



Mutua & 2 others (Suing as the Officials of Aimi Ma Lukenya Society) v East Africa Portland Cement Company Ltd & 5 others (Environment & Land Case 7 of 2023) [2023] KEELC 20837 (KLR) (19 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20837 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 7 OF 2023
A NYUKURI, J
OCTOBER 19, 2023**

BETWEEN

**JULIUS MUTIE MUTUA 1ST PLAINTIFF
ALEX KYALO MUTE MI 2ND PLAINTIFF
PASCAL KISELI BASILIO MUNGUI 3RD PLAINTIFF
SUING AS THE OFFICIALS OF AIMI MA LUKENYA SOCIETY**

AND

**EAST AFRICA PORTLAND CEMENT COMPANY LTD 1ST DEFENDANT
KENYA RAILWAYS COOPERATION 2ND DEFENDANT
GRAIN BULK HANDLERS LTD 3RD DEFENDANT
SUPERIOR HOMES LIMITED 4TH DEFENDANT
THE CHIEF LAND REGISTRAR 5TH DEFENDANT
NATIONAL LAND COMMISSION 6TH DEFENDANT**

RULING

Introduction

1. Before court is Notice of Motion application dated 11th October 2023, filed by the Plaintiff seeking the following orders;
 - a. Spent
 - b. Spent



- c. That this Honourable Court do issue injunctive orders restraining the 1st Defendants, whether acting by themselves, their servants, agents, contractors or any other person from demolishing, destroying and/or dismantling the homes, houses, churches, toilets and market structures put up by the Plaintiffs or interfering in any way whatsoever with LR. No. 10424 members pending the hearing and determination of the suit herein.
 - d. That the costs of this application be provided for.
 2. The application is predicated on the replying affidavit sworn on 11th October 2023 by Julius Mutie Mutua, the Plaintiff's chairman. It is the Applicants' case that they are the registered proprietors of LR. No. 10424 Athi River (suit property) as that property was transferred to them on 20th May 1980 by the 1st Defendant upon purchase. They stated that upon purchase, they took possession of the suit property and commenced subdivision and sold parts of the suit property to its members who have since lived and conducted their businesses on that suit property.
 3. The Applicants stated that the 1st Defendant and their agents had made it a recurring conduct to uproot beacons on the suit property, demolish houses and disrupt peaceful activities of the Plaintiff's members claiming legal entitlement to the property. They stated that demolition of the Plaintiff's members' homes, churches and markets had caused losses to the community and denied them their Constitutional right to property. They averred that the 1st Defendant had purported to cause 900 acres to be excised from the suit property and be compulsorily acquired by the National Land Commission for purposes of setting up a dry port despite the fact that their rights were extinguished on 20th May 1980.
 4. They further alleged that the 1st Defendant had purported to cause 100 acres to be excised from the suit property and transferred to Superior Homes Kenya Ltd. They maintained that the 1st Defendant had colluded with the other Defendants to impede the Plaintiffs' right to property and that their actions were illegal and amounted to trespass as they have no proprietary rights over the suit property. They stated that unless the orders sought are granted, the Plaintiff's members shall suffer irreparable loss due to the Defendant's unconstitutional actions. They attached a copy of the title and an official search in respect of the suit property and an OB report.
 5. The application is opposed.
 6. In response to the application, the 1st Defendant filed Notice of Preliminary Objection dated 17th October 2023. They stated that this suit is res judicata as this court had conclusively and effectively dealt with Machakos ELC No. 74 of 2014 consolidated with Petition No. 10 of 2018 which involved the same subject matter; and that this suit is an abuse of the court process.
 7. The 1st Defendant also filed a replying affidavit sworn on 17th October 2023 by Florence Mitey, the 1st Defendant's Company Secretary. She stated that the 1st Defendant was the registered proprietor of the suit property measuring 4298 acres. She stated that the 1st Defendant has never sold or transferred the suit property to the Plaintiff and therefore the Plaintiff cannot pass good title to third parties. She maintained that no documents were produced to support the Plaintiff's allegations of having sold the suit property and no agreement of purchase was produced by the Plaintiff. According to her, the Plaintiff's documents were not authentic and that the same were forgeries. She stated that documents from the Registrar of Societies confirmed that the Plaintiff was registered on 25th September 2014 and therefore could not have been registered as owner of the suit property in 1980 as they were not in existence then.



