



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT**

**AT MOMBASA**

**CIVIL SUIT NO. 44 OF 2021**

**MOSES MUGAMBI.....PLAINTIFF/APPLICANT**

**- VERSUS -**

**THE REGISTERED TRUSTEES OF THE KPA PENSION SCHEME.....1<sup>ST</sup> DEFENDANT**

**BANDARI SACCO SOCIETY LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

**I. Preliminaries**

1. What is for determination by this Honorable Court is the Notice of Motion application dated 9<sup>th</sup> March 2021 filed in Court on 11<sup>th</sup> March, 2021 by the Plaintiff/Applicant. It is brought by dint of Sections 1A, 1B, 3, 3A of the Civil Procedure Act, Cap. 21 and Order 40 Rule 1 of the Civil Procedure Rules, 2010.

**II. The Plaintiff/Applicant's case.**

2. The Plaintiff/Applicant seeks for the following orders:-

**a. Spent.**

**b. Spent.**

**c. There be a temporary interlocutory injunction, pending the hearing and determination of the suit, restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, its servants, employees or agents from leasing, offering for sale, transferring, presenting any instrument for registration, dispossessing, evicting the Plaintiff or in any way interfering with the Plaintiff's rights and occupation of premises situated on all that parcel of land known as Land Reference NO. MSA/XXIII/216.**

**d. The costs of this application be awarded to the Plaintiff.**

3. The application by the Plaintiff/Applicant is premised on the grounds, testimony and averments founded in the 21 Paragraphed Supporting Affidavit of MOSES MUGAMBI sworn and dated 9<sup>th</sup> March 2021 and one annexure marked as "MM – 1" annexed hereto He stated that he was the Plaintiff/Applicant herein and a member of the Kenya Ports Authority Pension Scheme (Hereinafter referred to as "KPAPS") and was authorized by other Plaintiffs to swear this affidavit on their behalf. He held that he contributed to KPAPS and thus was a beneficial owner of all investments and the scheme Funds under the KPAPS. He had been occupying the suit property pursuant to the Occupation Order for the staff quarters annexed hereto and marked as "MM – 1". He stated that the suit property was then handed over to the 1<sup>st</sup> Defendant/Respondent by Kenya Ports Authority (hereinafter referred to as "KPA") which owned the same on behalf of the registered members.

4. The Deponent deposed that he had been residing on the suit property for over ten (10) years and had been interested in purchasing it from the 1<sup>st</sup> Defendant/Respondent as a result attained legitimate expectation that he would be accorded the first opportunity to do so. He averred that on or about 19<sup>th</sup> December 2019, the 1<sup>st</sup> Defendant/Respondent approached him with the offer for a lease of the property. He accepted the offer and was awaiting to execute the said lease. According to him, he was shocked to later on learn that the 1<sup>st</sup> Defendant/Respondent had sold the suit property to the 2<sup>nd</sup> Defendant/Respondent through public auction.

5. The deponent further opined that the 1<sup>st</sup> Defendant/Respondent through its Advocates had send him a demand letter notifying him that the suit property already had been transferred to the 2<sup>nd</sup> Defendant/Respondent a Sacco where he was a registered member. This happened despite of him having acquired the legitimate expectation that he could be accorded the first opportunity to acquire the suit property. He could not understand and was perplexed how the 2<sup>nd</sup> Defendant/Respondent came to purchase the suit property. He held that being a member of the 2<sup>nd</sup> Defendant/Respondent he was privy to the fact that Sacco had neither applied nor made a bid for the suit property and therefore according to him the sale was irregular and contrary to the laid down procurement rules and regulations.

6. The deponent asserted that from the surrounding facts and circumstances his continued occupation of the suit property was now under eminent threat. As far as he was concerned, being a resident and in occupation of the suit property, he reiterated that he ought to have been accorded the first opportunity to purchase the suit property. Besides he held to be having the capacity to purchase the same under an arrangement akin to tenant purchase scheme and as stated above with the legitimate expectation accrued thereof.

