, this calls for an explanation from the Respondents during the full trial.
>
> 12. On the second factor, the Applicant must establish that she stands to suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction. The Applicant's case is that the respondents have refused to vacate the suit property despite a written agreement to do so as well as a police report being made. The actions of the Respondents of uprooting beacons on the suit property are wanton threat to the Applicant's rights. The Plaintiffs/Respondents have not responded to the application to explain or rebut the facts stated by the applicant despite being served. A temporary injunction is needed to protect the rights of the Defendant/Applicant from violation or threats of violation of acts that she cannot be compensated by an award of damages.

13. The balance of convenience tilts towards preserving the property in dispute in the suit until the suit is determined. The suit property could only be preserved if the actions of the Plaintiffs/Respondents were restrained pending the final disposal of the suit. It is for these reasons that, on preponderance of probability, I therefore find the Notice of Motion dated 19th November 2020 is merited and is hereby allowed. I order as follows:-

    a) That a temporary injunction do issue against the Plaintiffs/ Respondents jointly and/or severally either by themselves, their agents, servants or their assignees or any one claiming through them from continuing with any constructions, developments, sub - divisions, transfer or undertaking any kid of conveyance over Plot No. 20948/1/MN or in any way whatsoever interfering with the Plaintiff/Applicant quiet possession over the suit property pending the hearing and determination of this suit.

15. In the Mombasa ELC NO. 113 of 2021, Izera Enterprises Limited – Versus - Image Font Ltd, this Honorable Court held that:

> That pending the inter - parte hearing of this application, the Defendant/Respondent by itself, agent and/or servants be restrained from making any demands on the Plaintiff/ Applicant and its agents particularly with regards to a refund of the deposit of the purchase price that were paid by the Defendant in pursuance of the sale agreement for the sale of a portion of land measuring 2000 acres to be excised from all that parcel of land known as Land Reference Numbers 12177/11 (Original No.12177/7/3). CR. No. 70404 made between the Plaintiff/Applicant and the Defendant/Respondent dated 11th February, 2021.
>
> Whether there is any cause of action existing in the Plaintiff/Applicant's application and suit against the Defendant which is capable of being adjudicated in the full trial or not and hence need to be preserved by temporary injunction orders pending its hearing and final determination.
>
> b) Whether the Plaintiff/Applicant has met the threshold as set out under Order 40 Rule 1 and 2 of the Civil Procedure Rules 2010 to warrant being granted an interlocutory temporary injunction orders to preserve the suit property pending the hearing and final determination of the main suit.
>
> ISSUE NO.2- Whether the Plaintiff/Applicant has met the threshold as set out under Order 40 Rules 1 and 2 of the Civil Procedure Rules 2010 to warrant being granted an interlocutory temporary injunction orders to preserve the suit property pending the hearing and final determination of the main suit.
>
> Under this sub-heading, I must determine whether the Plaintiff/Applicant is entitled to temporary injunction orders that it prayed for. In deciding whether to grant the temporary injunction I must fully admit that both the Plaintiff/Applicant and Defendant/ Respondent have extensively submitted under this heading citing the relevant provision of law and authorities, including the precedent and principles set out on the now famous case of "GIELLA-VERSUS-CASSMAN BROWN (1973/ E.A.358.From this famous

precedent, the conditions for granting of an interlocutory injunction were settled as follows:-

> "The condition for the grant of an interlocutory injunction are now, I think well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will be ne normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.
>
> Thirdly, if the court is in doubt, it will decide an application on the balance of convenience".

Before proceeding further the fundamental issue to ponder here is whether the Plaintiff/ Applicant made "a prima facie case" with a probability of success. In the case of "MRAO-VS-FIRST AMERICAN BANK OF KENY4 LIMITED & 2 OTHERS (2003/eKLR 125 "prima facie" case was described as follows:-

> "A prima facie case in a civil application includes but not confined to "a genuine and arguable case", it is a case which, on material presented to the court a tribunal property directing itself will conclude that there exists a right which has apparently been infringed by the opposite parties to call for an explanation or rebuttal from the latter"

Under the 1st issue herein on whether there arises and/or exists any cause of action, it is evident the answer is in affirmative. The sale transaction of the said land commenced well from 11st February,2021.

On the 3rd principle regarding the balance of convenience I proceed to allow the application dated 5th June, 2021 and grant the temporary injunction in favour of the Plaintiff/Applicant as there will be need to preserve the suit property and the deposit sum pending the hearing of full trial.

ISSUE NO.3:-Whether the parties are entitled to the reliefs sought herein.

The Plaintiff/Applicant is entitled to the orders sought in the notice of motion application dated 5th July, 2021. Hence, in the interest of justice, equity and conscience. I now direct as follows:-

a) That temporary injunction be and is hereby granted to the Plaintiff/Applicant as prayed under the notice of motion application dated 5.7.2021 in terms of preserving the title deed to the suit land restraining both the Plaintiff and Defendant from undertaking any transaction on the suit land whatsoever until the suit is heard and determined.

16. In the case of: "Abdul Hamid Ebrahim – Versus - County Government of Mombasa & 9 others [2022] eKLR, this Honourable Court held that:

> That a permanent injunction restraining the Defendant either by itself, its agents, servants and/or personal representatives from selling, charging, alienating, trespassing onto, and/or in any other manner whatsoever interfering with or otherwise dealing with the property known as CR 20722 Subdivision No.6243 (Original No.5220/4).
>
> The Plaintiffs/Applicants brought the first application by way of Notice of Motion dated 8t April 2021 under the provision of Order 40 Rules 1, 2 and 4 of the Civil Procedure Rules

and Sections 1A, 1B, 3 & 3A of the *Civil Procedure Act*,Cap.21 of the Laws of Kenya and sought for the following orders:

a. Spent

b. Spent

c. That pending the hearing and determination of this suit, this Honorable Court be pleased to issue a temporary injunction restraining the defendant/ respondent either by itself, its agents, servants and/or personal representatives from selling, charging, alienating, trespassing onto, and/or in any other manner whatsoever interfering with or otherwise dealing with the property known as CR 20722 Subdivision No.6243 (Original No.5220/4).

Whether the Plaintiffs/Applicants have met the conditions for the grant of an interlocutory injunction pending the hearing and determination of the suit.

ISSUE NO. a).Whether the Plaintiffs/Applicants have met the conditions for the grant of an interlocutory injunction pending the hearing and determination of the suit.

Since both parties claim ownership to the suit land, backed with their respective evidence, it is only prudent for this court to preserve the suit land until a determination was made on the ownership. The question of ownership could only be well articulated and determined in full hearing where parties get to call witnesses and produce evidence and the same verified through cross examination in court for the issues raised in the five (5) interlocutory applications dated: 8th April, 2021, 25th May 2021, 22nd September 2021, 30th September 2021 and 6th October 2021 to make a final determination. Until this is done, I believe this court is called to preserve the suit property.

The balance of convenience tilts towards preserving the suit property

I wish to associate myself with the sentiments of Muriithi J in Tritex Industries Limited & 3 others-Vs -National Housing Corporation & another (2014) eKLR "The balance is in the competing interest between the parties, for the plaintiff to access and user of their plot and for the 1st defendant in constructing a wall to secure the house in the main plot for the benefit of its many tenants... If the injunction is granted pending the hearing and determination, and the defendants succeed at the trial the loss that 1st Defendant will have suffered is the delayed commencement of the perimeter wall with possible loss of rental revenue arising from lack tenants for their houses; if the injunction is refused and the 1st Defendant constructs the wall around the suit property and the Plaintiffs are successful at the trial, the plaintiffs will lost access to their plots during the period of hearing and determination of the suit. While the loss to the 1st Defendant may be accounted as loss of rental income which may be ascertain, it may be difficult to qualify the damage caused if the injunction is not granted to the Plaintiffs should they eventually prove their case against the Defendants... I think, therefore, that the injunction to be granted in this case should preserve the property in the state that is currently for the benefit of all the parties to the suit. The order of the court should therefore maintain the status quo on the property pending the hearing and determination of the suit."

26. For the reasons given above. the upshot of the Notice of Motion application dated 8th April 2021,should be allowed to the effect that the status quo on the suit property be maintained until the suit is heard and determined with no order as to costs.

That the Notice of Motion dated 8th April 2021 be and is hereby allowed whereby the status quo to the suit property be maintained meaning no selling, charging, alienation- no registration, selling or interference on it -until the suit is heard and determined.

17. The Learned Counsel submitted that the Honorable Court being guided by its own well-reasoned rulings as herein above indicated urged the Court to allow Issue No. "b" in favour of the Plaintiff/ Applicant herein.

18. On issue "C", the Learned Counsel submitted urged the Honourable Court to condemn the Defendants/Respondents to pay the costs, however they were aware pursuant to the Order in the four (4) cited Authorities the Honourable Court had the discretion to Orders the costs to be in the Cause. The Plaintiff/Applicant urged the Court to allow the Plaintiff/Applicant's application of 8th September, 2022 as prayed in light of the above submissions.

B. The Written Submissions by the 1st Defendant's/Respondent's

19. On 17th November, 2022, the Learned Counsel for the 1st Defendant through the Law firm of Messrs. Timamy & Co. Advocate filed their written submissions dated 15th November, 2022. Mr. Timamy Advocate submitted that the Plaintiff/Applicant filed the Plaint and an accompanying Application both dated 8th September, 2022 against the Defendants/Respondents with respect to Mombasa/Block XVII/261 (hereinafter "the suit property").

20. The Learned Counsel submitted that the 1st Defendant/Respondent responded to the Application vide his Replying Affidavit deponed on the 28th September 2022 and annexed 14 exhibits thereto. The 2nd and 3rd Defendants/Respondents responded to the Application vide their Joint Affidavit deponed on the 5th October, 2022 and annexed 7 exhibits thereto. In reply to the Replying Affidavits, the Plaintiff/Applicant filed a Supplementary Supporting Affidavit deponed on 24th October 2022.

21. The matter come up on the 6th October 2022 where the Advocate for the 1st Defendant/Respondent raised issues regarding the want of Jurisdiction of this Honorable Court to determine the matter and that the Plaintiff/Applicant had no locus standi to institute the suit herein. This Honorable Court directed that the issues be addressed in the submissions with respect to the Plaintiff/Applicant's Application dated 8th September, 2022.

22. The learned Counsel provided the Court with a full background of the matter as well captured from the filed pleadings herein. The Learned Counsel went on to submit that the Plaintiff /Applicant alleged that her father was party to a formal Sale Agreement dated 9th March 2007 and it is on the basis of the Agreement that the Plaintiff has brought the suit herein. However, the Plaintiff/Applicant also stated that her father died on 4th December 2001 and has annexed the Death Certificate to prove the same. It is absurd and illogical that the Plaintiff's father executed the Agreement on 9th March 2007 where he died on 4th December 2001.The above notwithstanding, the Sale Agreement annexed as Exhibit by the Plaintiff/Applicant herein (page 5 to 8) is an instrument chargeable with stamp duty under the provisions of the *Stamp Duty Act* (Cap. 480) and the same has not been stamped.As a result of the forgoing, the 1st Defendant/Respondent opposes the Application dated 8th September,2022.