8. She deposed that the Applicant's allegation that they purchased the suit property in 1980 was false because the Applicant's society had not been registered as at that date; the Petitioner did not produce the purported agreement between the Petitioner and the 1st Respondents; the I.R. Number and the land survey plan number referenced in the purported transfer instrument are different from the ones in the title; that the transfer instrument produced is a forgery and there are no other requisite completion documents which were produced including application from registration, consent to transfer, rent and rates clearance certificates, stamp duty payment receipts, valuation reports and identification documents of persons executing the transfer instruments.
9. She took the position that the Plaintiffs had illegally and intentionally encroached on the 1st Defendant's property, constructed thereon and wasted it without any right. They stated that in ELC Case No. 74 of 2014 consolidated with Petition No. 10 of 2018 this court issued orders of status quo in 2015 and that the Plaintiffs were in violation of those orders when they continued with construction of structures on the suit property. They further stated that the Plaintiffs had not met the three guiding principles governing grant of injunctive orders which are *prima facie* case with probability of success, existence of irreparable injury that cannot be compensated in damages if the injunction is not granted and consideration of the balance of convenience where there is doubt.
10. She further stated that no *prima facie* case has been demonstrated by the Plaintiff and that they have also not shown irreparable loss that cannot be remedied by an award of damages. She held the position that the 1st Defendant stood to suffer great injustice and prejudice if the orders sought are granted as it has been admitted by the Plaintiffs that they were dealing with the suit property and selling it to unknown buyers despite orders stopping the sale. She stated that the intervention sought by the Plaintiffs would result in unjust limitation of the 1st Defendant's right to quiet enjoyment of the suit property. They stated that if the orders sought are granted the Plaintiff will continue to collect money from the members of the public as they have done in regard to previous matters. She maintained that the balance of convenience tilted in their favour. She attached copies of the title to the suit property; forensic examination report in regard to the Plaintiff's title; a memo from the National Land Commission; correspondence documents from the Registrar of Societies; this court's order issued on 23rd January 2015; documents indicating purchases between the Plaintiff and third parties done in 2022 and public notice dated 3rd July 2020.
11. The 3rd Defendant filed grounds of opposition dated 18th October 2023 in response to the application. They stated that the motion as formulated was untenable, bad in law and orders sought cannot be granted. They also argued that the Applicant's motion does not meet the threshold for granting injunction and that the Applicants failed to demonstrate a *prima facie* case worth determination by the court. They held the view that the motion was fatally defective and ought to be struck out as the court was functus officio and lacked jurisdiction.
12. The 4th Respondent filed grounds of opposition dated 18th October 2023, and stated that the application is grossly misplaced, mischievous, frivolous, scandalous, vexatious, an abuse of the court process and hopelessly incompetent. They also stated that the application had not set out any *prima facie* case against the 4th Defendant to warrant orders of injunction against them. Further that the application did not meet the prerequisites of Order 40 Rule 1 and the conditions in *Giella v. Casman Brown* [1973] EA 358.
13. The court directed that both the Preliminary Objection filed by the 1st Defendant and dated 17th October 2023, regarding the jurisdiction of the court, and the instant application dated 11th October 2023 shall be argued together.



14. The application was disposed by way of oral submissions. Submissions on behalf of the Applicants were made by Senior Counsel Kalonzo Musyoka and Mr. Simiyu. Ms Tusiime holding brief for Mr. Sigei made submissions on behalf of the 1st Respondent while Mr. Agwara submitted for the 2nd Respondent. Mr. Busieka and Mr. Nyachoti submitted for the 3rd Respondent and 4th Respondent respectively. For the 5th Respondent submissions were made by Mr. Motari.