7. As a result of the above conduct, the Plaintiff/Applicant argued that the 1<sup>st</sup> Defendant/Respondent had acted in breach of the Trust Deed and Regulations of the KPAPS and the Retirement Benefits Authority Act. His contention was that he would lose his pension, house and hence suffer irreparably without any recourse of any compensation whatsoever if not granted the orders sought. He opined that the balance of convenience tilted in favour of restraining the Defendants/Respondents herein as prayed. He urged court to grant the orders as prayed from the filed Notice of Motion application.

### **III. The 1<sup>st</sup> Defendant/Respondent's replying Affidavit.**

8. On 26<sup>th</sup> July, 2021, the 1<sup>st</sup> Defendant/Respondent herein while opposing the application by the Plaintiff/Applicant herein, filed a 30 Paragraphed Replying Affidavit sworn by STEPHEN KYANDIH, the Secretary to the KPAPS and dated the 26<sup>th</sup> July 2021. From the very onset, the deponent held that the application was fatally defective and incapable of being granted the orders sought as the evidence, facts and the reliefs sought in the application were at total variance with the ones pleaded in the pleadings – particularly the filed Plaintiff and the Instant application.

9. He stated that the relationship between the Plaintiff/Applicant and the 1<sup>st</sup> Defendant/Respondent was governed by a Trust Deed dated 1<sup>st</sup> April 1998. He held that the dispute that existed between the Plaintiff/Applicant and the 1<sup>st</sup> Defendant/Respondent ought to be resolved in accordance with terms and conditions stipulated in the Trust Deed and in accordance with the provisions of Section 46 of the Retirement Benefits Act No. 3 of 1997. According to him and based on the advise provided to him by his Advocates, the provisions of Section 67 (3) of the Sacco Societies Act No. 14 of 2008 demanded that all disputes relating to anything done under the Act ought to be referred to the Tribunal established under the Co – operative Societies Act. No. 12 of 1997, thus filing of this suit before this court was a legal error as the court had no jurisdiction.

10. The deponent claimed that the decision to sell the suit land was unanimously arrived at by the 1<sup>st</sup> Defendant/Respondent's Board of Trustees resolution on 28<sup>th</sup> August 2019, in accordance with RBA Investment Regulations & Policies. Thereafter proper procedure was adhered with whereby the said sale was tendered and communicated to the Plaintiff/Applicant via an email sent to all employees of the KPA on 10<sup>th</sup> September 2019 and for interested bidders to inspect the same, and to the public via a newspaper advertisement carried out and published in two of the local dailies the Daily Nation of 17<sup>th</sup> September 2019 and the Standard of 10<sup>th</sup> September, 2021. The deponent refuted claims that the Plaintiff/Applicant was not aware of the sale and claimed that in any case there were several suits challenging the sale being Mombasa ELC 141/2009, HCCC 79/2019, HCCC 80/2019, HCCC 81/2019 and HCCC E001/2020 where the Plaintiff and his colleagues were a party to. In spite of all this information the Plaintiff/Applicant never expressed any interest in the sale by placing his bid for consideration or write to the 1<sup>st</sup> Defendant/Respondent expressing his interest in purchasing it. He denied that there were any legitimate expectation created on having the Plaintiff/Applicant being accorded first priority for purchasing the suit property ostensibly for having been its occupation for a long period. The same was a myth.

11. The Deponent maintained that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents entered into an agreement for the sale of the suit property, after the 2<sup>nd</sup> Defendant/Respondent became the successful bidder. He held that after the sale was complete, the 1<sup>st</sup> Defendant/Respondent gave the 2<sup>nd</sup> Defendant/Respondent possession of the properties pending the transfer of title. However, before the taking of vacant possession by the 2<sup>nd</sup> Defendant/Respondent could take place, the Plaintiff/Applicant instituted this suit and obtained interim orders stopping the process from progressing any further. The deponent stated that stopping the sale, would be prejudicial to the interest of the 2<sup>nd</sup> Defendant/Respondent which was in its last stages. He stated that the Plaintiff/Applicant had no prima facie case, and that he stood to suffer no irreparable damage since he was called and given adequate notice to give vacant possession to the lawful owner. On the other hand, the injunctive orders sought would greatly prejudice the 1<sup>st</sup> Defendant/Respondent who would face a huge claim of damages as a result of the breach of contract as envisioned in the RBA Investment Regulations & Policies. The deponent pleaded with court to dismiss the application by the Plaintiff/Applicant herein.

