



**Sheikh & 17 others v Elegant Holdings Limited & 2 others (Environment & Land
Case E018 of 2023) [2023] KEELC 22648 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 22648 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E018 OF 2023**

**AE DENA, J
OCTOBER 19, 2023**

BETWEEN

**NAVEED MOHAMED SHEIKH 1ST PLAINTIFF
PETER MUSYOKI NGAU 2ND PLAINTIFF
SONIL HOLDINGS LIMITED 3RD PLAINTIFF
WILLIAM OWEKE AGINGU 4TH PLAINTIFF
NARGIS SEIFUDDIN MOOSAJEE 5TH PLAINTIFF
FIDOS DIN 6TH PLAINTIFF
TAMANA KHAN 7TH PLAINTIFF
DORCAS KISIERO 8TH PLAINTIFF
PETER ESTORP 9TH PLAINTIFF
KJELL ERICK LINTHO 10TH PLAINTIFF
SISSEL MARGARE LINTHO 11TH PLAINTIFF
MALKIT SINGH RIYAT 12TH PLAINTIFF
PAULINE KARIUKI 13TH PLAINTIFF
PETER NDENDEROH 14TH PLAINTIFF
SHABEENA HABIBULLA HAMPOZ 15TH PLAINTIFF
FRANK KAMUNDE MWONGERA 16TH PLAINTIFF
JUDY MUTHONI MWAURA 17TH PLAINTIFF
MARY NDUTA KIMEMIA 18TH PLAINTIFF**

AND



ELEGANT HOLDINGS LIMITED 1ST DEFENDANT
GROUP FIVE HOLDINGS LIMITED 2ND DEFENDANT
GOLDEN SAND RESORT PLC 3RD DEFENDANT

RULING

Introduction

1. This ruling is subject of two applications dated 8/3/23 and 29th May 2023.

Application Dated 8/3/23

2. Vide an application dated 8/3/2023 and filed on 9/3/23 the Plaintiffs seek the following orders;
 1. Spent
 2. Spent
 3. That a temporary prohibitory injunction be issued restraining the defendants, their employees, agents, servants, assignees, successors in title or otherwise from carrying out any sub division and/or construction works on the properties LR Nos 31283/1 and 31283/3 pending the interpartes hearing of this suit.
 4. That a temporary prohibitory injunction be issued restraining the defendants, their employees, agents, servants, assignees, successors from transferring property LR Nos 31283/1 to any third party pending the interpartes hearing.
 5. That a temporary prohibitory injunction be issued restraining the defendants, their employees, agents, servants, assignees, successors from transferring property LR Nos 31283/1 to any third-party pending hearing and determination of this suit.
 6. That a temporary prohibitory injunction be issued against the 1st defendant, their employees, agents, servants, assignees, successors in title or otherwise from invoicing, billing, charging, debiting, receiving and /or collecting from the plaintiffs in respect of service charge pending the interparties hearing of this application.
 7. That a temporary prohibitory injunction be issued against the 1st defendant, their employees, agents, servants, assignees, successors in title or otherwise from invoicing, billing, charging, debiting, receiving and /or collecting from the plaintiffs in respect of service charge pending the interparties hearing of this suit.
 8. That a mandatory injunction do issue against the 3rd defendant, its employees agents servants assignees, successors in title or otherwise, to allot its shares to the plaintiffs and carry out the management service of the apartments as provided for in the respective agreements for lease and the agreement for management of common areas pending the hearing and determination of this suit.
 9. Spent
 10. Spent
 11. That costs of this application be awarded to the Plaintiffs/Applicants.