Applicant's Submissions

15. Senior Counsel Kalonzo Musyoka appearing together with Mr. Simiyu being counsel for the Applicant submitted that the Plaintiff's application was about the dehumanization of the Applicants and brutal force deployed by the Defendants at the instance of various state agencies as against the residents of the suit property. Counsel stated that the destruction on the suit property as result of the eviction was heart wrenching. Counsel invited the court to stand in the gap to demonstrate that this country is under the rule of law and not a police state where citizens cannot be reached with humanitarian help. Further that Kenya is a signatory to the Rome Statute and that what is happening is a crime against humanity. He argued that what has happened in the last two days was diversionary as the Applicant has a valid title and therefore they are entitled to have the eviction against them stopped. Mr. Simiyu, also counsel for the Applicant, maintained that although there has been a long standing dispute on the ownership of the suit property there has not been any judicial pronouncement on who owns that property. He argued that it is on the strength of the order striking out ELC No. 74 of 2014 as consolidated with Petition No. 10 of 2018 issued on 9th October 2023, that the Defendants began demolishing the suit properties. He contended that the title documents annexed to the Applicant's supporting affidavit which is in the name of the Plaintiff has never been invalidated in any court of law and that an order striking out a suit does not invalidate a title.
16. It was further submitted for the Applicant that the title exhibited by the Applicant was supported by a search certificate marked as JM2 which was a system generated document from e-citizen portal which is a record held by the Chief Land Registrar, the 5th Defendant in this case. Counsel maintained that entry No. 7 on the title tallies with the search and that particulars in regard to the I.R. number and the acreage on the title are in tandem with those on the search. Counsel submitted that while they had a title and a search, the 1st Defendant had nothing to show ownership and that therefore they had demonstrated a *prima facie* case.
17. Reliance was placed on Section 26 (1) of the [Land Registration Act](#) for the proposition that a search speaks to ownership of title and that therefore the Plaintiff's title is indefeasible unless the court declares it null and void. Counsel argued that the demolitions in Athi River had rendered children homeless and with no school to attend. They stated that churches and mosques had been demolished by the Respondents and that therefore the brutality on the 25,000 residents was overwhelming.
18. Relying on the Supreme Court decision in the case of *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 Others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021) (Judgment) Counsel argued that the right to housing over public land crystallizes upon long periods of occupation and that that right springs from the principle of equitable access to land under Article 60 of [the Constitution](#) of Kenya. Counsel emphasized that where eviction is in public interest, evictees have the right to seek redress and that if the property belongs to the 1st and 2nd Respondents, the law does not allow them to just evict the residents because even where the court on full trial were to find that the title is theirs they must comply with the law. Counsel also argued that where the Government fails to provide housing it must protect the dignity of the people.



19. It was also submitted for the Applicant that if the court finds that they had not met the *prima facie* threshold, the court should consider that the damage that will be suffered would be irreparable. Further, counsel argued that the balance of convenience tilts in favour of the 25,000 residents on the suit property and referred to the case of National of Kenya Ltd & 2 others v. Sam -Con Ltd [2003] eKLR.
20. On the Preliminary Objection filed by the 1st Respondent counsel argued that striking out of a suit does not take away the court's jurisdiction as there is a distinction between an order of striking out and an order of dismissal. Counsel argued that the latter operates as an absolute estoppel. While making reference to Section 7 of the [Civil Procedure Act](#) which provides for the doctrine of res judicata, counsel argued that the suit was not res judicata as the striking out order made proceedings in the former suit a non-event.