### **IV. The 2<sup>nd</sup> Defendant/Respondent's case.**

12. On 21<sup>st</sup> May, 2021 the 2<sup>nd</sup> Defendant/Respondent herein filed an 18 Paragraphed Replying affidavit sworn by one JOSEPH OTIENO BEE, the Chief Executive Officer of the 2<sup>nd</sup> Defendant/Respondent and on even date. He held to be duly authorized and competent to do so. He deponed that he was unaware of the relationship alleged to exist between the Plaintiff/Applicant and the 1<sup>st</sup> Defendant/Respondent. He further disputed the purported Occupation order for the staff quarters referred to by the Plaintiff/Applicant as upon perusal of the filed pleadings allegedly prepared by Kenya Ports Authority, they found the annexed document and marked as "MM – 1" was instead not the said occupation order document but a copy of unsigned draft license agreement and wondered to know its purpose in this suit.

13. The deponent averred that there was a great variance to the details of the suit property from the pleadings filed by the Plaintiff/Applicant. All along the Plaintiff/Applicant kept on referring to the suit property under the Plaintiff as being Land Reference Numbers Mombasa/Block

XVIII/335 situated at Msanifu Kombo estate within Mwembe Tayari area of the County of Mombasa.

14. Additionally, he held that Prayers 2 and 3 of the Notice of Motion application the Plaintiff/Applicant made reference to procure parcel of land known as Land Reference Mombasa/Block XXIII/215 and Mombasa/Block XXIII/216. From these information he confirmed that the 2<sup>nd</sup> Defendant/Respondent had no interest at all to these referred to properties. On the contrary and place facts to proper perspectives, he proceeded to explain in details what properties the 2<sup>nd</sup> Defendant was concerned about and certainly not the one being referred to repeatedly by the Plaintiff/Applicant from the filed pleadings. According to him this is how the process begun. In September, 2019, the 1<sup>st</sup> Defendant placed an advertisement in the in the local dailies of wide national circulation being “The Standard newspaper” of 10<sup>th</sup> September 2021 and “The Daily Nation newspaper” of 17<sup>th</sup> September 2021 respectively for the sale of several properties.

They proceeded and purchased the tender documents on 2<sup>nd</sup> October, 2019 where they paid a total of sum of Kenya Shillings Three Thousand (Kshs. 3, 000.00) for three (3) tender documents.

The 2<sup>nd</sup> Defendant/Respondent received communication from the 1<sup>st</sup> Defendant/Respondent that they had been declared the highest bidders and on 2<sup>nd</sup> October, 2019 they paid a sum of Kenya Shillings Fifteen Million Six Hundred and Forty Thousand (Kshs. 15, 640, 000.00). The balance of the purchase price was paid between 2<sup>nd</sup> October, 2019 and 16<sup>th</sup> February, 2021 where a total of a sum of Kenya Shillings One Fifty Six Million Six Eighty Thousand (Kshs. 156,680,000/=) was paid. Their Advocates issued an undertaking to enable their Advocates to release the original title deeds to them.

15. The deponent held that they commissioned a surveyor to check on the beacons and who advised them accordingly. From the Surveyor’s report it turned out that there was an entrance to Mbariki Sports Club separating the two parcels of Land known as Land Reference Numbers Plot No. Mombasa/Block/XXIII/215 and 216 which posed a challenge in the design of their proposed project. They held that having seen the three (3) plots upon being advertised, they were convinced that the whole world was already aware about the advertisements and any party with an interest should have moved in to register their concern. They held that as their member, the Plaintiff/Applicant ought to have raised his concern and blocked the auction at the time the said advertisement was carried out in the national newspapers. Further, as a member of the 2<sup>nd</sup> Defendant/ Respondents the Plaintiff/Applicant was all along aware of the sale and it was too late to come to court now as they ought to have done so as early as the year 2020 to stop the sale. They claimed that the suit posed another issue as there were two conflicting interests which the court needed to balance – that of the Plaintiff/Applicant as an individual and theirs being a large Sacco and having spend such a colossal amount of money on the project so far.