3. The application is premised upon grounds on its face and the supporting affidavit of Naveed Mohammed Sheikh the 1st Plaintiff. The grounds summarily state that the 1st Respondent entered into a lease agreement with the Applicants for the purchase of 147 apartments (hereinafter referred to as the apartments). The apartments were part of Golden Sand Resort Development constructed on LR No 31283[plot 12829]. That in October 2016 while in the process of leasing some of the units the 1st respondent undertook to subdivide the original land parcel 31283 into three parcels LR No 31283/1,31283/2 and 31283/3 with facilities to include restaurants, common parking, shopping complex, fitness center swimming pool, gym, recreational space, common garden and parking amenities located in the first and third parcels.
4. It is averred that the facilities were to be constructed on the original parcel LR No 31283 and were contained in the subdivided parcels being LR No 31283/1 and 31283/3 while the apartments are on LR No 31283/2. That the 1st respondent is however transferring LR No 31283/3 to the 2nd Respondent and has no intention to put up the facilities guaranteed in the lease agreements which were to be provided for on the said property. It is deponed that the 2nd defendant is presently undertaking construction on the said property 31283/3. According to the applicant the said construction work is a threat to imminently damage water pipes that supply water to the apartments while contaminating all septic tanks and soak pits hence posing an environmental harm.
5. It is further stated that the County Government of Kwale and NEMA have issued notices against the construction works and have asked that the same cease. The said notices have however not been complied with. That attempts by the applicants to seek for allotment of shares have been resisted by the 1st and 3rd Respondents as a result there is no proper management of the Apartments. The 1st Respondent has further issued backdated invoices for collection of backdated colossal amounts of service charge contrary to the provisions of the lease agreements.
6. The applicants further state that the refusal of the 1st respondent to be accountable and to transfer management of the apartments to the 3rd respondent has led to the common areas of the apartments deteriorate and continue to degrade. That sale and transfer of LR No 31283/3 to the 2nd respondent threatens the development of the facilities and has since caused the unavailability of car parking space, location of the apartments main water tanks and soak pits, swimming pool and among others.
7. The applicants are apprehensive that in the event the orders sought are not granted the respondents will continue to disregard their obligations under the respective leases and agreements and further the environmental and land planning authorities.
8. The above application was placed before me expert and I granted prayers 1 and 2 above. Subsequently the Plaintiff filed an application dated 29th May 2023 to cite the 1st respondent for contempt of these exparte orders. I will come back to this application later in this ruling.

1st Defendants Response to the Application dated 8/3/2023

9. In response to the application dated 8/3/2023, the 1st respondent filed an application dated 31/3/2023 under Certificate of Urgency. seeking the following orders;
 1. Spent
 2. That pending the hearing and determination of this application interparties, this honourable court be pleased to set aside and discharge the interim orders of 9th March 2023 and issued on 10th March 2023.



3. That this honourable court be pleased to strike out the Plaintiff's suit in so far as it relates to parcels of land Nos 31283/1 and 31283/3 for failing to disclose a reasonable cause of action.
 4. That the costs of this application be awarded to the 1st Defendant/Applicant against the Plaintiffs/Respondents.
10. The grounds of the application are that the 1st respondent is the registered owner of LR No 31283/1 and that the said property is adjacent to LR No 31283/2 Golden Sand Resort where the facilities are erected and developed. That all the contractual obligations were complied with under the agreements and lease by developing the estate and its amenities as agreed and for that reason the Plaintiffs/applicants have been residing thereon. It is stated that as per the provisions of the lease agreements the development and all the amenities above mentioned were erected, constructed and developed on LR No 31283/2 and registered as CR 70849/3. That it is misleading for the Plaintiffs/applicants to allege that the development of the apartments and amenities were done on separate parcels as the apartments are developed on LR No 31283/2 and the amenities on LR No 31283/1 and 31283/3.
 11. It is alleged that the amenities complained of as having not been developed on LR No 31283/2 are either on the back, front and or within the Golden Sounds Resort and not on the sides where the two portions are erected. It is stated that the claim that the 1st respondent had failed its contractual obligations is meant to restrict the owners of the adjacent properties from dealing with their respective properties. The court is called upon to examine the terms of the respective leases which govern the relationship between the applicants and to further establish the parcels within which the apartments being purchased and the amenities are developed on.
 12. The 1st respondent states that the terms of the lease included payment of service charge and which the Plaintiffs/applicants have both the contractual and legal obligations to settle. Further that there is an arbitration clause on the agreements which needs to be exhausted before the court is involved. The court is urged to set aside the orders earlier issued and to dismiss the applicants application.
 13. The application is supported by an affidavit sworn by Amjad Rahim Abdul. He avers that it was an express term of the agreement for sale aforementioned that the mother title LR No 12829 was in the process of being subdivided into three portions and the 1st respondent had constructed the development on one of the portions. Referring to clause D and E of the agreements, it is averred that the Plaintiffs/applicants were aware prior to the subdivision and issuance of new titles that the development would be within one of the portions of land measuring 2.670 Hectares. That seeking to acquire interest in the other two portions is to overstretch the terms of the agreement. That from the sale agreements and leases signed by the parties other than LR No 31283/2 there is no mention that the amenities within the estate would be developed on other parcels of land other than LR No 31283/2. It is lastly stated that the applicants will not suffer any prejudice at all if the interim orders are discharged and set aside as the amenities complained of are all within LR no 31283/2 which they have enjoyed since acquisition.
 14. On 13/4/23 the application dated 8/3/2023 was before this court for interpartes hearing where I directed that the 1st respondent's application above dated 31/3/2023 shall be treated as a substantive response to the Plaintiffs application dated 8/3/2023.