Respondents' submissions

21. Ms Tusiime, appearing for the 1st Respondent submitted that the Preliminary Objection dated 10th October 2023 raised a point of law to the effect that this court has no jurisdiction to entertain this suit as the same is res judicata as provided for in Section 7 of the [Civil Procedure Act](#). Counsel held the view that this court conclusively and effectively dealt with the dispute herein in Machakos ELC 74 of 2014 consolidated with Machakos ELC Petition 10 of 2018 which was struck out on 9th October 2023. Counsel took the view that a matter that has been struck out cannot be revived. Counsel maintained that this suit is an abuse of the court process and was a mere forum shopping as the Plaintiff admitted to have initially filed this suit in Nairobi when they were aware that the earlier suits were in Machakos. According to counsel, this suit is a mere cosmetic facelift of the previous suits as the order striking out earlier suits has not been set aside, reviewed or appealed against. She submitted that litigation must come to an end.
22. On the merits of the instant application, counsel relied on the replying affidavit filed on behalf of the 1st respondent and argued that the forensic examination report produced by the 1st Respondent demonstrated that the Applicant's title was forged and that that evidence has not been rebutted. Counsel maintained that there is evidence from the Registrar of Societies that the Plaintiff came into existence in 2014 when it was registered and that therefore there can be no possibility that they purchased the suit property in 1980 as alleged. Counsel pointed out that in the previous suits, orders were issued for maintenance of status quo on 23rd January 2015 but that the Plaintiff had been defiant of those orders and had been selling the suit property even after the orders had been issued. On whether the Applicant had met the threshold for grant of injunctive orders, counsel argued that there was no *prima facie* case and that any injury caused can be remedied by damages. In her view, the balance of convenience tilted in favour of the 1st Defendant.
23. Mr. Agwara for the 2nd Respondent submitted that the application as framed was limited to a prayer for injunction against the 1st Defendant. Counsel pointed out that the case before court is a plaint and not a Constitutional Petition and therefore the Plaintiff must show a *prima facie* case. He argued that the Plaintiff has been enjoying orders of injunction up to when the suit was struck out and therefore this application is a clever way to reinstate the orders they lost when their suit was struck out. Counsel submitted that the Plaintiff had come to court with unclean hands while seeking equitable orders and therefore his suit is an abuse of the court process. Further, counsel submitted that there is no evidence by way of an affidavit of the owners of demolished properties to show that indeed the 1st Defendant had destroyed their properties.



24. Counsel submitted that the Applicant had not demonstrated the nature of the loss they would suffer and that the issue of 25,000 Kenyans being affected is an allegation from the bar and no evidence was presented for the same. On the question of balance of convenience, counsel argued that when the Plaintiff obtained injunction in the previous suits they continued to sell the suit property to third parties and that therefore they have demonstrated their readiness to abuse court orders. Counsel also argued that the search certificate produced must as a matter of course indicate the date and time it was issued but that the search produced by the Applicants herein has no date when it was issued and therefore its authenticity is in question.
25. Counsel expressed apprehension that if the Plaintiff is granted a temporary injunction they will repeat what they did in the previous suit as they will not be willing to prosecute this suit so that they can continue enjoying interim orders. Counsel also argued that the decision in the Mitu-Bell case is not applicable in the circumstances of this case as the persons who occupied the property in dispute in that case were squatters unlike in this case where the Plaintiff claim ownership.
26. Mr. Busieka, counsel for the 3rd Respondent relied on the 3rd Respondent's grounds of opposition dated 18th October 2023 and submitted that this court has no jurisdiction to determine this matter as the court is functus officio. Counsel argued that the previous suit was not struck out under the provisions of Order 12 rule 6 of the Civil Procedure Rules which allows filing fresh suits. He held the view that there is no law that allows a party to file a fresh suit where an earlier suit was struck out. To buttress this argument, he relied on the case of Raila Odinga v. IEBC & 3 Others [2013] eKLR. He was of the view that once a case has been struck out and there is an appeal against an order to strike it, then the doctrine finality kicks in and the court becomes functus officio. Counsel maintained that this therefore means that there is no *prima facie* case as there is no suit before court.
27. Mr. Nyachoti, counsel for the 4th Respondent relied on the grounds of opposition dated 18th October 2023 and emphasized that there is no Applicant who had pin pointed a particular property of their that has been demolished. According to counsel, while it is in the public domain that some individuals alleged that their properties were demolished, none of them is before court. Counsel argued that the Applicant is an amorphous body and that the genuineness, validity and their proprietary interest is in question.
28. Mr. Motari, counsel for the 5th Defendant argued that the search in question which was produced by the Applicant was doubtful as it did not have the date when it was issued. He also submitted that in law a society can only own property through its official and therefore the purported registration of the suit property in the name of the society and not its officials show fraud. Counsel also argued that the balance of convenience was against granting the orders sought.
29. In a rejoinder, Senior Counsel Kalonzo Musyoka for the Applicant argued that the land in issue measures 4298 acres and that present in court are representatives of all the affected persons. He took the position that the actions of the Respondents had suspended the rights of the Applicant. He argued that this matter is about people's lives and destruction of livelihoods. Mr. Simiyu, counsel for the Applicant argued that the issue of the search being doubtful is a matter that should go to full trial and that the concept of locus died with the old Constitution by dint of Article 22 (1) of *the Constitution* of Kenya. In regard to the decision in Raila Odinga case (supra), counsel argued that that matter was in respect to electoral context and Constitutional timelines and that what was struck out was an affidavit and not the Petition and therefore that that decision was not applicable to this case. Counsel argued that while the Applicants have a right to appeal against the order striking out their earlier suit, that does not mean that this court is functus officio. Counsel referred the court to the case of Enok Kirao Muhanji vs. Hammid Abdalla Mbarak [2013] eKLR. On the Mitu-Bell decision, counsel submitted that Mr.