16. The deponent argued that the Plaintiff/Applicant would suffer no irreparable injury since he was a senior employee at Kenya Ports Authority with the financial ability to purchase alternative property at ease. He contended that having missed this particular suit property he would easily obtain another one. Further, that the Plaintiff/Applicant’s case was not proved as he had not demonstrated to court that he had been in occupation of the suit property for the alleged ten (10) years other than the draft license agreement attached to his application a document they termed as being irrelevant to this case. The deponent pleaded with court to disallow the application which had no chance of success and the said purchase was conducted in a public tender and the Plaintiff/Applicant never placed his bid.

## V. SUBMISSIONS

17. It will be noted that this was a matter the parties during this proceedings had attempted an out of court negotiation as provided for under the provisions of Article 159 (2) (c ) of the Constitution. Unfortunately, the said negotiations became a cropper necessitating the litigation hereof to proceed on.

18. Therefore, on diverse dates being the 3<sup>rd</sup> November, 2021 and 14<sup>th</sup> December, 2021, in the presence of all the parties, the Honorable Court directed that all the parties canvass the Notice of Motion application dated 9<sup>th</sup> March, 2021 by way of written submissions. Upon full compliance the Honorable court reserved a day for delivery of the ruling thereof.

### A. The Plaintiff/Applicant’s Written Submission

19. On 5<sup>th</sup> November, 2021, the Learned Counsel for the Plaintiff/Applicant the law firm of Messrs. Waziri, Omollo & Advocates filed their written submissions dated 5<sup>th</sup> November, 2021 in support of the application. Mr. Waziri Advocate submitted that the Plaintiff/Applicant herein had adequately fulfilled all the requirements as set out in the famous case of “**Giella – Versus - Cassman Brown & Co Limited (1973) EA 358**”, which are; the existence of a “prima facie” case with probability of success, the applicant standing to suffer irreparable damage which could not be adequately compensated by an award of damages if the injunction was not granted and lastly if court was in doubt, it would decide the application on a balance of convenience.

20. While applying these principles to the instant case, on prima facie, the Learned Counsel submitted that the Plaintiff/Applicant was an employee of KPA and had been residents of the suit property for a long time, As such he had legitimate expectation created whereby as an employee of KPA and members of the 1<sup>st</sup> Defendant/Respondent he would be given first priority to purchase the suit premises. The Learned Counsel relied on the case of “**Mwanauwani Nassir & 8 others – Versus - The Registered Trustees of KPA Pension Scheme (2019) eKLR**”, where the court held that the applicants deserved to be given first priority to purchase the suit property as they had legitimate expectation been created and in so doing the sale of scheme properties would be above board. The Learned Counsel submitted that the issues raised by the Plaintiff/Applicant ought to be canvassed at full hearing.

21. On irreparable harm the Plaintiff/Applicant was likely to suffer, the Learned Counsel submitted that the Plaintiff/Applicant had occupied the suit property for over ten (10) years. He was in occupation before the offer for the license agreement and there was any engagement of the suit property in any commercial considerations. The Learned Counsel argued that if the orders were not granted, the Plaintiff/Applicant would be evicted from the suit property and the suit would be rendered nugatory. The sentimental value and feelings he had developed over

the years while residing in the suit property could not be compensated by damages. He pleaded with court to tilt the balance of convenience in his favour, since there was no proof of payment of purchase price or execution of transfer of the suit property from the 1<sup>st</sup> to the 2<sup>nd</sup> Defendant/Respondent.