23. The Learned Counsel framed five (5) issues which he urged Court to consider for its determination:

    a. Whether the Plaintiff/Applicant had the requisite "locus standi" to institute the present suit against the Defendants/Respondents;

    b. Whether this Honorable Court has Jurisdiction to determine the issues:

c. Whether the Plaintiff/Applicant had established a prima facie case against the Defendants/ Respondents;

d. Whether the Plaintiff/Applicant was going to suffer irreparable injury; and

e. Whether the Balance on Convenience tilted in favour of the Plaintiff/Applicant.

24. The Learned Counsel analysed the issued as below. Firstly, on whether the Plaintiff had the requisite Locus Standi to institute the present suit. He argued that the issue of locus standi was a primary point of law similar to that of Jurisdiction since the lack of capacity to sue or be sued renders the suit incompetent as was held in the case of Beatrice Wambui Kiarie & v Beatrice Wambui Kiarie & 9 others [2018] eKLR where it was stated as follows:

> " To that effect thereof I find that the issue on locus standi is a primary point of law almost similar to that of jurisdiction and since the Plaintiffs herein did not take out the letters of Administration, they lacked the capacity to sue or be sued which renders the suit incompetent."

25. In the present suit herein, the Counsel held that the Plaintiff/Applicant is allegedly bringing the suit on behalf of the Estate of Saleh Salim Said alias Swaleh Salim Said as an Administrator following the grant issued to her in Mombasa Kadhi's Succession Cause No.E180 of 2022. Order number 5 issued by the Hon. Kadhi, on the basis of which the Plaintiff/Applicant instituted the suit herein reads as follows:

> " 5) That this Hon Court is hereby happy to appoint one Maryuma Swaleh Said of ID No. 8535290 as the Administrator of the deceased estate for the purposes of distributing the estate to the rightful heirs according to the Islamic Sharia" [Emphasis Added]

26. He informed Court that the order issued by the Hon Kadhi was limited to distribution of the Estate of the deceased and was not a full grant. We do submit that for one to have locus, the Plaintiff/Applicant should either have a limited grant limited to instituting a suit (Ad Litem) or a full grant. To support his point, the Counsel cited the authority of "Abdilahi Salim Badri – Versus - Hemed Mohmaed Mbarak [2022] eKLR, where it was held as follows:

> " Now, having stated the facts of this case, I now wish to turn my attention to the deep analysis of the case. I will proceed to address the legal issues under this sub-heading. It is trite law that for one to institute a legal action and proceedings in the estate of a deceased person, an application should be clothed with proper legal capacity (Locus Standi) to do so. In order to attain the said Locus Standi, the applicant has to apply for either a limited grant or the Special Ad Litem Ad Colligenda bona under the provisions of Sections 54 and 55 of Laws of Succession Cap. 160 or full grant letters of Administration under the provisions of the Laws of Succession or under the Islamic Personal Laws all of the Laws of Kenya.

27. The Counsel argued that in the event that a suit was instituted by a party that lacked the Locus standi to file a suit, he or she did not have the authority to file the suit and suit ought to be struck out as it was defective ab initio. The Counsel asserted that in the present suit, the Plaintiff/Applicant neither had a grant limited to instituting a suit nor a full grant and this suit ought to be struck out as it was

defective ab initio. The Learned Counsel sought solace from the authority of:- "Hawo Shanko – Versus - Mohamed Uta Shanko [2018] eKLR wherein Chitembwe J observed that:

> " .....The general consensus is that a party lacks the Locus standi to file a suit before obtaining a grant limited for that purpose. This legal position is quite reasonable in that if the Plaintiff or Applicant has not been formally authorized by the Court by way of a grant limited for that purpose, then it will be difficult to control the flow of Court cases by those entitled to benefit from the estate. If each beneficiary is allowed to file a suit touching on a deceased's estate without first obtaining a limited grant, then several suits will be filed by the beneficiaries. It is the Limited grant which gives the plaintiff the locus to stand before the Court and argue the case. It does not matter whether the suit involves a claim of intermeddling of the estate or the preservation of the same. One has to first obtain a limited grant that will give him/her the authority to file the suit. The leave of the Court is not required before one seeks a grant limited to the filing of the suit. The orders granted to the plaintiff herein authorizing her to seek a grant of letters of administration are superfluous and cannot assist her. She ought to have sought a limited grant first before filing this suit.....
>
> ....Without a limited grant being issued allowing the filing of the suit, the plaintiff would be like someone who has entered a closed room without opening the door. All what the court can tell someone who is before it without having obtained a grant limited to the filing of the suit is that despite the validity of the suit or the strength of the case, the court cannot hear the suit as the initiator thereof lacks the capacity to file the suit. The correct procedure is not to allow the plaintiff to go back and obtain a limited grant for that purpose and then allow him to continue with the suit. The suit as initiated becomes void ab initio and cannot be resuscitated by the issuance of a subsequent limited grant....."

28. Further, the Learned Counsel cited the case of in "Rajesh Pranjivan Chandasame [2014] eKLR, where it was held as follows:-

> " In his view therefore the deceased died intestate. As far as he was concerned he moved to court by virtue of being a beneficiary for purposes of preserving the decease's estate. That may well be the case but in our view the position in law as regards locus standi in Succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or full grant of letters of administration in cases of Intestate Succession. In Otieno -Vs-Ougo (Supra) this court differently constituted rendered itself thus;
>
> "an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception."

29. As per the foregoing, it was the contention of the Learned Counsel that the Plaintiff/Applicant did not have the requisite locus standi. And, hence this suit was void ab initio and ought to be struck out. The suit was incompetent from the date of inception.

30. Secondly, on whether the Court has jurisdiction to determine the issue. The Learned Counsel submitted that from inception, they would like to appreciate that jurisdiction was everything as echoed by the case of "Owners of the Motor Vessel "Lillian S" – Versus - Caltex Oil (Kenya) Ltd [1989] eKLR where it was held that:

> " Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending

other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

31. This was a succession dispute as it was apparent from the Plaint, Supporting Affidavit and Supplementary Affidavit filed by the Plaintiff/Applicant and annextures thereto. This could be deciphered from the following:

    a. In the Supporting Affidavit, the Plaintiff/Applicant categorially stated that in September 2014, they reported the matter to the 4th Defendant/Respondent herein. Further, that the 4th Defendant responded vide their letters dated 29th August 2014 and 16th September 2014. In the letter dated 16th September 2014 [found on page 17 of the annextures by the Plaintiff/Applicant in her Supporting Affidavit] the 4th Respondent directed the matter to the Kadhi's Court since it involved family inheritance. The said letter partly reads:

        "Following the Presentation by one Abdullghani Ahmed Salim with regard to the foresaid dispute, it is evident that the issue raised are more of family dispute or feud based on family inheritance. It requires the involvement of the Kadhi."

    b. 'In paragraph 4 and 5 of the Supplementary Affidavit, the Plaintiff/Applicant states that the suit property belonged to the Estate of Salim Said Bin AbdiSheikh which passed to his eight [8] children. Further, she states that all heirs of the eight children were required to give their written consent and authority to sell the suit property. The Plaintiff further claims that 21 heirs are yet to give consent to sell the suit property and have indeed never received their share of the purposed sale. To buttress this fact, the Plaintiff/Applicant annexed exhibit "MMS-1" as confirmation that the various heirs have not received their share nor did they consent to the sale. Isn't this a succession matter?

    c. In paragraph 17 of the Supplementary Affidavit, the Plaintiff provides an analysis as to the distribution of the proceeds of Sale of the suit property and how each family from among the eight [8] children of the Estate of Salim Said Bin Abdi Sheikh was to be divided. The Plaintiff/Applicant further invites this Honorable Court to examine what each family received from the proceeds of the Sale. Is this the purview of the Environment and Land Courts?

32. The Learned Counsel submitted that without an iota of doubt, this matter related to a succession dispute. The Plaintiff/Applicant was among beneficiaries of the Estate of the Late Salim Said Bin Abdi Sheikh (The Plaintiff/Applicant's grandfather) since the Estate of the Saleh Salim Said (The Plaintiff's father) inherited from the Late Salim Said Bin Abdi Sheikh. The Plaintiff/Applicant was dissatisfied with the sale of the suit property to the 1st Defendant/Respondent and resolved to sue the Warsme Bishar Issack, the 1st Defendant/Respondent herein, instead of expressing her concerns at the right forum being the Succession Courts.

33. According to the Counsel, it was trite law that matters pertaining to succession ought to be filed at the High Court or the Chief Magistrate Court and not the Environment and Land Court. To that point, he referred Court to the authority of: "Beatrice Wambui Kiarie & - Versus - Beatrice Wambui Kiarie & 9 others [2018] eKLR, where it was held:-

    "7. On the second issue, as to whether this court has the jurisdiction to hear and determine this matter, it has not been disputed that the original suit land being Nyandarua/ Silbwet/24 belonged to the deceased one Maria Wabai Nganga. That upon her death, the Plaintiffs submitted, that the 1st Defendant proceeded to unlawfully sub-divide and transfer the resultant parcels of land to

her co-defendants. That this was done irrespective of the deceased's will herein annexed in the Plaintiffs list of documents. That the Plaintiffs are now desirous of cancelling the titles and having the land reverted into their mother's name.

48. There having been a will in place, I do find that that although it is clear from the provisions of Article 162 (2) (b) of *the Constitution* and sections 4 and 26 of the *Environment and Land Court Act* that this court has unlimited and original jurisdiction to deal with disputes relating to the environment and the use and occupation of, and title to land in the whole country. However in the present case and looking at the plaint filed by the Plaintiff, and the annexures thereto, I find that the issue raised herein is a succession dispute that ought to have been filled either in the High Court or the Chief Magistrates' Court.

49. I find that this court has no jurisdiction to try matters pertaining to succession disputes. Jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction there will be no basis for a continuation of proceedings pending other 'evidence. A court of law downs its tools in respect of the matter before it the moment it holds that it is without jurisdiction."

34. Similarly, the Counsel argued that looking at the Plaint and Affidavits filed by the Plaintiff/Applicant, and the annexures thereto, the issue herein involved a succession dispute amongst the beneficiaries and ought not to be filed at the Environment and Law Courts. Thus, the asserted that this Honorable Court never had the requisite jurisdiction to entertain the current suit involving the succession dispute and the suit should be struck out.