Agwara did not address the provisions of Article 61 of *the Constitution* which protects illegal occupiers and those claiming title. Counsel insisted that the forensic report by the police on the authenticity of the 1st Respondent's title does not confer title on the 1st Respondent.

Analysis and Determination

31. With immense reflection, this court has considered the instant application, supporting affidavit, the 1st Defendant's Preliminary Objection, grounds of opposition, replying affidavit and oral submissions made by counsel on both sides. In the court's view, two issues arise for determination, namely;
 - a. Whether this matter is res judicata in view of the orders made on 9th October 2023 in Machakos ELC Case No. 74 of 2014 consolidated with Machakos ELC Petition No. 10 of 2018.
 - b. Whether the Applicant has met the threshold for grant of temporary injunction.
32. Section 7 of the *Civil Procedure Act* bars a court from trying a suit or an issue which has been tried in a former suit involving the same parties or their privies in a competent court and where the decision made was final.
33. Section 7 of the *Civil Procedure Act* provides as follows;

Res Judicata

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

1. Explanation. (1)—The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.
2. Explanation. (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.
3. Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.
4. Explanation. (4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.
5. Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.



34. The Black's Law Dictionary 10th Edition defines res judicata to mean;

“A thing adjudicated.” An issue that has been definitely settled by judicial decision. An affirmative defence barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been - but was not - raised in the first suit. The three essential elements are (1) an earlier decision on the issue, (2) a trial judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties.”

35. The elements of res judicata were stated in the case of *Invesco Assurance Company Limited & 2 Others v Auctioneers Licensing Board & Another; Kinyanjui Njuguna & Company & Another (Interested Parties)* [2020] eKLR, where the court held as follows;

A close reading of section 7 of the Act reveals that for the bar of Res Judicata to be effectively raised and upheld, the party raising it must satisfy the doctrine five essential elements which are stipulated in the conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that;

- i. The suit or issue raised was directly and substantially in issue in the former suit.
- ii. That the former suit was between the same party or parties under whom or any of them claim
- iii. That those parties were litigating under the same title
- iv. That the issue in question was heard and finally determined in the former suit
- v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.”

36. The purpose of the doctrine is to have finality in litigation where a matter has already been determined on merit so that a Defendant is not vexed with unnecessary litigation. In the case of *The Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others*, [2017] eKLR stated;

The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of Res Judicata thus rest in the public interest for swift, sure and certain justice.

37. The doctrine frowns upon escalating litigation horizontally by having parties file successive suits on the same issues regarding the same parties where a competent court has with finality pronounced itself on the rights of the parties involved.