2nd Defendants Response to the Application dated 8/3/2023

15. In opposing the Plaintiffs application dated 8/3/23, the 2nd defendant filed grounds of opposition dated 3/4/2023. The grounds were listed as follows;



1. None of the plaintiffs is suited to the 2nd defendant
2. The plaintiffs, jointly and severally have no cause of action against the 2nd defendant
3. The orders sought for impact negatively on an innocent proprietor of LR No 31283/3 and yet the plaintiffs have not given an undertaking as to damages as it is/was required of them.
4. The application is bad in law and fatally defective.

Hearing of the application dated 8/3/2023

16. The application dated 8/3/23 was canvassed by way of written submissions. Parties were also given an opportunity to highlight on 3/7/23 The Plaintiffs/applicants identified the following issues for determination;-
 - a. Whether the Applicants have met the threshold for the grant of a temporary injunction in respect to prayers 3, 5 and 7 of the subject application;
 - b. Whether the Applicants have satisfied the elements to justify the grant of the mandatory injunction in respect to prayer 8 of the subject application; and
 - c. Whether the Applicants are entitled to the costs of this application as prayed for in prayer 11 of the subject application.
17. On whether the Applicants have met the threshold for the grant of a temporary injunction the court is referred to the provisions of Section 13(7) of the *Environment and Land Court Act* No. 19 of 2011 on its power to grant interim or permanent injunctions as the same is within its jurisdiction, reference is further made to the provisions of Order 40(1) on temporary injunctions.
18. Referring to the guiding principles for the grant of orders of temporary injunctions as set out in *Giela v Cassman Brown (1973) EA* at page 358. As reiterated by the Court of Appeal in the case of *Nguruman Limited v Jane Bonde Nilsen & 2 Others*, Court of Appeal No. 77 of 2012 [2014] eKLR. It is the Applicants' submissions that they have established a prima facie case as particularized in the Supporting and Further Affidavits of sworn by the 1st Applicant. That the Plaintiffs/applicants stand to suffer not only a degradation of the value of their property but also serious far reaching environmental concerns in the current state of affairs in the suit property.
19. Referring to *Mrao Limited v First American Bank of Kenya Limited* [2003] eKLR where the Court of Appeal gave a determination on a prima facie case. It is submitted that the Applicants in this case have demonstrated to the Court that the Respondents herein have not only apparently infringed on their environmental rights in respect to the property but also on their contractual obligations as provided by the various lease agreements.
20. On whether the Applicants have demonstrated that irreparable injury will be occasioned to them if an order of temporary injunction is not granted, the applicants refer to the Judicial decision of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR which provides an explanation for what is meant by irreparable injury. That based on the material placed by them before court, unless the interlocutory orders prayed for are granted they will only be left with a shell of property being LR No. 31283/2 while supply of water, septic tanks, convenient spaces, amenities will all be hosted in either LR No. 31283/1 or LR No. 31283/3 at the disposition of the 1st and 2nd respondents. That if the 2nd respondent is not prohibited from carrying out any further construction on LR No. 31283/23 pending the hearing and determination of this suit, by the time the suit is heard and determined, the 2nd respondent would have progressed in its construction activities on LR No. 31283/3 and would have in the process damaged



not just the Estate's environment but very fundamental amenities to which the Plaintiffs/applicants are entitled to.

21. Further, that if the 1st respondent is not prohibited from transferring property LR No. 31283/1 to a third party during the pendency of the hearing and determination of this suit, the same fate above, will befall LR No. 31283/1. These orders of prohibition if not granted, would then not only throw the Plaintiffs/applicants and other 108 homeowners into an arena of no available option but would be highly prejudicial and unjust in the circumstances.
22. Citing the cases of Pius Kipchirchir Kogo (Supra), Paul Gitonga Wanjau v Gathuthi Tea Factory Company Limited & 2 Others [2016] eKLR, Amir Suleiman v Amboseli Resort Limited [2004] eKLR and Robert Mugo Wakaranja v Ecobank Kenya Limited & Another [2019] eKLR it is submitted based on the foregoing that the balance of convenience tilts in Plaintiffs/applicants favour.
23. On whether the Applicants have satisfied the elements to justify the grant of the mandatory injunction it is submitted that the applicants have established a prima facie case as to why a mandatory injunction should be issued.
24. Whether the Applicants are entitled to the costs of this application. The court is referred to the provisions of Section 27 of the Civil Procedure Act to the effect that the successful party shall ordinarily have the cost.