35. Thirdly, on the issue of whether the Plaintiff/Applicant had established a prima facie case against the 1st Defendant/Respondent. The Learned Counsel averred that the Plaintiff/Applicant had not placed before this Honorable Court a prima facie case with a serious issue that was worth full trial. He referred Court to the Court of Appeal pronouncement regarding what constituted prima facie in the case of:"Mrao Ltd – Versus - First American Bank of Kenya Ltd& 2 Others [2003] eKLR where it held as follows:

> "A prima facie case in a civil suit application includes but not defined to a genuine and arguable case" it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

36. As earlier indicated, the Counsel rehashed that the Plaintiff/Applicant alleged that her father was party to a Sale Agreement dated 9th March 2007 and it was on the basis of the Sale Agreement that the Plaintiff had brought the suit herein. However, the Plaintiff/Applicant also stated that her father died on 4th December 2001 and had annexed the Death Certificate to prove the same. According to him, it was absurd and illogical that the Plaintiff's father executed the Agreement on 9th March 2007 where he died on 4th December 2001.

37. The Counsel invited the Honorable Court to take judicial notice that a deceased person could not enter into a contract. Moreover, he submitted that a deceased person could not sign a contract. On

this issue he cited the Authority of:- "Re Estate of Stanley Maore (Deceased) [2009] eKLR where it was held as follows:

> " Thirdly, dead men do not tell tales, and cannot be expected to enter into contracts, there is obviously no privity of contract between the deceased and the Objector, the Objector did not purchase the land from the deceased. He purchased the land registered in the deceased's name from the deceased's father

38. The Learned Counsel submitted that the Plaintiff/Applicant's deceased father therefore never had privity of contract. The Plaintiff/Applicant was seeking an equitable remedy and equity demands that "he who comes to equity must come with clean hands." That is, he who comes to seek equity must do so in a manner that his/her actions are not tainted by an illegality. The Agreement for Sale dated 9th March 2007 which was the basis upon which the Plaintiff/Applicant was seeking the equitable remedy was fraudulent. The Application should not be granted since the Plaintiff/Applicant was seeking the equitable remedy when her actions and conduct were irked with illegalities and hence is coming to this Honorable Court with unclean hands.

39. The above' notwithstanding, the Plaintiff/Applicant never controverted the averment that the Sale Agreement was executed by a dead person made by the 1st Defendant/Respondent in the Replying Affidavit of the 1st Defendant/Respondent. This was the case despite that the Plaintiff/Applicant had the opportunity of controverting the same in the Supplementary Affidavit filed. The Learned Counsel therefore that the Plaintiff/Applicant never had a genuine and an arguable case and she had failed to establish a prima facie case.

40. In addition, there was apparent contradictions in the evidence relied upon by the Plaintiff/Applicant. Where the Green Card, which the Plaintiff/Applicant intended to rely upon (page 14 of the annexures to the Supporting Affidavit) indicates that the suit property was allegedly owned by 5 people. The Agreement for Sale relied upon by the Plaintiff (page 5-8 of the annexures to the Supporting Affidavit) indicated that the suit property was allegedly owned by 8 people. On this premise, the Counsel opined that the Plaintiff/Applicant had failed to establish a prima facie case.

41. Without prejudice to the foregoing, the Sale Agreement annexed in the Supporting Affidavit of the Plaintiff/Applicant was an instrument chargeable with stamp duty under the provisions of the *Stamp Duty Act* and the same had not been stamped.The Sale Agreement dated 9th March 2007 not being stamped as required by the *Stamp Duty Act*, was not admissible. Pursuant to Section 19 of the *Stamp Duty Act*, the Court should at all times strictly refrain from accepting unstamped instruments to be used in evidence. The said section reads as follows:

19. Non-admissibility of unstamped instruments in evidence; and penalty

(1) Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except-

(a) in criminal proceedings; and

(b) in civil proceedings by a collector to recover stamp duty, unless it is duly stamped.

(2)No instrument chargeable with stamp duty shall be filed, enrolled, registered or acted upon by any person unless it is duly stamped.

(3) Upon the production to any court (other than a criminal court), arbitrator, referee, company or other corporation, or to any officer or servant of any public body, of any instrument which

is chargeable with stamp duty and which is not duly stamped, the court, arbitrator, referee, company or other corporation, or officer or servant, shall take notice of the omission or insufficiency of the stamp on the instrument and thereupon take action in accordance with the following provisions-

(a) if the period of time within or before which the instrument should have been stamped has expired and the instrument is one in respect of which a person is specified in the Schedule to this Act as being liable for the stamping thereof, the instrument shall be impounded and, unless the instrument has been produced to a collector, shall forthwith be forwarded to a collector;

(b) in any such case, before the exclusion or rejection of the instrument, the person tendering it shall, if he desires, be given a reasonable opportunity of applying to a collector for leave under section 20 or of obtaining a certificate under section 21;

(c) in all other cases, unless otherwise expressly provided in this Act, the instrument shall, saving all just exceptions on other grounds, be received in evidence upon payment to the court, arbitrator or referee of the amount of the unpaid duty and of the penalty specified in subsection (5), and the duty and penalty, if any, shall forthwith be remitted to a collector with the instrument to be stamped after the instrument has been admitted in evidence.

42. The Plaintiff/Applicant had not demonstrated any intention to have the Sale Agreement to be stamped and the Applicant could not therefore use the Sale Agreement as evidence. Therefore, it was from this point that the 1st Respondent/Defendant submitted that the Plaintiff/Applicant had failed to establish that they have a prima facie case with probability of success.

43. Finally, the nature of the final orders sought by the Plaintiff/Applicant in the Plaint were contrary to the Plaintiff/Applicant's averments. She averred that the Estate of Saleh Salim Said owns a part of the suit property yet she wants the title to be issued in her name, not even the name of the Estate of Saleh Salim Said, as prayed in order (c) of the Plaint. Moreover, as a final order she prays that the Court should stop interference of the Plaintiff's peaceful possession and enjoyment of the suit property as Order (a). Based on her averments in the Plaint and Affidavits, could the Court grant such orders? From this, it was crystal clear that the Plaintiff/Applicant never had a genuine and arguable case. Grounded on the foregoing, the Learned Counsel submitted that the Plaintiff/Applicant had failed to establish a prima facie case.

44. On whether the Plaintiff was going to suffer irreparable injury, the Learned Counsel submitted that the Plaintiff/Applicant ought to prove that she was going to suffer irreparable injury. What an irreparable injury is was dealt with in the case of "Nguruman Limited – Versus - Jan Bonde Nielsen & 2 Others [2014] eKLR where it was held as follows:

> "On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by

which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

45. The Plaintiff/Applicant was thus required to demonstrate how she would suffer an injury that could not be adequately compensated by an award of damages which the Counsel humbly submitted that she had failed to do so.

46. The Learned Counsel submitted that according to the Plaintiff/Applicant, she averred that the suit property never belonged to the Estate of Saleh Salim Said property alone. The Estate of Saleh Salim Said was thus only entitled to a portion of the suit property according to the averments of the Plaintiff/Applicant. The portion of the said Estate, if at all the allegations by the Plaintiff/Applicant was true could be adequately compensated-should the Plaintiff/Applicant succeed in her claim. In any event, the Application herein was grounded on the issue of compensation of the portion belonging to the Estate of Saleh Salim Said. Ground 12 upon which the Application is premised reads as follows:

> That the Estate of the Deceased that is Saleh Salim Said has lost a Share of a prime property without compensation....

47. The Learned Counsel further went on to submit that the Plaintiff acknowledged that the suit property was empty and not in use as stated in paragraph 15 of the Supporting Affidavit and therefore she was not in possession. She only claimed for compensation for the portion belonging to the Estate of Saleh Salim Said. It therefore followed that since the Plaintiff/Applicant could be adequately remedied by damages, the Counsel submitted that she had failed to establish that she would suffer irreparable harm. The authority of Halsbury's Laws of England, cited with approval in "Paul Gitonga Wanjau – Versus - Gathuthi Tea Factory Company Ltd & 2 others [2016] eKLR where it was held that:-

> " By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages."

48. The Learned Counsel further submitted that should the suit be determined in favour of the Plaintiff/Applicant, she could be compensated in form of damages and the Plaintiff/Applicant had thus failed to establish that she was going to suffer an irreparable harm.

49. On the issue of whether on a balance of convenience, the Applicant had no stronger case. The Learned Counsel relied on the case of China Wu-Yi Company Limited – Versus - Suraya Property Group Limited & 2 others [2020] eKLR which illustrated the same where it was held that:-

> " In considering the balance of convenience, the court balances the relative harm to be suffered by either party if an injunction is either granted or refused. It is however the burden of the Plaintiff to demonstrate that it will suffer greater injustice or harm, if the injunction is not granted pending the hearing and determination of the suit."

50. The 1st Defendant/Respondent purchased the property for investment purpose after undertaking extensive due diligence on the suit property. The 1st Defendant/Respondent would stand to suffer grave prejudice if the orders sought for in the Application are granted. With the huge financial investment of purchasing the suit property; the same would be sunken costs at the expense of the 1st Defendant/Respondent. On the other hand, the Plaintiff/Applicant was seeking for a portion of the suit property. Which portion could adequately be compensated if the suit herein was decided in her favour. It was

on this premise that the Counsel submitted that on a balance of convenience, the Plaintiff/Applicant did not have a stronger case.

51. The Learned Counsel submitted that from the foregoing, the inconvenience caused to the 1st Defendant/Respondent would be greater than that which would be occasioned on the Plaintiff/ Applicant. On this issue the 1st Respondent/Defendant would place reliance in the case of "Paul Gitonga Wanjau – Versus - Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR, where the court dealing with the issue on balance of convenience expressed itself as follows:-

> "Where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the Applicant; on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion."

52. The Learned Counsel submitted that when the matter was looked at as a whole the 1st Respondent/ Defendant had demonstrated how the balance of convenience herein tilted in his favour.

53. In conclusion, they submitted that the suit ought to be struck out as the Plaintiff/Applicant never had the requisite locus standi and hence the suit was defective ab initio. Moreover, the Learned Counsel submitted that the subject matter of the suit herein was a succession dispute and ought to be resolved in the succession courts and not the Environment and Land Court and on this premise. He submitted that this Court does not have jurisdiction and suit ought to be struck out.

54. The Learned Counsel submitted that Plaintiff/ Applicant had not demonstrated the three limbs of granting injunction as per the case of "Giella -Versus - Cassman Brown Co. Ltd 1973 E.A. 358. It was imperative and in the interest of justice that the Plaintiff/Applicant's Application dated 8th September 2022 herein be disallowed, the interim orders be set aside and the cost of this application should therefore be borne by the Plaintiff/Applicant.