38. In the instant matter, the fact that the parties and issues in *Machakos ELC No. 74 of 2014* consolidated with *Machakos ELC Petition No. 10 of 2018* are similar to parties and issues in this matter has not been disputed. It is also not in doubt that the two suits were struck out on 9th October 2023 for want



- of compliance with court orders. What is disputed is the import of the order striking out those two previously filed suits and whether that order renders this suit res judicata.
39. I take the view that the order issued on 9th October 2023 striking out the aforesaid previous suit did not determine the matter on its merit but basically removed the suit from court without trying the issues before court. Consequently, the issues in dispute in Machakos ELC 74 of 2014 consolidated with Machakos ELC Petition 10 of 2018 were not adjudicated upon and therefore the door to file a fresh suit remained open for the Applicants. In the premises I hold and find that this suit is not res judicata.
 40. On the merits of the instant application, I note that in the oral submissions made before court, several matters were raised including arguments that the eviction of the Plaintiff amounted to crimes against humanity, contrary to the Rome Statute and that they were contrary to the Applicant's right protected under Article 43 of *the Constitution* of Kenya 2010, and therefore the evictions ought to have complied with the law. It must however be borne in mind that issues for determination flows from the pleadings. It is trite that parties are bound by their pleadings and this court while exercising judicial authority as provided for in Article 159 ought to ensure that it dispenses substantive justice within the bounds of the law.
 41. In their oral submissions, the Applicant relied on the case of Mitubell Welfare Society (supra) to argue that an injunction should issue to them, as they are entitled to a right to housing under Article 43 of *the Constitution* of Kenya, whether or not they claim ownership of the suit property. While this appears as a sound argument, this argument does not arise from the pleadings filed before me. The suit before court which was commenced by Plaintiff did not raise any Constitutional questions beyond Article 40 of *the Constitution* of Kenya as read with Section 26 of the *Land Registration Act* on protection of property rights based on the alleged Applicant's registration of title. The argument on the right to housing under Article 43 of *the Constitution* of Kenya is an argument that came from the bar, having only been raised in the oral submissions and in my view, that argument has no bearing on what the court has been invited to determine in regard to the Applicant's Motion dated 11th October, 2023, as that motion only restricted itself to a prayer for an order of temporary injunction against the 1st Respondent, from interfering with the suit property on basis of alleged title held by the Applicant.
 42. Giving that matter another perspective, it is clear that the Plaintiff stated that the Plaintiff is the owner of the suit property and therefore any claim thereon by the 1st Defendant has no legal basis. The prayers sought in the Plaintiff are a permanent injunction, to restrain the Defendants from interfering or trespassing on the suit property, a declaration that the Defendants actions are an interference with the Plaintiff's peaceful occupation; a declaration that the Plaintiff is the bona fide owner of the suit property; that the title held by the 1st Defendant is irregularly, unlawfully and fraudulently held and should therefore be canceled; together with general and aggravated damages and costs.
 43. Therefore, the gravamen of the Plaintiff's claim as captured in the plaintiff is that the 1st Defendant's claim on the title of the suit property is unlawful and the purported sale of that property to the 2nd and 3rd Defendants and its surrender of part of the property to the 6th Defendant is irregular, a misrepresentation and constitutes fraud. I therefore find and hold that the argument raised in the oral submissions on Article 43 of *the Constitution* of Kenya 2010 has no relevance to the application before me.
 44. Therefore, the dispute as presented in the Plaintiff's motion dated 11th October 2023 as anchored on the plaintiff before court, turns on whether the Plaintiff has met the threshold for grant of a temporary injunction on the basis of the provisions of Order 40 of the Civil Procedure Rules.