1st Respondents Submissions

25. The 1st respondents' identified the following issues:-
 1. Whether the Plaintiffs have met the criteria of being granted an injunction.
 2. Whether the suit ought to be struck out for failing to disclose a reasonable cause of action
26. Referring to the case of Giella –Vs.-Cassman Brown Co. Ltd [1973] EA 358 it is stated that the Plaintiffs'/applicants knew that the property was undergoing subdivision prior to purchase of their respective units. That the development and all the amenities would be undertaken on LR No. 31283/2. It is stated that the Plaintiffs/applicants have no interest whatsoever over LR Nos. 31283/1 & 3. Moreover, they had not produced any survey document to demonstrate that there exists amenities on the other parcel of land. In the absence of any expert survey report to demonstrate and buttress the said allegation, it would be remiss for the Court to prevent the owners of LR Nos. /1 & 3 from dealing with their respective land for the said allegation remains a mere allegation.
27. On whether an award of damages cannot compensate any loss suffered it is submitted no material had been presented in support thereof. That it is the 1st defendant who stands to suffer irreparable damage in the event the prayers sought by the Plaintiffs' are allowed, the Plaintiffs will continue infringing on the 1st defendant proprietary rights. It is stated that the Plaintiffs/applicants were extending the dispute to parcels belonging to third parties and or which they want to acquire interest unjustly through the back door.
28. The 1st defendant/Respondent submits that the balance of convenience tilts in its favour as all the amenities stated as not having been developed on LR No. 31283/2 are either on the back, front and or within the Golden Sands Resort and not on the sides where the other two portions are erected. It is urged that the application should be dismissed with costs to the 1st defendant/Respondent.



Submissions by the 2nd Respondent

29. The 2nd defendants' submissions are mainly focused on the issue of privity of contract. It is submitted that the relationship between the Plaintiffs and the 1st defendant stems out of the respective lease agreements which contain the agreed binding terms and conditions. That the lease cannot affect the rights and or privileges of a third party such as the 2nd defendant. Reliance is placed on *Aineah Likuyani Njirah v Aga Khan Health Services* [2013] eKLR and in *Agricultural Finance Corporation v Lengetia Ltd* [1985] KLR 765
30. On the orders of Injunction sought it is contended the Plaintiffs have no cause of action against the 2nd defendant by dint of privity of contract. Citing the principles set out in *Giella vs. Cassman Brown* [1973] E A 35 and as restated in *Esther Wanjiku Mwangi & 3 others v Wambui Ngarachu* [2017] eKLR counsel urged that the applicants have not met the threshold for the grant of injunctive orders against the 2nd defendant/Respondent. The court is urged to find so and dismiss the said application with costs to the 2nd Defendant.

Application dated 29th May 2023

31. The second application is the application dated 29th May 2023 brought under Sections 3,3A, 63 (e) of the *Civil Procedure Act* and section 5 of the *Judicature Act* cap 8 the Laws of Kenya. The Plaintiffs seek
1. Spent
 2. Spent
 3. The court finds that the 1st respondents directors Amjad Rahim Abdul, Abdul Tejani Rahim and Faraaz Jahangir Tejani are in contempt of court order issued on the 9th March 2023.
 4. That this honorable court be pleased to order the confiscation of the 1st respondents construction equipment which has been, continues to be or may be used to carry out any further unauthorized construction works on the suit properties in contravention of the court order issued on 9th March 2023.
 5. That in the alternative to prayer 4 above, the court be pleased to order the 1st respondents directors Amjad Rahim Abdul, Abdul Tejani Rahim and Faraaz Jahangir Tejani be committed to civil jail for contempt for disobedience of the orders issued on 9th March 2023 in these proceedings.
 6. That in the alternative to prayer 5 above, the honourable court be pleased to impose a fine on the 1st respondents directors aforementioned on such terms as it may dem fit or any other punishment permitted under law.
 7. That costs of this application be provided for.
32. The application is based on grounds that on 9/3/2023 the court issued interim orders against the defendants/respondents injunctioning them from carrying out sub division and construction work on properties LR No 31283/1 and 31283/3 pending hearing and determination of the application dated 8/3/2023. That the orders were directly served upon the 1st respondent on 14/3/2023 and upon the 2nd and 3rd respondents by substituted service on the same date. That on 17/5/2023 the 1st respondent engaged Iplan Consult [Intl] Limited, to undertake infrastructural improvement of the bio digester, car parking, water reserve tanks and swimming pool pump room in LR No 31283/2.