C. The Written Submission by 2nd and 3rd Defendant/Respondents

55. On 11th November, 2022 the 2nd and 3rd Defendants through the the Law firm of Messrs. A.O. Hamza & Company Advocates filed their written submissions dated 1st November, 2022. Mr. Hamza Advocate submitted that the Submissions were in respect of the Plaintiff's Application dated 8th September, 2022 where the Plaintiff sought the orders as already stated out hereinabove. The 1st Defendant filed his response thereto as well as the 2nd and 3rd Defendants/Applicants. The 2nd and 3rd Defendants swore and filed their Replying Affidavit on 5th October, 2022 to which they entirely relied on it and further submitted as follows:

56. The Learned Counsel relied on the following four (4) issues:

    i. Whether the said Application as well as the suit herein were proper before this Honorable Court.

    ii. Whether the documents which were attached to the Plaintiffs Supporting Affidavit and Supplementary/Supporting Affidavit as annexures but were neither marked nor executed by a Commissioner for Oaths should be expunged from the Court record.

iii. Whether the Plaintiff was deserving of the Orders sought.

iv. Who should bear the costs herein.

57. The Counsel provided the brief facts of the case as already pleaded. On the issue of whether the said Application as well as the suit herein were proper before this Honorable Court, the Learned Counsel submitted that the Order said to be annexed in the Plaintiff's Supporting Affidavit only appointed the Plaintiff as an Administrator of the Estate of Swaleh Salim Said alias Saleh Salim Said for purposes of distributing the said Estate to its heirs according to Islamic Shariah. He cited the case of Hawo Shanko – Versus - Mohamed Uta (Supra) while relying on Julian Adoyo Ongunga – Versus - Francis Kiberenge Abano Migori Civil Appeal No.119 of 2015, cited Justice A. Mrima who had this to say on the issue of a party filing a suit without having obtained a limited grant:

> " Further, the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a Court acting without jurisdiction. Since it all amounts to null and void proceedings. It is also worth noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties."
>
> The Court went further and stated:
>
> "The effect of the above cases is that for a party to have locus standi and appear in a case involving a deceased person, he or she must first obtain a grant limited for that purpose.
>
> There is no dispute that the Plaintiff did not obtain a limited grant allowing her to file this suit. Such a grant is the key which allows the Plaintiff access to the Court. Without a limited grant being issued allowing the filing of the suit, the Plaintiff would be like someone who has entered a closed room without opening the door. All what the court can tell someone who is before it without having obtained a grant limited to the filing of the suit is that despite the validity of the suit or the strength of the case. the court cannot hear the suit as the initiator thereof lacks the capacity to file the suit. The correct procedure is not to allow the Plaintiff to go back and obtain a limited grant for that purpose and then allow him to continue with the suit. The suit as initiated becomes void ab initio and cannot be resuscitated by the issuance of a subsequent limited grant."
>
> The effect of the above cases is that for a party to have locus standi and appear in a case involving a deceased person, he or she must first obtain a grant limited for that purpose.
>
> There is no dispute that the Plaintiff did not obtain a limited grant allowing her to file this suit. Such a grant is the key which allows the Plaintiff access to the Court. Without a limited grant being issued allowing the filing of the suit, the Plaintiff would be like someone who has entered a closed room without opening the door. All what the court can tell someone who is before it without having obtained a grant limited to the filing of the suit is that despite the validity of the suit or the strength of the case, the court cannot hear the suit as the initiator thereof lacks the capacity to file the suit. The correct procedure is not to allow the Plaintiff to go back and obtain a limited grant for that purpose and then allow him to continue with the suit. The suit as initiated becomes void ab initio and cannot be resuscitated by the issuance of a subsequent limited grant.

58. To buttress his point, the Counsel referred Court to Justice J.G. Kemei in the case of: "Elijah Nderitu Gachaga – Versus - Francis Gakuu Gachaga & 2 others [2019] eKLR added that:

> 48. I have looked at the wording of the grant in issue and I find that it does not include filing of suit as the Plaintiff has done in this case. Clearly, the said grant, in addition to being inappropriate, had also not been tailored to include institution and maintenance of a suit, at least going by its contents and wording. Similarly, there is no evidence that the grant was ever rectified in order to give locus to the Plaintiff.
>
> 49. It is the finding of the Court that the Plaintiff having filed suit on the basis of a grant ad colligenda is not clothe with locus to file suit. The Court finds that the cause of action is incontestably wrong noting that locus is an issue that goes to the root of the case and that all proceedings here are a nullity since the Plaintiff did not have locus standi to file the suit . I can do no better than to cite Denning, L.J. in Macfoy – Versus - United Africa Co. Ltd. [1961] 3 ALL ER 1169 at 1172 who stated that;
>
> > "If an act is void, it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so."
>
> 50. In other words the issue of locus is not a technicality but it goes to the root of the case.

59. The Learned Counsel submitted that from the foregoing, the Plaintiff herein lacked the capacity to bring the suit herein and as such the suit as well as the said Application was a non-starter. Secondly, no evidence had been tendered by the Plaintiff to prove that she indeed served by the 4th Defendant herein with the 30 days statutory notice as required by the provision of Section 13A of the *Government Proceedings Act* thus as such, such failure rendered the suit herein incompetent.Additionally, there was no doubt that the matters arising out of the suit herein are purely succession matters. Thus the Plaintiff could be said to have also filed the said Application and suit before the wrong Court Division. Gazette Notice No. 9123/ 2015 on the Notification of Practice Directions on the Division of the High Court of Kenya identifies the High Court divisions and the Family Division is amongst them.

60. The Learned Counsel asserted that in as much as the Environment and Land Court has jurisdiction to hear disputes with regards to land by virtue of Article 162(2)(b) of *the Constitution*; the Court also shares a concurrent jurisdiction with other High Court divisions in certain matters relating to land. and the appeal herein falls under the prescription of the Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in other Courts dated 25th July 2014 and published in Gazette Notice NNo.5178 as cases touching on inheritance, succession and distribution of land under the *Law of Succession Act*. These cases shall continue to be filed and heard by the High Court or the Magistrates Courts of competent jurisdiction.

61. The Learned Counsel urged the Honorable Court to be guided by the reasoning in the case of:- "Re Estate of Teresa Wangui Muruga (Deceased) [2021] eKLR where the Court held that:

> " 16. The *Law of Succession Act* in Section 47 provides for jurisdiction of the High Court in respect of matters falling under the Act as follows:-
>
> > The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.
>
> 17. Rule 41(3) of the Probate and Administration Rules provides that:-
>
> > Where a question arises as to the identity. share or estate of any person claiming to be beneficially interested in. or of any condition or qualification attaching to. such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant. but subject to the provisions of Section 82 of the Act. by order appropriate and set aside the particular share or estate of the property comprising it to abide the determination of the question in proceedings under Order XXXVT. rule I of the Civil Procedure Rules and may thereupon. subject to the proviso to Section 71 (2) of the Act. proceed to confirm the grant.
>
> 18. In the case of Priscilla Ndubi and Zipporah Mutiga – Versus – Versus - Gerishon Gatobu Mbui, Meru Succession Cause No. 720 of 2013, held:-
>
> > "The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues of ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which are prima facie valid should be determined before confirmation."
>
> 26. In arguing that this court has jurisdiction, the petitioner relies on Article 165 of *the Constitution* and on Sections 47 & 72 (2) of the Succession Act Rule 73 of the Probate & Administration Rule. The protestor's counsel relies on Article 162(2) (b) and on Section 13 of the Land and Environment Act in his argument that this court lacks jurisdiction.
>
> 27. I have carefully considered the provisions relied on by the parties and their respective arguments. I have also relied on the background facts leading to the filing of the protest that all emanate from the contents and the implementation of the grant as well as the allegations of tampering with records in the Lands office. From the material before me, I am of the considered view, the issues in the protest herein are deeply rooted in the grant in Succession Cause No. 651 of 2001 which only a Succession court possesses the jurisdiction to hear and determine. The Environment and Land Court has jurisdiction to determine ownership of land but where such ownership results in the implementation

or interpretation of a grant and which have now spilled in a subsequent succession cause which involves a sub-division parcel of the mother land in the grant, such issue cannot be determined in the ELC court, in my view.

28. In conclusion, I find that this court is possessed of the requisite jurisdiction to determine the protest without first referring the issue of ownership of L.R Othaya/Kiahagu/2126 to the ELC Court.

62. Lastly, the Learned Counsel argued that the suit herein had been filed before the wrong Court – on pecuniary jurisdiction as the suit property was worth a sum of Kenya Shillings Sixteen Million (Kshs. 16,000,000/=) only which fell under the jurisdiction of the Chief Magistrates' Courts as per the provision of Section 7 of the *Magistrates' Courts Act*; The objectives of the said Act were to enable Magistrate Courts to facilitate just, expeditious, proportionate and accessible judicial services. In as much as they appreciate Article 159(2)(d) of *the Constitution* of Kenya, 2010 and the overriding objectives under the provision of Sections 1A, 1B and 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya. However, for this Honorable Court to perform its duties as per the said provisos, the procedures must be followed as was held by the Court of Appeal in the case of "Kakuta Maimai Hamisi – Versus - Peris Pesi Tobiko & 2 others [2013] eKLR where the Court held:-

> "We do not consider Article 159 (2) (d) to be a panacea. Nay, a general whitewash that cures and mends all ills, misdeeds and defaults of litigation. A five judge bench of this Court expressed itself very succinctly but a few days ago on this precise point is the case of Mumo Matemu – Versus - Trusted Society Of Human Rights Alliance & 5 Others Civil Appeal No.290 Of 2012 as follows:
>
> > "increased frequency, that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under Section 1A and 1B of the *Civil Procedure Act* (Cap 21) and Sections 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases."

63. In summary, the Learned Counsel submitted that for the aforementioned the said Application must fail as the same was incurably and/or fatally defective as was observed by the Court of Appeal in case of: "Adala- Versus- Anjere:- "it is pointless to accept wrong procedure simply out of sympathy for the Applicant."In any event, the Plaintiff had the chance of amending her pleadings and file the suit herein while following the proper channels but she waived the said right. The Learned Counsel submitted that guided by the above principles and the arguments here it was crystal clear that the Plaintiff/ Applicant herein is not deserving of the orders she seeks for, as the said Application is incurably defective, scandalous, frivolous or vexatious and clearly an abuse of this Honorable Court's time and process;the said Application and the entire suit was a nullity and it ought to be dismissed with costs forthwith.

64. On whether all the documents which were attached to the Supporting Affidavit and Supplementary/ Supporting Affidavit as annexures but were neither marked nor executed by a Commissioner for Oaths should be expunged from the Court record, the Learned Counsel submitted that the documents attached to the Supporting Affidavit and Supplementary/Supporting Affidavit had not been annexed to the said Affidavits nor had they been marked and the same went contrary to the Civil Procedure and Rule 9 of the Oaths and Statutory Declarations Rules, thus they prayed that this Honorable Court do expunge the same. The Learned Counsel urged this Honorable Court to be guided by the reasoning in the case of: "Jeremiah Nyangwara Matoke – Versus - Independent Electoral and Boundaries Commission & 2 others (2017) eKLR where it was held that:-

22. On the second issue of annextures, Rule 9 of the Oaths and Statutory Declarations Rules requires that annextures should be sealed and stamped. The said rule stipulates as follows:

> "All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner and shall be marked with the serial letters of identification."