45. Order 40 Rule 1 of the Civil Procedure Rules provides for the power of the court to grant temporary injunction where in any suit it is demonstrated that the property in dispute is in danger of being wasted, damaged, alienated, wrongfully sold in execution of a decree, or where the Defendant intends to remove or dispose the property in circumstances that will obstruct a decree that may be made against the Defendant.
46. Principles for grant of temporary injunction are well settled. The Applicant must demonstrate;
- a. A *prima facie* case with chances of success;
 - b. That the applicant stands to suffer irreparable injury that may not be compensated in damages, if the injunction is not granted.
 - c. Where the court is in doubt, it ought to decide the application on a balance of convenience.
47. In the case of *Nguruman Limited v. Jan Bonde Nielsen & 2 Others* CA No. 77 of 2012 [2014] eKLR, the Court of Appeal held as follows;

in an interlocutory 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) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which vest 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.

48. Therefore, for an applicant to obtain a temporary injunction they must first show that they have a *prima facie* case with chances of success. Once a *prima facie* case has been established, they must show that if the injunction is not granted, they stand to suffer irreparable injury that cannot be compensated in damages. Lastly, where the court is in doubt whether the injury is irreparable, it must consider in whose favour the balance of convenience tilts. Over and above that, the court should bear in mind the tenets of substantive justice. A *prima facie* case is one which demonstrates an ostensible infringement of the applicant's legal right requiring a rebuttal from the respondent. A *prima facie* case was defined by the Court of Appeal in the case of *Mrao Ltd v. First American Bank of Kenya Ltd* [2003] eKLR as follows;

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.

50. In the instant matter, I have considered the affidavit sworn on 11th October 2023 by Julius Mutie Mutua in support of the motion herein and the evidence attached to that affidavit which are the title documents, and the official search. The same are in regard to L.R. No. 10424 and I.R. No. 17951 and shows that the Plaintiff was registered as proprietor of the suit property on 20th May 1980. The Applicant in relying on Section 26 (1) of the [Land Registration Act](#) has argued that as their title has not been declared a nullity by any competent court, they have demonstrated a *prima facie* case.
51. On the other hand, the 1st Respondent attached a forensic report to show that entry No. 7 in the title shown by the Plaintiff was a forgery. They also availed documents from the Registrar of Societies to show that the Plaintiff was registered as a society on 25th September 2014 and argued that therefore the Applicant was not in existence in 1980 when they purport to have purchased the suit property from the



- 1st Respondent. They also produced a status report from National Land Commission showing that in 1960 the electric typewriter which was used to produce the Plaintiff's title was not on the market then.
52. Article 40 (6) of *the Constitution* of Kenya 2010 limits Constitutional protection to property rights only in regard to property that is lawfully acquired. That provision is expounded in Section 26 of the *Land Registration Act* 2012, which removes legal protection from a title obtained by fraud, misrepresentation, illegality, want of procedure or through a corrupt scheme. Therefore, it is not enough for a registered proprietor to produce a title without demonstrating that its root is clean.
53. From the evidence given by the Applicant, they do not deny that the suit property was at one time lawfully held by the 1st Respondent. I understand them to be stating that they purchased the suit property from the 1st Respondent in the year 1980. It is therefore upon them to demonstrate at a *prima facie* level, that the root of their title is clean as the sale and transfer is contested by the 1st Respondent.
54. This matter raises the question of authenticity of the Applicant's documents of registration and acquisition of the suit property. I note that the nature of the challenge on the authenticity of the Applicant's title has always been the same as stated above, which was raised in 2014 in Machakos ELC No. 74 of 2014 consolidated with Machakos ELC Petition No. 10 of 2018. Therefore, it would be expected that the Applicant in this matter would have anticipated this same challenge and argument from the 1st Respondent and would have attempted to discredit the 1st Respondent's evidence by availing a search from the Registrar of Societies to show that the records held at that institution indicate that the Applicant was registered before 1980 when they allege to have purchased the suit property; that entry No. 7 on their title was not forged; that they have documents to show that they purchased the suit property and that their title which was printed by an electric printer allegedly in 1960 was genuine. However, the Applicant did not avail any evidence rebutting the 1st Respondent's evidence above, at a *prima facie* level, in any way. In my view, the evidence produced by the 1st Respondent having been documentary evidence from government records show *prima facie* that the Applicant's title is based on forged documents. I therefore hold and find that the 1st Respondent's evidence that the Applicant's title documents were forged was not rebutted.
55. The Applicant's counsel has argued that since there are two titles then an injunction ought to issue to protect and preserve the suit property. My view is that where there are two titles and at the preliminary application there is no reasonable evidence as to their authenticity, it is only fair to preserve the suit property. However, where, like in this matter, at the preliminary stage, it is clear that although there are two titles, one title cannot be said to have any iota of authenticity, the court ought not grant an injunction. This is because Article 40 of *the Constitution* of Kenya 2010 protects the right to acquire and own property and Sections 24 and 25 of the *Land Registration Act* 2012 provide for absolute ownership as an interest conferred by registration, and the rights appurtenant to registration respectively, which means that an owner of property ought not be limited in the enjoyment of their property without a clear lawful and justifiable basis.
56. An injunction limits enjoyment of proprietary rights until those rights are ultimately clarified in the judgment and decree; and therefore the court is obligated to ensure that any limitation placed on a person's title pass the legal threshold provided in law. It is my view that the Applicant having failed to discredit the 1st Respondent's evidence on the lack of credibility of the Applicant's title, failed to meet the threshold for limiting the 1st Respondent's enjoyment of the suit property.
57. Another issue that came to the fore was the Applicant's conduct. A temporary injunction is an equitable remedy. It is trite that whoever approaches equity must do so with clean hands. In this matter, the Applicant confirmed that they were enjoying temporary orders in Machakos ELC No. 74