33. That the 1st respondent's contractor commenced the removal and transfer of the apartments swimming pool pump house equipment an act that is in clear contravention of the court orders issued on 9/3/2023. The applicants are apprehensive that in the event the 1st respondent through its directors are not held accountable for breach of the court orders issued on 9/2/2023 then the suit will be an academic exercise.
34. The application is supported by the affidavit of Peter Musyoki Ngau. The deponent reiterated the averments raised in the grounds of the application and further stated that the 1st respondents act of commencing construction activities on LR No 31283/3 is not only in contempt of the court orders issued on 9th march 2023 but also a deliberate attempt by the 1st respondent through its directors to frustrate and defeat the determination of the real issues in these proceedings.
35. In opposing the application, the respondents filed a replying affidavit sworn by Amjad Rahim Abdul one of the directors of the 1st defendant. It is averred that the 1st respondent has not breached the orders of the court and have complied with the said orders by not sub dividing and or developing on land reference no 31283/1 as the court orders were in respect of parcels 31283/1 and 31282/3.
36. The deponent states that the improvements referred to in the email dated 17/5/2023 were on infrastructure at Golden Sands Resort which included among others the swimming pool pumps on LR No 31283/2. That there was therefore no construction but improvements being done on LR No 31283/1 and 3 only. The respondents further aver that the pictures relied upon by the applicants do not meet the legal threshold of the *Evidence Act* in particular section 106B and ought to be struck out for want of compliance. The court is urged to dismiss the application.
37. The application is dispensed by written submissions. It is the Applicants submission that applicable law and requirements for contempt of Court proceedings are under Section 5 of the *Judicature Act*, Cap. 8, Laws of Kenya thus in the present jurisdiction and the English Civil Procedure Rules (Amendment No. 3) Rules, 2020 (hereinafter the English CRP) in England.
38. On Whether the act of commencing "infrastructure improvement" and removal/transfer of the swimming pool pump, house equipment from L.R. No. 31283/3 amounts to a contravention of the orders herein, it is pointed that it is not in dispute that the 1st Respondent engaged and/or instructed M/S iPlan Consult (int'l) Limited to carry out an Environmental Impact Assessment (EIA) on the proposed infrastructure improvement including bio-digester, car parking, water reserve tanks and swimming pool pump room at the Golden Sand Resort on L.R. No. 31283/2.
39. That it is also not disputed that the 2nd respondent responded to the 1st Respondent's agent and informed them of the existence of these proceedings. Six (6) days later, one of the items which was earmarked for infrastructure improvement (swimming pool pump room equipment) which is based on L.R. No. 31283/3 was removed. It is not in dispute that this removal has destroyed the duct of the pool pump house and as a result caused destruction of key water pipes that supply water to the Apartments.
40. That the objective of the proposed infrastructure improvement on L.R. No. 31283/2 was due to the fact that these facilities are not found within L.R. No. 31283/2 but are contained in L.R. No. 31283/3. This would consequently mean that as these facilities are being "improved" on L.R. No. 31283/2, it is in actual fact that construction works would need to be undertaken on L.R. No. 31283/3 in contravention of the Court Order. That even amidst the argument that the removal/transfer of the swimming pool pump room equipment, from L.R. No. 31283/3 was not a construction activity, the Court prohibited any construction works on properties L.R. No. 31283/1 and 31283/3. What is to be deemed as construction works presents a difference in interpretation.