#### **B. The 1<sup>st</sup> Defendant/Respondent Written Submission.**

22. On 2<sup>nd</sup> November 2021, the Learned Counsel for the 1<sup>st</sup> Defendant/Respondent, the law firm of Messrs. Muriu Mungai & Company Advocates filed their written submission. Mr. Kongere Advocate submitted that the 1<sup>st</sup> Defendant/Respondent referred to the RBA Investment Regulations & Policies as the basis for its decision to sell the suit property. They contested that this court lacked jurisdiction over the matter since the Plaintiff/Applicant had stated that the 1<sup>st</sup> Defendant/Respondent's decision was made under the Scheme Rules and the RBA Act. They opined that all disputes arising between the pension schemes and their members ought to be resolved by the statutory bodies at the first instance and this court would only be an appellate one. To buttress their point, the Learned Counsel relied on the case of :- **“Albert Chaurembo Mumba & 7 others – Versus - Maurice Munyao & 148 others (2019)eKLR** where the court stated that **“The RBA requires that any member, beneficiary or dependents of the scheme who is aggrieved or dissatisfied by any decision made by a manager, administrator or trustee of the scheme while exercising their powers under the provision of the relevant scheme rules or the Act under which the scheme is established may if he or she wishes make a written request to the CEO to review such decisions.”** The Learned Counsel argued that the Plaintiff/Applicant ought to have exhausted the Retirement Benefits Appeal Tribunal before approaching this court for redress by filing the suit herein.

23. With regard to the injunction orders sought, the Learned Counsel submitted that there was a variance to the property references in the pleadings both the Plaintiff and the filed application, and what the Plaintiff/Applicant claimed to have been in occupation. The license agreement upon which the Plaintiff/Applicant relied on to claim as being the suit property and he had legitimate expectation was indeed the Mbaraki Block 116/1- Mombasa which was for a commercial premises. They argued that was not the same as the suit property that the Plaintiff/Applicant claimed to have resided on for the ten (10) years. To buttress his case, the Counsel relied on the case of **“Sarah Jemuge Toroitich – Versus - The Board of Trustees Teleposta Pension Scheme (2016)eKLR**, where the court held that **“no employee has a right to have a house offered to them to purchase at a preferential price as claimed by the Plaintiff. The only right that is recognized in law is a right to housing.”**

24. Further, on the argument that the Plaintiff/Applicant failed to demonstrate a prima facie case, the Counsel submitted that the Plaintiff/Applicant would not suffer irreparable injury if the sought injunctive orders were not granted. The Counsel cited the case of Nguruman, where it was held that the Plaintiff could not speculate injury nor presume to suffer injury being a tenant who would only be giving the owner vacant possession. The Learned Counsel urged court to dismiss the application with costs.

#### **The 2<sup>nd</sup> Defendant/Respondent's Written Submission**

25. On 26<sup>th</sup> October 2021, the Learned Counsel for the 2<sup>nd</sup> Defendant/Respondent, the law firm of Messrs. Munyithiya, Mutugi, Umara & Muzna & Company Advocates filed their written submissions. Mr. Munyithia submitted that the Plaintiff/Applicant had not fulfilled the requirements as set out in the case of **“Giella - Versus - Cassman Brown Co Limited (1973) EA 358**. On whether the Plaintiff/Applicant had a prima facie case with a probability of success, the Learned Counsel submitted that the Plaintiff/Applicant's case was not in alignment with prima facie case as defined in the MRAO case.

26. On the second limb of their argument was whether the Plaintiff /Applicant would suffer irreparable harm, the Learned Counsel argued that the license agreement tabled before court to support the application referred to a commercial premises as opposed to a residential house that the Plaintiff/Applicant claimed to have stayed in or occupied for over ten (10) years. He argued that since the Plaintiff /Applicant was not in occupation and he was a tenant on the suit land he could not suffer irreparable harm by giving the owner vacant possession. On the last limb of their argument, the Learned Counsel submitted that the Plaintiff/Applicant had not disclosed how the balance of convenience tilted in his favour and as such the application ought to be dismissed with costs.