23. In the case of Abraham Mwangivs. S. O. Omboo & Others HCCC No. 1511 of 2002 Hayanga J (as he then was) quoted Order 41 of the Rules of Supreme Court of England that dealt with forms of affidavits and exhibits. That Order 41 divided exhibits into documents and non-documents and maintained that fly papers are misleading and fraught with uncertainty. He held:

> "Exhibits to affidavits which are loose fly sheets for identification attached to them and do not bear exhibits marks on them directly must be rejected. The danger is so great. These exhibits are therefore rejected and struck out from the record. That being the case the application fails and is dismissed."

24. Similarly, in the case of Francis A. Mbalanya – Versus - Cecilia N. Waema [2017] eKLR, the annextures had not been marked completely. The judge held that:

> "The law that requires the sealing and marking of annexures with serial letters is in mandatory terms and must be complied with... in the instant case, the law has provided in mandatory terms the manner in which evidence by way of annextures can be received by court. The failure to comply with that law, like in the instant case can only lead to one thing, the striking out of the offending documents. However, considering that the supporting affidavit in itself complies with the law, it is only the annexures that can be expunged from the record, and not the supporting affidavit and the application."

25. Further, in the case of Fredrick Mwangi Nganga – Versus Garam Investments & Another [2013] eKLR where an annexture was only marked "A" the court stated:

> "As a consequence of all the above, I find that although the court has power to allow an amendment to the plaintiffs said Notice of Motion dated 14th June 2013 under the provisions of Order 8 Rules 5 as well as Section 100 of the *Civil Procedure Act*, the fact that the Plaintiff has breached Rule 9 of the oaths and Statutory declarations rules necessarily means that his application to amend must fail. As I see it, the only option is to withdraw the same and field a fresh application. Further, as I have refused the plaintiff's application dated 14th June 2013 as currently drawn and presented does not support the interim orders sought therein and the same are lifted accordingly."

26. Another decision addressing the matter of annextures to affidavits was made by Judge Mutungi in the case of Solomon Omwega Omache & Another – Versus - Zachary O Ayieko & 2 others [2016] eKLR, where he stated as follows:-

> "Although the point was not taken up by the plaintiffs the court has a duty to uphold the sanctity of the record noting that this is a court of record. Before the court is a replying affidavit with annextures which are neither marked nor sealed with commissioner's stamp. Are they really exhibits? I do not think so and they cannot be properly admitted as part of the record. I expunge the exhibits and in

> effect that renders the replying affidavit incomplete and therefore the same is also for rejection as without the annextures it is valueless. This should serve as a wakeup call to practitioners not to be too casual when processing documents for filing as it could be extremely costly to them or their clients as crucial evidence could be excluded owing to counsels or their assistant's lack of attention and due diligence."

27. In the instant case, the petitioner argued that the error or failure to mark and seal the annextures could be cured by the provisions of Article 159(2) (d) of *the Constitution*. I disagree with this argument because annexures form a very critical part of an affidavit as it is the documentary evidence on which the petition is anchored for which the attestation and marking of exhibits are a mandatory statutory requirement and not a mere procedural technicality.

28. In the case of Abdul Aziz Juma – Versus - Nikisuhu Investment & 2 Others ELC. No. 291 of 2013 Mutungi J. held:

> "Article 159 of *the Constitution* was never intended to override clear provisions of statute unless such provisions of the statute had been found and held to be unconstitutional. Acts of Parliament... make provisions for the application of the law and *the Constitution* demands of the courts to protect *the Constitution*, the law and the Acts enacted by Parliament. In my view, Article 159 of *the Constitution* cannot be resorted to where there are clear and express provisions of the law."

29. I concur with the findings of Mutungi J. in the above cited Abdul Aziz Juma case (supra) as the clear rules must be adhered to lest our courts sink to a state of anarchy. Taking a cue from the above decision, I similarly find that all the documents that were highlighted by the 3rd Respondent as annextures to the Petitioner's affidavit appearing just before page 53, 57, 58, 59, 122 and 171 of the Petition bundle, that contained a blank stamp of attestation that was neither signed, dated or marked as exhibits are fly documents which are hereby expunged from the record. For purposes of clarity, I find that all the documents that are attached to the Petitioner's affidavit that are neither marked nor signed as exhibits are hereby expunged from the record.

65. As such the Plaintiff's Supporting Affidavit and the Supplementary/Supporting Affidavit was simply based on uncorroborated facts which amount to mere allegations. Thus the said Application lacked merit and was frivolous, vexatious and an abuse of the Court process only brought to delay justice. They urged the Honorable Court to dismiss the said Application with costs. However, if this Honorable Court is inclined to rule otherwise then they went on to submit as below.

66. The Learned Counsel on the issue of whether the Plaintiff was deserving of the orders sought. He stated that the Plaintiff mostly relied on the agreement dated 9th March, 2007 which was a forgery as from the Certificate of Death issued by the Plaintiff herself (in paragraph 2 of the said Affidavit) it was indicated that the Plaintiff's father, Swaleh Salim- one of the purchaser's therein, died on 4th December, 2001 and the vendor, the late Salim Said Abdisheikh had passed on sometime in the 1970s. As such the said Agreement and the subsequent Transfer were invalid and void ab initio. By virtue of the foregoing the Title Deed given on 16th March, 2007 and which is relied upon heavily by the Plaintiff herein was obtained fraudulently, illegally and/or unlawfully since no Letters of Administration had been taken out in respect of the Estates of Salim Said Abdisheikh and that of Swaleh Salim.

67. The Learned Counsel submitted that the history of the suit property was as follows by virtue of the illegality discussed hereinabove the Title Deed given on 16th March, 2007 was cancelled as evidenced by entry no. 2 in the Green Card. It was also in every family members' knowledge that after the Title

Deed given on 16th March, 2007 wascancelled, the family held meetings and every heir's family was duly represented, for instance:

Direct Heir Representative

Swaleh Salim Hassan Swaleh(the Plaintiff's brother).

Ahmed Salim Abdulghany Ahmed.

Said Salim Ali Said/Hussein Said.

Abdalla Salim Anwar Abdalla.

Noor Salim (the 2nd Defendant)- Herself & Hassan Jumaan.

Sheikha Salim herself(till her demise) & the 3rd Defendant.

Khadiye Salim Omar Saleh.

Salame Salim Twalib Salim.

68. The letters dated 29th August, 2014 and 16th September,2014 as enclosed in the Supporting Affidavit touched on suspicions of ownership (despite all Salim Said Abdi sheikh heirs being registered) and not illegal and unlawful transfer to the 2nd Defendant and the 3rd Defendant's mother as alleged and the complainant therein was Abdulghany Ahmed the son of Ahmed Salim. Subsequent to the said cancellation the family sat and agreed to have the suit property registered in the names of the heirs who were then alive; that is Noor Salim, Sheikha Salim, Saleh Salim, Abdalla Salim and Ahmed Salim; and that is how entry no. 3 was entered in the Green Card.

69. Further, from the meeting of 30th October, 2017 (Annexture NSS 2 in the 2nd and 3rd Defendants' Replying Affidavit) the family was notified that the approximate area indicated in the said title document, i.e. 0.014 Ha, was very small as compared to the actual area on the ground. It was then agreed that a Survey be done by the 3rd Defendant to determine the correct size and that since the 2nd Defendant and the 3rd Defendant's mother(Sheikha Salim) were the only surviving heirs then the Title could be reissued in their names on behalf of the others-hence entry no. 4 and 5 on the Green Card.As a result of the same and subsequent to Sheikha Salim's death, the 3rd Defendant took out Letters of Administration before the Kadhi's Court and caused the Decree obtained therein to be registered against the Title as such entry 6 and 7 of the Green Card.

70. Based on the Agreement dated 2nd March, 2021 between the 1st,2nd and 3rd Defendants, the purchase price, was paid and divided equally to all the 8 families, save for the family of Ahmed Salim which was being owed rent as evidenced by the minutes annexed as NSS 5 in the 2nd and 3rd Defendants' Replying Affidavit and Yasser Ahmed collected the remaining balance as he had never resided on the suit property. Thus the claim by Ahmed Salim's remaining beneficiaries. (Fatma Salim, Swabrina Ahmed Salim, Abdulghaniy Ahmed Salim, Swaleh Ahmed Salim and Nasra Ahmed Salim) in the Supplementary/Supporting Affidavit hold no water.

71. The Learned Counsel submitted that additionally, the claims that the Plaintiff had been residing in the suit property were malicious, fabricated and aimed at misdirecting this Honourable Court as neither the Plaintiff nor her family had been residing on the suit property but rather it was Ahmed Salim's family who resided thereat but vacated the suit property sometime in May 2019 as evidenced by annexture NSS 6 in the 2nd and 3rd Defendants' Replying Affidavit being the Minutes of 1st June,2019; the suit property has been vacant ever since May 2019 until when the 1st Defendant took possession of the same.

72. Further, Most families collected their share from the purchase price-save for the families of Swaleh Salim, whereby the Plaintiff had brought the suit herein, and that of Said Salim(for reasons known best to them but which monies was still available for them to collect at the office of the 1st Defendant's Advocates) as follows:

Direct Heir Cheque Collected by

Ahmed Salim Yasser Ahmed.

Abdalla Salim Anwar Abdalla.

Noor Salim (the 2nd Defendant)- Herself.

Sheikha Salim the 3rd Defendant and all his siblings.

Khadiye Salim Mahmud Saleh.

Salame Salim Twalib Salim.

73. As for the Confirmations and Affidavit attached in the Supplementary/Supporting Affidavit containing numerous names the Learned Counsel submitted that the same was simply made to misdirect this Honorable Court into believing that there were many beneficiaries who were affected by the sale herein while in reality it was only 2 families out of the eight families who had refused to collect their shares: Additionally, the Affidavit enclosed in the Supplementary/Supporting Affidavit wass not executed by a Commissioner for Oath.

74. As such the Plaintiff's Letter of 12th November,2021 to Timamy & Company Advocates and the suit herein were made in bad faith and were an afterthought as the Plaintiff and all other beneficiaries were well aware of the sale and their family even consented to the same and by virtue of their families being represented during the family meetings the Plaintiff, her family and/or any other beneficiary were estopped by law to claim ignorance and/or non-involvement in the same. The provision of Section 120 of the *Evidence Act*, Cap. 80 provides that:

> " When one person has. by his declaration, act or omission. intentionally caused or permitted another person to believe a thing to be true and to act upon such belief. neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

75. From the foregoing, it was clear, that the said Affidavit was full of falsehood. That the Plaintiff/Applicant was not afraid of committing perjury and was taking this Honorable Court for granted as such we urge this Honorable Court not to permit itself to be subjected to such an offence time and again and to commit the Plaintiff on account of the same.