- 41 . On whether the contempt application has established the threshold for the grant of orders sought it is submitted that the application complied with requirements as to nature and summary of facts of the contempt, disclosure of the date when the breach occurred being 23rd May 2023 when the pool house pump was removed, service of the order upon the 1st respondent which also contained a penal notice, an acknowledged copy thereof. In any event, the 1st Respondent's directors have not denied service of the subject Court Orders. The applicants submit that having demonstrated that the Contemnors are aware of the Court Order and that the 1st respondent willfully disobeyed those orders, the grant of the orders sought for in the contempt application should be granted. The Applicants seek for costs of the application.
- 42 . The 1st Respondents submissions to the application are filed before court on 26/6/2023. It is submitted that the application for contempt is premature before court as the same presupposes the courts findings on the 1st respondent without according them a chance to be heard. Reliance is placed on the holding in Samuel MN Mweru & Another Versus National Land Commission & 2 Others [2020] eKLR.
- 42 . On whether the directors of the 1st respondent should be committed to civil jail for disobeying the court the 1st respondent does not dispute having knowledge of the order but states that the removal and transfer of swimming pool pumps on LR 31283/2 does not amount to subdivision and construction on the two parcels mentioned. That the applicants have not shown and proved on a standard higher than that of the balance of probabilities the actions by the respondents. The court is referred to the holding in Abdi Satarhaji & Another Versus Oman Ahmed & Another [2018] eKLR. It is prayed the application is dismissed with costs to them.

Analysis And Determination

- 42 . Having considered both the applications, responses thereto and submissions of the parties the following issues warrant determination;
1. Whether the Applicants have made out a case for the granting of orders of temporary injunction.
 2. Whether the 1st defendant have met the threshold for setting aside the court orders dated 9/3/2023 and issued on 10/3/2023
 3. Whether the Plaintiffs suit should be struck out for not disclosing a reasonable cause of action against the 2nd defendant
 4. Whether the contempt application is competent
 5. Whether the Respondents are in contempt of the court orders issued on the 9th March 2023
- 43 . The conditions for consideration in granting an injunction were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* (1973) E A 358, where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction as follows: -
- “ Firstly, an 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.”



44. The test for issuance of interlocutory injunctions was further considered in the American Cyanamid Co. v Ethicom Limited (1975) A AER 504 where three elements were noted to be of great importance namely, there must be a serious/fair issue to be tried, Damages are not an adequate remedy and the balance of convenience lies in favour of granting or refusing the application.
45. Order 40(1) (a) and (b) of the Civil Procedure Rules 2010 is the law steering the grant of temporary injunctions. It is trite that in granting temporary injunctions there has to be proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party to 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 a situation enjoined to grant a temporary injunction to restrain such acts see Robert Mugo Wa Karanja Vs Ecobank (Kenya) Limited & Another [2019] eKLR.
46. So what is a prima facie case? The Court of Appeal in Moses. C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others, (2014) eKLR, defined a prima facie case as: -
- “ A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.
47. Applying the above, from the documents annexed in support of the application dated 8/3/23, the Plaintiff/applicants entered into a lease agreement with the Respondents for purchase of 147 apartments. The apartments were constructed on LR No 31283. The land was later subdivided into three portions namely 31283/1, 31283/2 and 31283/3. The same was to have amenities which include restaurants, recreational spaces, parking among others. According to the applicants, all these amenities were to be contained in the subdivided parcels even before the subdivision. The amenities were to be on LR No 31283/1 and 31283/2 while the apartments were to be on 31283/3. The 1st respondent has however transferred LR No 31283/3 to the 2nd respondent. The Plaintiffs/applicants have demonstrated through the documents attached to the application that the 2nd respondent is taking over ownership of the said parcel. The court is satisfied that a prima facie case has been established.
48. On whether the Plaintiffs applicants have demonstrated that irreparable injury will be occasioned to them in absence of the orders sought the court is referred to Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) eKLR where the court stated;-
- “ 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.
49. I have perused the lease agreements between the parties herein. Indeed, the leases include the provision on the amenities herein, which were to be used by the tenants/purchasers of the apartments. As intimated by the Plaintiffs applicants, the respondents are in the process of using up the land that would hold some of the amenities. One of the parcels is in the process of being transferred to another party. It has also been stated that the facilities and the apartments are not being maintained. Issues on the service charges in my view can only be determined once the parties have ventilated their cases as the same goes to the core of interpretation of the leases and this is not the appropriate forum. Accordingly, the respondent’s actions are bound to cause irreparable loss and harm that might not be rectified by an



award of damages. The Applicants have demonstrated the second limb for the threshold of granting an injunction.

- 50 . Where does the balance of convenience lie? I will draw guidance from the decision of *Amir Suleiman Vs Amboseli Resort Limited* [2004] eKLR where the court offered 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.”