#### **VI. Analysis and Determination**

27. I have read through all the pleadings in this matter, the written submissions, the cited authorities by the parties hereof and the relevant provisions of the law in relation to the Notice of Motion application dated 9<sup>th</sup> March, 2021 by the Plaintiff/Applicant herein. In order to arrive at an informed, fair and just decision, I have framed the following four (4) salient issues for determination. These are:-

**a. Whether this Honorable Court has Jurisdiction to entertain this matter by dint of the provisions of Article 162 (2) (b) of the Constitution of Kenya Section 3, 4 and 13 of the Environment Land Act, Sections 150 of the Land Act No. 6 of 2012 and Section 101 of the Land Registration Act No. 3 of 2012 Sections 46 and 48 of the Retirement Benefit Act and Section 67 (3) of The Sacco Societies Act No. 14 of 2008.**

**b. Whether the Plaintiff/Applicant through his Notice of Motion application dated 9<sup>th</sup> March, 2021 meets the required threshold for granting temporary interlocutory injunction as founded under the provisions of Order 40 Rules 1 and 2 of the Civil Procedure Rules, 2010.**

**c. Whether the parties are entitled to the relief sought from the application.**

**d. Who will bear the Costs.**

**ISSUE No. a). Whether this Honorable Court has Jurisdiction to entertain this matter by dint of the provisions of Article 162 (2) (b) of the Constitution of Kenya Section 3, 4 and 13 of the Environment Land Act, Sections 150 of the Land Act No. 6 of 2012 and Section 101 of the Land Registration Act No. 3 of 2012 Sections 46 and 48 of the Retirement Benefit Act and Section 67 (3) of The Sacco Societies Act No. 14 of 2008.**

**Brief facts**

28. Before this Honorable court embarks on a detailed analysis on the above framed four (4) issues, it feels it imperative to first and foremost expounds on the brief facts of the case. From the filed pleadings, on 11<sup>th</sup> March, 2021 the Plaintiff instituted this case against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein. The Plaintiff calimed to be both a registered member of the KPAPS and a tenant of a unit on all that parcels of land known as Land Reference Numbers Mombasa/XVIII. 335 situated at Msanifu Kombo estate within Mwembe Tayari area of the County of Mombasa. He held that the suit property was situated on the land parcel number MSA/XXIII/216 which was sold by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant at a public auction without according him the first priority and/or opportunity to have bought it having lived on it for over a decade and thus established legitimate expectation on it. The Honorable Court was informed that the Plaintiff made contribution and was a beneficial owner of all the investments and the Scheme Fund.

29. On the other hand, the Defendants held that they were a pension scheme established under the RBA Act. No. 3 of 1997. The 1<sup>st</sup> Defendant/Respondent as an appointed trustees for the Plaintiffs, held the Pension Scheme Assets and Funds for the benefit and behalf of the Plaintiffs. They stressed having fully adhered with the rules and regulations for the scheme in this process. They further challenged the jurisdiction of this court to entertain its suit as according to them all disputes for the scheme had to be handled internally as a first instance. The Plaintiff/Applicant argued that the 1<sup>st</sup> Defendant/Respondent was in breach of the Trust Deed and Regulations of Kenya Ports Authority Pension Scheme and as such he risked being unlawfully evicted from the suit properties and lose all his pension. Therefore it was as a result of that he decided to file this suit and application seeking temporary injunction orders against the Defendants/ Respondents hereof. That is all on the facts of the case.

**The issue of Court's Jurisdiction**

30. It is trite law that the moment a party in a suit challenges the jurisdiction of a Court, anything else the court does from then onwards became a nullity whatsoever. Once that happens, it was significant that that huddle is finally tackled first and foremost. This was because without jurisdiction the court had no mandate to make one more step. It ought to down its tools. This legal preposition was well established in the now famous case in the now famous case of **"Owners of Motor Vessel "Lilian S" – Versus - Caltex Oil (Kenya) Limited (1989) eKLR** dealt with a court, jurisdiction thus:-

**"Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction.....where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given".**

31. In the instant case, this court's jurisdiction was challenged by the 1<sup>st</sup> Defendant/Respondent. They submitted, based on the Doctrine of Exhaustion, that the Plaintiff/Applicant ought to have exhausted all the available and sufficient alternative disputes avenues to resolve the dispute before invoking the court process. In doing so, the 1<sup>st</sup> Defendant/Respondent relied on the provision of Sections 46 and 48 of the Retirement Benefits Authority Act and Clause 27 of the Trust Deed to submit that the Plaintiff/Applicant ought to have challenged the decision to purchase the suit property at the Retirement Benefits Appeal Tribunal before coming to this court. Hence, to them the decision by the Plaintiff/Applicant was premature.