76. The Learned Counsel submitted that the suit herein fell under the provision of Order 2 Rule 15 of the Civil Procedure Rules, 2010. It was an abuse the due process of the Court as well as being a waste of this Honorable Court's time and sources. Thus, to the Counsel, it was clear that the suit and said Application disclosed no cause of action as the Plaintiff/Applicant was simply using this Honorable Court to settle her indifferences with the rest of the family. The said Application was therefore scandalous, frivolous or vexatious and otherwise an abuse of the due process of the Court and should be dismissed with costs.

77. On the other hand, the provision of Order 40 Rule 1 of the Civil Procedure Rules, 2010 was the law governing temporary injunctions and Courts of law grant injunctions if the following are adhered to:

> " Where in any suit it is proved by affidavit or otherwise—
>
> a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or y g wrongfully sold in execution of a decree; or
>
> b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

78. However, in the instant case, the above had not been met as no evidence has been tendered by the Plaintiff/Applicant herein to prove the 1st Defendant's intention of wasting, damaging, alienating or disposing the plot. On the contrary and as far as the Counsel was concerned the 1st Defendant was the actual and registered owner of the suit property as per the provision of Sections 24 and 40 of *Land Registration Act*, No. 3 of 2012 and he was, by law, entitled to quiet and peaceful possession of the suit property; As such and be it as it may and without prejudice to the foregoing the Plaintiff/Applicant was only but a trespasser of the suit property.

79. Additionally, from the above, the Learned Counsel submitted that the 2nd and 3rd Defendants/ Respondents had tendered sufficient evidence to prove that the title as transferred to the 1st Defendant was a clean one. Further, the Counsel believed that the 1st Defendant/Respondent never carried out any due diligence on his part before executing the Sale Agreement with the 2nd and 3rd Defendants/ Respondents and given there was no Court order or restriction registered against the title nor did they have reasons to doubt the title or any notice of alleged impropriety, their actions were open and lawful. In sum, the 1st Defendant/Respondent was a bona fide purchaser of the plot for value without any notice of fraud or other impropriety. And if there was, then the 1st Defendant was not party to it and was therefore protected under the law.

80. To support his point, the Learned Counsel referred the Honorable Court to the case of:- Lawrence Mukiri – Versus - Attorney General & 4 Others [2013] eKLR, where the High Court defined what amounts to "bona fide" purchaser for value, thus:

> " ...a bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine. he must prove the following:
>
> a. He holds a certificate of Title.
>
> b. He purchased the Property in good faith;
>
> c. He had no knowledge of the fraud;
>
> d. The vendors had apparent valid title;

e. He purchased without notice of any fraud;

f. He was not party to any fraud.

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner."

81. This follows the Black's law Dictionary 8th Edition definition of a "bona fide purchaser" as:

> " One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title: one who has in good faith paid valuable consideration for property without notice of prior adverse claims."

82. And Snell's Principles of Equity (supra) illustrated the issue, thus;-

> " An important qualification to the basic rule is the doctrine of the purchaser without notice, which demonstrates a fundamental distinction between legal estates and equitable interests....A legal right is enforceable against any person who takes the property; whether he has notice of it or not, except where the right is overreached or is void against him for want of registration. If A sells to C land over which B has a legal right of way, C takes the land subject to B's right. although he was ignorant of the right. But it is different as regards equitable rights. Nothing can be clearer than that a purchaser for valuable consideration who obtains a legal estate at the time of his purchase without notice of a prior equitable right is entitled to priority in equity as well as at law. In such a case equity follows the law, the purchaser's conscience not being in any way affected by the equitable right. Where there is equal equity the law prevails."

83. The 1st Defendant fitted perfectly in the above definitions. Furthermore, the provision of Section 26 of the *Land Registration Act*, gives an absolute and indefeasible title to the owner of the registered property and such title may only be challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party.

84. He cited the Uganda case of "Lwanga – Versus - Registrar of Titles, Misc. Cause No. 7A of 1977 (1980) HCB 24 as cited in the case of "Charles Karathe Kiarie & 2 others – Versus - Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others [2013] eKLR, the Court stated that:

> " Because of the seriousness of allegation of fraud, a criminal act. the burden of proof is on the party who alleges it and the standard of proof is more than a mere balance of probabilities. Fraud, for that reason, is treated as matter of evidence."

85. The provision of Section 107 (1)of the *Evidence Act*, Chapter 80 of the Laws of Kenya, provides:

> " Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

86. The evidential burden that is cast upon any party, the burden of proving any particular fact which desires the court to believe in its existence. That is captured in Sections 109 and 112 of the Act as follows:

> " 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

87. Moreover, fraud must be expressly pleaded in the pleading as is law under the provision of Order 2 Rule 4 of the Civil Procedure Rules, 2010. Likewise in the case of:- "Rosemary Wanjiru Murithi – Versus - George Maina Ndinwa NYR Civil Appeal No. 9 of 2014 [2014] eKLR, the Court of Appeal held that:-

> " Proof of fraud involves questions of fact. Simply raising the issue of fraud in a statement of defence and counterclaim is not proof of fraud."

88. It was thus clear that the Plaintiff/Applicant had not met the aforementioned threshold in order to allow this Honorable Court to exercise its discretion in her favour. Further, if the interlocutory orders are issued then without a doubt the 1st Defendant will suffer prejudice as he is at a risk of suffering great loss and damage. There was no doubt that the Plaintiff misdirected this Honorable Court using untrue allegations of facts essential in point of law into issuing the Order of 15th September, 2022. As such the said Order could be said to have been obtained fraudulently as it was clear that the Plaintiff made false statements and concealed from this Honorable Court material facts concerning the issues herein. Clearly, the Plaintiff/Applicant's said act was contrary to the maxims that who comes to equity must come with clean hands and he who seeks equity must do equity. It is just and fair in the circumstance as well as in the best interests of justice for the said Application to be struck out with costs to the 2nd and 3rd Defendants.

89. On who should bear the costs herein, the Learned Counsel submitted that it was practice that costs follow events and they are in the discretion of the Court and in any event, to the successful party. Thus he urged this Honorable Court to issue costs to the 2nd and 3rd Defendants as they had established herein that the Plaintiff/Applicant was malicious and gluttonous. The Learned Counsel prayed that this Honorable Court exercised its discretion in favour of the 2nd and 3rd Defendants/Respondents and dismiss the said Application with costs.

90. The Learned Counsel concluded that given the Application did not specifically plead fraud or adduce any evidence to prove the said impropriety, they urged this Honorable Court to be guided by the Lady Justice Mary M. Gitumbi's decision in the case of "Lawrence P. Mukiri Mungai (Supra) that it ruled:

> " In determining whether or not to give the Plaintiff/Applicant the orders they seek of an interlocutory injunction, I will refer to and rely on the principles laid down in the celebrated case of Giella - Versus- Cassman Brown (1973)EA 358 as follows:
>
> "The conditions for the grant of an interlocutory injunction are now. I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the Applicant

might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly. if the court is in doubt. it will decide an application on the balance of convenience."

91. From the foregoing, they had established that the Plaintiff/Applicant had failed to prove that she had a prima facie case with a high chance of success. This was the case as all her allegations had been countered by the 1st,2nd and 3rd Defendants/Respondents. And to prove fraud the matter must undergo hearing first, as was decided in the above case laws. Additionally, the issue of innocent purchaser for value without notice has always been determined in terms of indefeasibility of title thus making this Application unmerited as the Plaintiff will suffer no prejudice or harm if compensated by an award of damages. Thus they prayed that this Honorable Court dismisses the said Application with costs to the 2nd and 3rd Defendants/Respondents herein.

VII. Analysis and Determination

92. I have carefully read and considered the pleadings herein, the written submissions and the plethora of authorities cited herein by the parties, the relevant provisions of *the Constitution* of Kenya, 2010 and the statures.

93. In order to arrive at an informed, treasonable, fair and Equitable decision, the Honorable Court has framed four (4) salient issues for its determination. These are as follows:-

a. Whether the suit herein falls under the provision of Order 2 Rule 15 of the Civil Procedure Rules, 2010 being an abuse of the due process of the Court as well as it is a waste of time.

b. Whether this Honorable Court has the jurisdiction to hear and determine this suit and whether the Plaintiff has the locus standi to institute this suit.

c. Whether the documents which were attached to the Plaintiff's Supporting Affidavit and Supplementary/ Supporting Affidavit as annexures but were neither marked nor executed by a Commissioner for Oaths should be expunged from the Court record

d. Whether the Notice of Motion dated 8th September, 2022 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010 and Conservatory injunction.

e. Who will bear the Costs of Notice of Motion application dated 8th September, 2022.

ISSUE a). Whether the suit herein falls under the provision of Order 2 Rule 15 of the Civil Procedure Rules being an abuse of the due process of the Court as well as it is a waste of time.

94. This suit comprises of several weighty issues and substratum. They including the desire to have the suit struck out; whether the Plaintiff/Applicant has "locus standi" to institute this suit; whether this Honorable Court has Jurisdiction to hear and determine this case or not; the Court considering whether to grant temporary injunctive orders or not and whether the documents annexed herein by the Plaintiff/Applicant are properly done as required by law and should be admitted or not. For good order, the Honorable Court will graphically and indepth deal with each one of them separately.

95. To begin with, the 2nd and 3rd Defendant/Respondent herein have argued that this suit falls under the provision of Order 2 Rule 15 of the Civil Procedure Rules, 2010. To them, it is an abuse the due process of the Court as well as it is a waste of this Honorable Court's time and sources. Thus, as far as they are concerned, the suit and said Application discloses no cause of action as the Plaintiff/Applicant herein is simply using this Honorable Court to settle her indifferences with the rest of the family. To them,

the said Application is therefore scandalous, frivolous or vexatious and otherwise an abuse of the due process of the Court and should be dismissed with costs.

96. The provision of Order 2 Rule 15 (1) of Civil Procedure Rules, 2010 provides as follows: -

1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under sub rule (1)(a) but the application shall state concisely the grounds on which it is made.

(3) So far as applicable this rule shall apply to an originating summons and a Petition.

97. I discern that the jurisdiction to strike out pleadings is discretionary and must be exercised judicially. In the case of:- Yaya Towers Limited – Versus - Trade Bank Limited (In Liquidation) (Civil Appeal No. 35 of 2000) the Court expressed itself thus:-

> " A Plaintiff (Defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the Defendant (Plaintiff) can demonstrate shortly and conclusively that the Plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved".