- 51 . Bearing the above in mind, the court is persuaded that there is a lower risk in granting orders of temporary injunction than not granting them, as we await the hearing of both sides on merit. This is especially so because the court has not had opportunity to interrogate all the documents pertaining the lease agreement and the plans for the construction allegedly being undertaken by the 1st and 2nd Respondents. The same will be necessary in understanding whether the apartments and the amenities were to be put up in one parcel and hence the respondent’s decision to sell the other parcel to the 2nd respondents. The courts attention has further been drawn on the likely danger posed by the alleged ongoing constructions, As stated the same interferes with the drainage system of the apartments and as deponed might pose not only an environmental but health risk. While this may require further interrogation, the need for prevention cannot be gainsaid.
- 52 . On whether the court should set aside its orders issued on 10/3/2023. I will not spend a lot of time on this issue for the reason that whether the orders will be set aside will abide the determination on the application for injunction. I will proceed to discuss the plea for striking out of the suit.
- 53 . On the third issue for determination, the power to strike out pleadings is a discretionary one and must be deployed sparingly. Although the law allows a party to apply to strike out pleadings at any stage of proceedings for failure not disclosing a reasonable cause of action, being scandalous, frivolous or vexations, the court must act to preserve the suit and allow parties to have their day in court if that would enhance the cause of justice rather than strike out the pleadings. The applicants have attached copies of the lease agreement between them and the respondents. The leases are not disputed by the respondents. The bone of contention is the terms set out in the agreement which the applicants opine have been breached by the respondents. It is stated that the 1st respondents are in as far as the agreement is concerned failed to meet its contractual obligations in providing some of the amenities as indicated in the lease. In my view a reasonable cause of action has been proved and the parties herein are entitled to proceed and ventilate their cases. Triable issues have been raised and the same are bonafide their success notwithstanding. See *Olympic Escort International Co. Ltd. & 2 Others v Parminder Singh Sandhu & Another* [2009] eKLR).

Application for contempt

- 54 . I will now deal with the allegations of contempt of court orders levelled against the 1st defendant. But before I delve into the substantive issue, the manner in which the application has been brought before court has been termed defective by Mr. Khalid Counsel for the 1st defendant. It is contended that the applicant has failed to accord the respondent an opportunity to first show cause why they should not be punished for the same. This court has been referred to the case of *Samuel M.N. Mweru Vs National Land Commission* (supra). It is submitted by the applicant that Rule 81.3 subrule 6 of the English CPR does not require the filing of a separate substantive application for contempt as both the leave and prayers shall be included in the contempt application which is what the applicants have done in the present application. I have read the decision in *Samuel M.N Mweru* (supra) and it is largely on the requirement for leave to file contempt proceedings which the court therein stated is no longer a



requirement where the order said to have been disobeyed is that of an injunction. My view is that as long as the application sets out the grounds, the alleged act of contempt and supported by affidavit containing all the evidence relied upon the same should suffice. Further as long as the respondent has an opportunity to respond to the application, that to me serves as the opportunity to ventilate his defence which is a way of showing the cause why he should not be punished and to me this is what justice is about.

55. Having found that the application is properly before court, I will proceed to answer whether the 1st Respondents directors Amjad Rahim Abdul, Abdul Tejani Rahim and Faraaz Jahangir Tejani should be cited for contempt of the court orders issued on 9/3/2023. It is stated that on 9/3/2023 the court issued interim orders as against the Respondents injunctioning them from carrying out sub division and on construction work on properties LR No 31283/1 and 31283/3 pending hearing and determination of the application dated 8/3/2023.
56. The applicants aver that the orders were directly served upon the 1st respondent on 14/3/2023 and upon the 2nd and 3rd Respondents by substituted service on the same date. That on 17/5/2023 the 1st Respondent engaged Iplan Consult [Intl]Limited, to undertake infrastructural improvement of the bio digester, car parking, water reserve tanks and swimming pool pump room in respect to LR No 31283/2.
57. The Black's Law Dictionary 9th Edition, defines contempt as:
- “The act or state of despising; the conduct of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice.
58. Section 5(1) of the *Judicature Act* provides that:
- “The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts”.
59. Section 29 of the Environment and Land Court is clear to the effect that;
- “Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both’
60. In the case of North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi (2016) eKLR Justice Mativo stated as follows:
- “ Writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand have authoritatively stated as follows: -
- “ There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases – (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant; (b) the defendant had knowledge of or proper notice of the terms of the order; (c) the defendant has acted in breach of the terms of the order; and (d) the defendant's conduct was deliberate.”