32. To them, the Doctrine of exhaustion provided that a litigant ought to explore all other available mechanisms in dispute resolution before proceedings to the courts. They emphasized that where there were clear procedures of redress of any particular grievance prescribed by the constitution or statutes, then the procedure should be strictly followed and adhered to. They cited and elaborately relied on the Court of Appeal the case of **"Benson Ambuti Adegga & 2 others – Versus - Kibos Distillers & 5 others Civil Appeal No. 153 of 2019** which this court deliberately reproduces as such. **"Even if a court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction to a court or body to hear and determine all and sundry disputes. Original jurisdiction only means the jurisdiction to hear specifically constitutional or legislative delineated law and facts at first instance. To this end I reiterate and affirm the dicta in Speaker of the National Assembly – Versus - James Njenge Karume (1992)eKLR** where it was stated that where there is a clear procedure for the redress of a particular grievance prescribed by the constitution or an Act of Parliament, that procedure should be strictly followed."

The Learned Counsel further relied on **"Albert Chaurembo Mumba & 7 others – Versus - Maurice Munyao & 148 others (2019)eKLR** where the court stated that **"The RBA requires that any member, beneficiary or dependents of the scheme who is aggrieved or dissatisfied by any decision made by a manager, administrator or trustee of the scheme while exercising their powers under the provision of the relevant scheme rules or the Act under which the scheme is established may if he or she wishes make a written request to the CEO to review such decisions."** The Learned Counsel argued that the Plaintiff/Applicant ought to have exhausted the Retirement Benefits Appeal Tribunal before approaching court with the suit herein.

In as much as this Honorable Court fully concurs with the above legal preposition, but has a slight variation to it. This Honorable Court holds that this cannot be a general principles applicable to all cases and disputes pertaining to the scheme and its rules. There are certain exceptions to this rule and as this court will demonstrate going forward. The Court needs to determine if this is a dispute between a pension scheme and its members as envisaged by the Retirement Benefits Act. The Honorable Court wishes to look into the relevant provisions of the law in to

support its position.

The provision of Sections 46 and 48 of the Act provided as follows:-

**“46. Appeals to the Chief Executive Officer.**

**1. Any member of Scheme who is dissatisfied with a decision of the manager, administrator, custodian or trustees of the Scheme may request, in writing, that such decision be reviewed by the Chief Executive Officer with a view to ensure that such decision is made in accordance with the provision of the relevant scheme rules or Act under which the scheme is established.**

**2. A copy of every request under this Section shall be served on the manager, administrator, custodian or trustees of the Scheme.**

**“48 Appeals to the Tribunal.**

**1. Any person aggrieved by a decision of the Authority or the Chief Executive Officer under the provisions of the Act or any regulations made thereunder may appeal to the Tribunal within thirty days of the receipt of the decision.**

**2. Where any dispute arises between person and Authority as to the exercise of the powers conferred upon the Authority by this Act, either party may appeal to the Tribunal in such manner as may be prescribed....”**

33. From the above cited provision of the law, it brings out a very weighty issue on jurisdiction of this court on matters of the scheme. It is evident that under the Retirement Benefits Act, pension scheme are registered and regulated by the Retirement Benefits Authority (Hereinafter referred to as “The Authority”). There is a Chief Executive Officer of the Authority (Hereinafter referred to as “The CEO”) who is responsible for the day to day running of the affairs of the Authority. Thus, under the dint of Section 46, if a member is dissatisfied with the decision of the manager, Administrator, Custodian or Trustees of the scheme, he may request, in writing, that such a decision be reviewed by the CEO with a view to ensuring that such decision is made in accordance with the provisions of the relevant scheme rules or the Act under which the scheme is established. Clearly, the law accords a member the liberty to seek a review of a decision of the persons in charge of the scheme to the CEO.