98. The Court must be cognisant of the fact that judicial time is precious and must not be wasted in engaging itself in academic exercises by hearing cases in a full trial where it is plain and obvious that a Plaint discloses no reasonable cause of action or defence in law, where a plaint is scandalous, frivolous, vexatious, where a Plaint may prejudice, embarrass or delay the full trial of the action or where the plaint is otherwise an abuse of the court process.

99. Be that as it may, it cannot be gainsaid that striking out of pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham. The Court of Appeal in "Blue Shield Insurance Company Ltd – Versus - Joseph Mboya Oguttu [2009] eKLR restated this principle thus:

> " The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Ltd – Versus - Muchina (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in

effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-

> " The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case."

We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of Cail Zeiss Stiftung – Versus - Ranjuer & Keeler Ltd and others (No.3) (1970) ChpD 506, where the Lord Justice said:-

> " The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading."

We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable."

100. As already indicated above, this court carefully considered the written submissions filed by the parties. Additionally, I have noted that analyzing the suit has the potential of this court combing through the evidence which the Defendants/Applicants wish to rely upon to determine whether or not they had disclosed a reasonable cause of action.

101. For these reasons, therefore, I find the strong contention by the 2nd and 3rd Defendants/Respondents to strike out the application and the Plaint filed by the Plaintiff/Applicant herein unsubstantiated and unconvincing. Therefore, I decline to allow that prayer sought by the said Defendants/Respondents.

ISSUE No. b). Whether this Honorable Court has the jurisdiction to hear and determine this suit and whether the Plaintiff has the locus standi to bring this suit.

102. The Black's Law dictionary defines "locus standi' as the right to bring an action or to be heard in a given forum. The forum includes a Court of law. In the case of: "Rajesh Pranjivan Chudasama – Versus - Sailesh Pranjivan Chudasama [2014] eKLR the Court of Appeal held that:

> " .....a litigant is clothed with locus standi upon obtaining a limited or full letters of administration in cases of intestate succession....."

103. The Judges in the case of Rajesh Pranjivan Chudasama (above) case underscored the need to determine an issue of locus standi first hand .In their words the justices of the appellate Court had this to say:-

> " In our view issues of locus standi and jurisdiction are critical preliminary issues which ought to have been settled before dwelling on other substantive issues. Thus in our view, the learned Judge erred when she refused to determine the issues raised in the Preliminary Objection on the basis that there were other pending applications on the same issues. The Judge should have determined the Preliminary Objection on its merits. We agree with the Appellant's position that a Preliminary Objection, if upheld, serves the interest of justice by saving time and costs by expeditiously disposing off matters in their entirety. In this case the

Preliminary Objection dated 8th February, 2012 questioned the respondent's locus standi and the Court's jurisdiction. The issues for determination before the learned Judge should have been whether the Preliminary Objection was purely on a point(s) of law? If the answer to that question was in the affirmative, were the points properly raised or merited so as to dispose of the suit and any other pending applications? If she then upheld the objection it would have saved the parties herein both time, costs and served the interest of justice by disposing off all other pending applications raising the same issues."

104. The 2nd and 3rd Defendants have contended that the Order said to be annexed in the Plaintiff's Supporting Affidavit only appoints the Plaintiff as an Administrator of the Estate of Swaleh Salim Said alias Saleh Salim Said for purposes of distributing the said Estate to its heirs according to Islamic Shariah. The Learned Counsel for the 2nd and 3rd Defendant relied on the Court's decision in "Hawo Shanko – Versus - Mohamed Uta Shanko (Sypra) while relying on Julian Adoyo Ongunga – Versus - Francis Kiberenge Abano Migori Civil Appeal No.119 of 2015, cited Justice A. Mrima who had this to say on the issue of a party filing a suit without having obtained a limited grant:

> " Further, the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a Court acting without jurisdiction. Since it all amounts to null and void proceedings. It is also worth noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties."

105. It is trite that the estate of the deceased vests in the personal representatives who then have capacity to file or defend suit. Such persons must be appointed by the Court either through probate or grant in the case of intestate succession.

106. The 1st Defendant contended the capacity of the Plaintiff/Applicant to file the suit, through his counsel on record submitting that the issue of locus standi is a primary point of law similar to that of Jurisdiction since the lack of capacity to sue or be sued renders the suit incompetent while relying on the case of Beatrice Wambui Kiarie (Supra) where it was stated as follows:

> " To that effect thereof I find that the issue on locus standi is a primary point of law almost similar to that of jurisdiction and since the Plaintiffs herein did not take out the letters of Administration, they lacked the capacity to sue or be sued which renders the suit incompetent."

107. The Learned Counsel for the Plaintiff/Applicant further submitting that in the present suit herein, the Plaintiff/Applicant is allegedly bringing the suit on behalf of the Estate of Saleh Salim Said alias Swaleh Salim Said as an Administrator following the grant issued to her in Mombasa Kadhi's Succession Cause No.E180 of 2022. Order number 5 issued by the Hon. Kadhi, on the basis of which the Plaintiff/Applicant instituted the suit herein reads as follows:

> " 5) That this Hon Court is hereby happy to appoint one Maryuma Swaleh Said of ID No. 8535290 as the Administrator of the deceased estate for the purposes of distributing the estate to the rightful heirs according to the Islamic Sharia"

108. The Plaintiff/Applicant on the other hand argued that filing of this suit was part and parcel of her administrative duties on behalf of the Estate of the Late Swaleh Salim Said alias Saleth Salim Said, hence there can be no distribution of the Estate until she ensured that the heirs receive the lawful shares and reason for filing of this suit. It should be noted that the 2nd, 3rd and 4th Defendants have not produced any evidence in terms of documents how her father's name was removed from the Title Deed and hence the 1st Defendant did not obtain a clean Title Deed and hence need to grant orders sought till full and final determination of this matter.

109. Essentially, the argument has been that this being a succession cause this Court has no jurisdiction to entertain the matter, Further, it has been argued that from the value of the suit property, the Court with the pecuniary jurisdiction should have been the Chief magistrate Court and not this Court. In other words, the 2nd and 3rd Defendants/Respondents' contention is that being that the Plaintiff/Applicant obtained an order from the Khadhi's court, this Honorable Court has no jurisdiction. And being that the subject value of the suit property is a sum of Kenya Shillings Sixteen Million (Kshs 16,000,000/-) the suit is wrongly instituted in this Honorable Court.

110. Based on all these facts, this Honorable Court takes note that in the instant case the Plaintiff/Applicant was appointed the Legal administrator of the estate of Saleh Salim Said alias Swaleh Salim Said vide orders of MOMBASA KADHI'S SUCCESSION CAUSE NO. E180 OF 2022, therefore she had the locus standi to file the suit on behalf of the estate of the deceased.

111. The Plaintiff averred that a sum of Kenya Shillings Sixteen Million (Kshs 16,000,000/-) was in respect to the purported agreement to when a meeting with all the heirs was held and the heirs agreed to sell the property to the 1st Defendant/Respondent at that price. In fact the three [3] families who have never taken their shares of sale aver that they were never given any opportunity to purchase the property and they are ready and willing to pay a sum of Kenya Shillings Ten Million (Kshs.10,000,000/=) and retain their sum of Kenya Shillings Two Million (Kshs.2, 000, 000.00/=) per family as their share. They are ready to refund a sum of Kenya Shillings Seven Twenty Thousand Five Ninety Four hundred & twenty five cents (Kshs. 720,594/25) taken by the two [2] family members but the 21 of them who never took any of their shares amounting to Kshs. 5,279,405/75 are ready to purchase the suit property. According to the Plaintiff there was never a meeting to sell the suit property and any minutes produced before the court are fake.

112. The 'locus classicus' on jurisdiction is the celebrated case of Owners of "the Motor Vessel "Lilian S" (Supra) it will be evident that if this court lacks jurisdiction, the matter will be at an end as this court will have to down its tools and take no further step.A court's jurisdiction flows from either *the Constitution* or legislation or both. The Supreme Court of Kenya in the case of Samuel Kamau Macharia – Versus - KCB & 2 Others, Civil Application No. 2 of 2011 stated thus:-

> " A court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.
>
> We agree with Counsel for the first and second Respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively in the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application No. 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits.

It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

113. The provision of Article 165(3) of *the Constitution* confers the High Court with jurisdiction and provides:-

(3)Subject to clause (5), the High Court shall have-

a) Unlimited original jurisdiction in criminal and civil matters;

114. It is instructive to note that the jurisdiction is subject to Article 165(5) of *the Constitution* which provides:-

(5) The High Court shall not have jurisdiction in respect of matters:-

a) Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

b) Falling within the jurisdiction of the courts contemplated in Article 162(2).

115. Pursuant to the provision of Article 162 (2) of *the Constitution*, the *Environment and Land Court Act* 2011 was enacted and in Section 13 it confers the Environment and Land Court with jurisdiction as follows:-

(2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes-

a) Relating to environment planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

b) Relating to compulsory acquisition of land;

c) Relating to land administration and management;

d) Relating to public, private and community land and contracts, chooses in action or other instruments granting any enforceable interests in land; and

e) Any other dispute relating to environment and land.

116. As I have already pronounced myself before on the issue of Jurisdiction in the case of "Zipporah Njoki Kangara – Versus - Rock and Pure Limited & 3 others [2021] eKLR:

Jurisdiction means a courts power to decide case or issue a decree. In Kenya, the Environment and Land Court is a statutory creation by *the Constitution* of Kenya under the provision of Article 162 (b). Here, the Courts are vested it with original and unlimited jurisdiction. From the preamble of the ELC Act, the jurisdiction of the court is defined as ".....a Superior court to hear and determine disputes relating to the environment and the use and occupation of, and the titles to, land and to make provisions for its jurisdiction functions and powers and for connected purposes....."

117. From this decision, I further went ahead to state:

> "Under Sections 4 and 13 (1) of the Environment Land court Act this court has the legal mandate to hear any matter related to environment and land including the one filed by the Plaintiffs hereof. In the case of the ELC (Malindi) in the Kharisa Kyango – Versus - Law Society of Kenya (2014) eKLR.

118. In this instant suit, the Plaintiff pursues inter alia the a temporary order of injunction restraining, inhibiting and prohibiting all dealings in respect of PLOT NUMBER MOMBASA/BLOCK XVII/261 till further Orders of the Honorable Court in this matter and a conservatory Order of Injunction be issued restraining the Respondents by themselves, their servants, agents and whomsoever, howsoever from in any manner dealing and interfering with TITLE NO.MOMBASA/ BLOCK XVII/261 contending that on 16th March, 2007, the Plaintiff's father one Saleh Salim Said alias Swaleh Salim Said was one of the registered owner of the suit property, that a new land title was reissued on 29th September, 2016 by the 4th Defendant in the names of Noor Salim Said and Sheikha Salim and no transfer was even signed by the Plaintiff's father in favour of the new owners hence transaction was illegal and unlawful.