61 . The above case sets the tone for when a litigant can be cited for contempt of court. In the instant suit it is safe to state that the terms of the orders issued by the court were clear and the injunction touched on use of LR No 31283/1 and 31283/3 or subdivision of the same. In respect of service it has been sufficiently proved that service was properly effected on the respondents and the same is not in contestation.

62 . On whether the Respondents acted in breach of the said orders, it is the Respondents case that the construction works are ongoing on parcel no LR No 31283/2. It is clear the orders were directed to the two parcels LR No 31283/1 and 31283/3 and not LR No 31283/2. How then can the Respondents actions be deemed to be deliberate when the works were not on the parcels against which the orders were issued and bearing in mind the slightly higher standard of proof for proving contempt? In my view the applicants have not proved to the requisite standard that indeed the orders granted were against the use of the third suit property where the alleged constructions are said to be ongoing. I draw guidance from the holding in the case of Sheila Cassatt Issenberg & another – Versus - Antony Machatha Kinyanjui [2021] eKLR, that:-

“.....in cases of Contempt the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt...

63 . But having reached the conclusion aforesaid, I must record my observation with regard to the ongoing construction which has not been disputed by the respondents except as to the meaning of what a construction is. I will not be drawn into that contest. From the application for injunction earlier on filed and the Plaint, the applicants in this case are alleging a deviation from the terms of the contract by the respondents and more specifically on the issue of amenities and other recreational facilities. To my understanding, the said amenities were to be erected within the suit parcel which was later subdivided. The court will render itself on whether the amenities have already been set up as alleged by the respondents or whether the same ought to be set up in the suit parcel that is currently in the process of transfer to the 2nd respondent. For this to happen the suit is to be heard viva voce and for all parties to be given a chance to present their case and the necessary evidence.

64 . Despite the constructions not taking place in the parcels mentioned in the orders issued on 9/3/2023, it is clear that the constructions are on a parcel forming part of the suit parcels. Indeed, while the 2nd defendant pleads want of privity, the fact is that the alleged property is in the middle of the contest. This got me thinking on the need to redirect this courts focus on interventions that would meet the ends of justice despite the hard positions taken by the parties herein. I found guidance in the following dictum in Sheila Cassatt Issenberg case[supra] where the court further suggested as follows; -

“..it is competent for the court where contempt is alleged to or has been committed, and or an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not”. (emphasis)



65. Given that the subdivided parcels are all in dispute on their use, the court finds it safe to issue injunctive orders against them all pending the hearing and determination of the suit. The court is hesitant on grant of the mandatory orders sought by the applicants. The principles for granting of a mandatory injunction at an interlocutory stage are now settled as enumerated in the case of Cyclo Systems (K) Ltd Vs Kibuwa Enterprises Ltd HCCOMMMISC/E151/2021 stated;-

“.....A permanent injunction can only be granted by a decree made at the hearing and upon the merits of the suit. A Permanent injunction finally determines the rights of the parties and forms part of the decree made at the hearing. It can only be granted at final stage/hearing of the suit. A permanent injunction can only be granted upon the merits of the case and at final hearing of the suit.’

66. To therefore allow the orders as sought herein will absolutely be a determination on the issue of allotment of the shares among the Applicants. My considered view is that the allotment and management of the apartments be determined once the matter has been fully canvassed through a hearing. The upshot of the foregoing is that the application dated 29/05/23 must fail and the following orders shall issue on the application dated 8/03/23

- i. A temporary prohibitory injunction is hereby issued restraining the defendants, their employees, agents, servants, assignees, successors in title or otherwise from carrying out any sub division, transfer and/or construction works on the properties LR Nos 31283/1, 31283/2 and 31283/3 pending the hearing and determination of this suit.
- ii. The application dated 29/05/23 is dismissed with no orders as to costs.
- iii. Costs of the application dated 8/3/2023 be in the cause.

It is so ordered.

DATED SIGNED AND DELIVERED THIS 19th DAY OF OCTOBER 2023

A E DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Ms Akwana for the applicant, 1st 3rd -19 plaintiff

Mr Onsongo for the 2nd plaintiff

Kihira for 2nd defendant/Respondent

Mr. Daniel Disii - Court Assistant.