of 2014 consolidated with Machakos Petition No. 10 of 2018. The 1st Respondent attached an order issued on 23rd January 2015 directing that status quo be maintained on the suit property. However, the 1st respondent by annexure marked FM-5 attached documents purported to be certificates of ownership showing that the suit properties were being sold by the Applicant to third parties as late as 5th February 2022 and several sales had happened between January 2015 when the order was granted, and 9th October 2023 when Machakos ELC No. 74 of 2014 consolidated with Machakos ELC Petition No. 10 of 2018 was struck out. This evidence was not denied by the Applicant. In addition, the order striking out the suit was made because while the Applicant was enjoying temporary orders, they had been unwilling to serve their own pleadings on the defence and therefore the matter could not proceed. Having said that, it is clear that the conduct of the Applicant in violating orders of status quo issued in 2015 in Machakos ELC No. 74 of 2014 consolidated with Machakos ELC Petition No. 10 of 2018 shows that they have come to court with unclean hands and are therefore not deserving of equitable orders of injunction.

58. Having considered the evidence on record, I am not persuaded that the Applicant has placed material before me to limit the enjoyment of proprietary rights by the 1st Respondent who has shown that they are the registered proprietors of the suit property as demonstrated by entry No. 6 in the title, an entry not contested by the Applicant.
59. In the premises, I find and hold that the Applicant has failed to demonstrate a *prima facie* case to warrant grant of temporary injunction.
60. Therefore, as the Applicant has failed to demonstrate a *prima facie* case, the question of whether there is irreparable injury or the balance of convenience becomes moot as an irreparable injury can only be predicated on a *prima facie* case.
61. The upshot is that I find no merit in the application dated 11th October 2023 and I dismiss the same with costs to the Respondents.
62. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS IN OPEN COURT THIS 19th DAY OF OCTOBER, 2023.

A. NYUKURI

JUDGE

In the Presence of;

Mr. Musyoka SC appearing with Mr. Kathili holding brief for Mr. Simiyu for the Plaintiffs

Ms. Tusiime holding brief for Mr. Sigei for 1st Defendant

Mr. Kimathi appearing together with Mr. Kamande holding brief for Mr. Agwara for 2nd Defendant

Dr. Musau appearing for Intended Interested Party and also holding brief for Mr. Otieno for Intended Interested Party

Mr. Busieka for 3rd Defendant

Mr. Nyachoti for 4th Defendant

Ms. Mwalozi appearing alongside Mr. Motari for 5th Defendant

No appearance for 6th Defendant