119. As stated above, the cause of action related to alleged fraud perpetrated by the Defendants in transferring the suit property from the name of the Plaintiff's father and others to the names of the 1st, 2nd and 3rd Defendant without notice to the administrator of the deceased estate. The evidence before court, demonstrates that indeed the suit property was transferred and the Plaintiff's father as one of the proprietors was removed. Court will make a determination as to who owns the suit property and for that to happen judicial discretion has to be exercised.

120. As regards to pecuniary jurisdiction, I find that the Defendants had not sufficiently proved for instant filing of a Valuation report on the current market value of the suit property that the said suit property fell below the pecuniary jurisdiction of this Court. Suffice it to say, the provisions of the Magistrates' Act cannot oust the jurisdiction of this Court as vested by Article 162 (2)(a) of *the Constitution*. To that effect, I strongly hold that this Court is well clothed with the Jurisdiction to hear and determine this matter whatsoever. Having dealt with the issue of jurisdiction and locus standi I will proceed the deal with the issue of documents.

ISSUE No. c). Whether the documents which were attached to the Plaintiff's Supporting Affidavit and Supplementary/ Supporting Affidavit as annexures but were neither marked nor executed by a Commissioner for Oaths should be expunged from the Court record.

121. The 2nd and 3rd Defendant have gone ahead and submitted that the documents attached to the Supporting Affidavit and Supplementary/Supporting Affidavit have not been annexed to the said Affidavits nor have they been marked and the same goes contrary to the Civil Procedure and Rule 9 of the Oaths and Statutory Declarations Rules, they went ahead to pray that this Honourable Court do expunge the same. They relied on the case of Jeremiah Nyangwara Matoke vs Independent Electoral And Boundaries Commission & 2 others (Supra).

122. The Plaintiff's application is premised on numerous grounds and supported by the Affidavit of the application. Although the annextures have been annexed on the Supporting Affidavit, the same have not been marked and commissioned by the Commissioner for Oaths. The Defendants are seeking to

have the said annextures struck off the record. Rules 9 of the Oaths and Statutory Declarations Rules provides as follows-

> " all exhibits to Affidavits shall be securely sealed thereto under the seal of the Commissioner, and shall be marked with serial letters of identification."

123. It is trite in law that an Affidavit and the annextures attached on it constitute evidence. Indeed, where a person seeks to proof a fact by way of Affidavit, he is obligated to exhibit any document on his Affidavit. However, before such a document can be received in evidence by the court, the law requires that such a document must be sealed by the Commissioner for Oaths.The law that requires the sealing and marking of annextures with serial letters is in mandatory terms, and must be complied with.

124. The Plaintiff's advocate was quiet on the issue.The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, delay and to focus on substantive justice (See "Abdirahman Abdi – Versus - Safi Petroleum Products ltd & 6 others Civil Application No. 173 of 2010). However, the overriding objective does not mean that the courts should ignore the law and the rules which are meant to guide the manner in which parties are to move the court. In the instant case, the law has provided in mandatory terms the manner in which evidence by way of annextures can be received by the court. The failure to comply with that law, like in the instant case, can only lead to one thing, the striking out of the offending documents.

125. However, considering that the Supporting Affidavit in itself complies with the law, it is only the annextures that can be expunged from the record, and not the Supporting Affidavit and the Application. Of course, it would not be prudent for the Plaintiff to proceed with his Application in the absence of documents in support of the depositions in the Affidavit. However, and with the leave of the court, the Plaintiff can still exhibit the properly sealed and marked annextures either by filing a Supplementary or Further Affidavit.

126. I say so because under the provisions of Order 51 Rule 4 of the Civil Procedure Rules, an Application can proceed for hearing notwithstanding that it is not accompanied by an Affidavit, meaning that where annextures on an Affidavit are expunged, the Applicant can still introduce those annextures by filing a Supplementary Affidavit without having the Application, or the initial Affidavit, struck out.

127. For these reasons, I strike out the unsealed and unmarked annextures annexed on the affidavit sworn on 8th September, 2022, being that this issue has been determined I move on to the issue of whether the Plaintiff has made out a case to warrant the grant of interlocutory and conservatory injunction.

ISSUE No. d). Whether the Notice of Motion dated 8th September, 2022 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010 and Conservatory injunction.

128. Under this Sub heading the Honorable Court will critically deal on the legal rationale on granting injunctive orders. It recognizes the fact that indeed all the Learned Counsels in these proceedings have been extremely fair and elaborate on the subject matter too. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of Giella – Versus - Cassman Brown (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that;

> " in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable

injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially".

129. In dealing with the first condition of prima facie case, the Honorable Court guided by the definition melted down in "MRAO Limited – Versus - First American Bank of Kenya Ltd & 2 others (2003) KLR 125,

> "..... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."
>
> > "So what is a prima facie case, I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself would conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter"

130. The contention in this suit is an issue that may be construed as fraud and the Parties are contesting ownership of the land which is in it self depicts a prima facie case being that this is a land matter whether the title deed is contested.

131. Secondly, The Plaintiff has to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of "Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (2018) eKLR provides an explanation for what is meant by irreparable injury and it states:-

> "Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

132. The Plaintiff had deposed the Estate of the Deceased that is Saleh Salim Said, has lost a Share of a prime Property without compensation and since the transactions surrounding the Transfers are invalid hence null and void all entries done by the 4th Defendant to the Suit Property Title that is Entries Nos.3,4,5,6,7,8 and 9 in the Green Card ought to be cancelled forthwith in the meantime all transactions and dealings in respect to the Title should be halted forthwith and that the Defendants may be colluding to be hiding documents from her with an intention to further dispose/transfer the suit Property.

133. In my view, therefore, the risk of having the suit property disposed of before the conclusion and final determination is sufficient demonstration of irreparable loss being occasioned to the Plaintiff.

134. Thirdly, the Plaintiffs have to demonstrate that the balance of convenience tilts in their favour. In the case of Pius Kipchirchir Kogo (Supra) which defined the concept of balance of convenience as:

> "The meaning of balance of convenience will favour of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience

caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".

135. In the case of "Paul Gitonga Wanjau – Versus - Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR, the Court dealing with the issue of balance of convenience expressed itself thus:-

> " Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies."

136. The Plaintiff/Applicant contends that the balance of convenience tilts in her favour because the deceased also owned the suit property and they were shocked to find out that there were other persons registered under the title deed after its transfer.

137. The decision of Amir Suleiman – Versus - Amboseli Resort Limited [2004] eKLR where the learned judge offered further elaboration on what is meant by "balance of convenience" and stated;

> " The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice."

138. Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the registration of title in the name of the Plaintiff/Applicant.

139. I wish to cite the case of:- Robert Mugo Wa Karanja – Versus - Ecobank (Kenya) Limited & Another [2019] eKLR where the Court in deciding on an injunction application stated:-

> " circumstances for consideration before granting a temporary injunction under Order 40 Rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts..."

140. I am convinced that if orders of temporary injunction are not granted in this suit, the property in dispute might be in danger of being dealt in the manner set out in the application and apprehended by the Plaintiff/Applicant. In view of the foregoing, I find that the Plaintiff/Applicant has met the criteria for grant of orders of temporary injunction.

141. The Plaintiff/Applicant also seeks a conservatory injunction against the Defendants/ Respondentrestraining the Respondent from convening any general meeting, or interfering with the general work of the court. The Supreme Court of Kenya in Gitirau Peter Munya – Versus - Dickson Mwenda Kithinji and 2 Other (2014) eKLR while addressing the concept of Conservatory Orders held that:

> " Conservatory orders bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the "prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success' in the Applicant's case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes."

142. The principles to be satisfied in granting of a conservatory order were expressed by Justice Onguto J. (as he then was) in the case of Board of Management of Uhuru Secondary School – Versus - City County Director of Education & 2 Others [2015] eKLR are as follows: -

> " In summary, the principles are that the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether to grant or deny a conservatory order."

143. In determining the Application herein this court is limited to examining and evaluating the material placed before it, in order to ascertain whether the Applicant had made out a prima facie case to warrant grant of conservatory orders, I am minded not to delve the merits of the main suit.

144. Previously in this ruling I have pronounced myself and stated that the Plaintiff had presented a prima facie case, I have also demonstrated and the Plaintiff is likely to suffer if the orders sought for in the Application are not granted. The balance of convenience as discussed below lies with the Plaintiff. The totality of the foregoing, it is in the interest of justice that the Application by the Plaintiff/Applicant herein be allowed.

ISSUE No. e). Who will bear the Costs of Notice of Motion application dated 8th September, 2022.

145. It is trite law that the issue of Costs is at the discretion of the Court. "Costs" mean an award that a party is granted at the conclusion of any legal action and/or proceeding in a litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By the event it means the result of the said legal action or proceedings. See the supreme court case of "Jasbir Rai Singh

– Versus – Tarchalans Singh", (2014) eKLR and Rosemary Wambui Munene – Versus – Ihururu Dairy Co – Operatives Societies Limited"

146. In the instant case, the Honorable Court finds that objections to strike out the suit on allegation of the Plaintiff/Applicant herein lacking "the locus standi" and the Court failing to have jurisdiction being unmeritorious; while the Plaintiff/Applicant herein has fulfilled the conditions set out under the provisions of Order 40 Rule 1 of the Civil Procedure Rules, 2010, this Notice of Motion application dated 8th September, 2022 shall be deemed to have merit and is hereby allowed with costs. However, taking that the matter is still on course, the costs shall remain to be in the cause.

VIII. Conclusion & Disposition

147. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience and the principles of Preponderance of probabilities thereof. Clearly, from the face value, the Plaintiff/Applicant herein apparently may be having a case against the 1st, 2nd, 3rd & 4th Defendants/Respondents herein to be proved during the full trial.

148. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-

a. That the Notice of Motion application dated 8th September, 2022 be and is hereby found to have merit and thus allowed in its entirety.

b. That an order of Temporary injunction do issue restraining, inhibiting and prohibiting all dealings in respect of PLOT NUMBER MOMBASA/BLOCK XVII/261 till further Orders of the Honourable Court in this matter.

c. That a conservatory Order of Injunction be issued restraining the Respondents by themselves, their servants, agents and whomsoever, howsoever from in any manner dealing and interfering with TITLE NO. MOMBASA/BLOCK XVII/261 till hearing and final determination of the Suit.

d. That for expediency sake, this suit should be heard and disposed off within the next One Hundred and Eighty (180) days commencing from 14th March, 2024. There shall be a Mention date on 30th October, 2023 for purposes of conducting a Pre – Trial Conference session pursuant to the provision of Order 11 of the Civil procedure Rules, 2010.

e. That the cost of this application to be in the cause.

It Is So Ordered Acordingly.

RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 27TH DAY OF JULY 2023.

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HON. JUSTICE L. L. NAIKUNI, JUDGE

ENVIRONMENT AND LAND COURT AT MOMBASA