34. All said and done the only contention by this Honorable Court and in its own interpretation, this does not apply to all cases. In its view, this would correctly apply to other administrative and day to day operation issues decisions under the scheme rules and the Act. But, a decision to sell property could not be interpreted to mean a decision under the scheme rules or Act. It is a rather weighty matter. In this case, the decision has been made to sell the suit property to the 2<sup>nd</sup> Defendant who was not an existing occupant to the suit property and disregarded the Plaintiff/Applicant who was an occupant and member of the scheme. This was not a mere decision falling within the ambit of the scheme or rules. Indeed, the Plaintiff/Applicant claim based on the doctrine of legitimate expectations ought to have been given first priority to purchase the suit property being the person in occupation of the suit property rather than selling it to the 2<sup>nd</sup> Defendant. I reiterate that these are extremely weighty and triable issues not to be simply placed before the scheme rules or Act but before this Court for hearing and final determination. On the contrary, assuming for what it is worth, if the issue was one which challenged the decision to sell, that is if the Plaintiff opposed the decision of the scheme to diversify its investment portfolio, then probably that would have been a decision on how the affairs of the scheme are managed which would first have to go to the CEO for determination then the Tribunal.

35. Juxtapose, the matter in the instant case involve the sale of the suit property which is on land. From the Provisions of Article 162 (2) (b) of the Constitution of Kenya Section 3, 4 and 13 of the ELC Act, No. 19 of 2011 confers this court with original and unlimited jurisdiction to hear and determine on all matters pertaining to land and environment. Based on the facts hereof, there exist a land dispute between a member of a scheme and arising from a decision of the KPAPS. In this case, the Plaintiff/Applicant is seeking to stop a transfer of a suit land that was sold as a result of a decision of a Board of Trustees, who is the 1<sup>st</sup> Defendant/Respondent. With all due respect and great humility the said matter is beyond the purview of the Chief Executive Officer as envisaged by law. From the above, it will be discerned that this Honorable Court has found out that the suit was properly before it and the objection that this court has no jurisdiction by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent is dismissed for being baseless and unfounded in law.

**ISSUE b). Whether the Plaintiff/Applicant through his Notice of Motion application dated 9<sup>th</sup> March, 2021 meets the required threshold for granting temporary interlocutory injunction as founded under the provisions of Order 40 Rules 1 and 2 of the Civil Procedure Rules, 2010.**

36. The principles for granting an interlocutory injunction are well settled in the now famous case of “**Giella – Versus - Cassman Brown & Co Limited (1973) EA 358**, into law:-

- a. the applicant must show a prima facie case with high chances of success,
- b. the applicant stands to suffer irreparable damage which cannot be adequately compensated by an award of damages,
- c. if the court is in doubt, it will decide the application on the balance of convenience.

A prima facie case a prima facie case was defined in **MRAO LIMITED – Versus - First American Bank of Kenya Limited & 2 others (2003) KLR 125, inter alia:-**

**‘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.**

37. On prima facie, in the instant case, it is not disputed, challenged nor controverted that the Plaintiff/Applicant is a Senior employee of KPA and had been a resident of the suit property for a long time, and as such had inculcated legitimate expectation that as employees of KPA and members of the 1<sup>st</sup> Defendant/Respondent they would be given first priority to purchase the suit premises. On the 19<sup>th</sup> December, 2019, the 1<sup>st</sup> Defendant/Respondent approached him with an offer for the lease of the suit property which offer he accepted and had been waiting to execute it. It was later on that he learnt the 1<sup>st</sup> Defendant/Respondent had sold it through a public auction to the 2<sup>nd</sup> Defendant/Respondent. This really shattered his long awaited hopes of being the legal and absolute owner to this property. The Learned Counsel for the Plaintiff/Applicant relied on the case of **“Mwanauwani Nassir & 8 others – Versus - The Registered Trustees of KPA Pension Scheme (2019) eKLR**, where the court held that the applicants deserved to be given first priority to purchase as they have legitimate expectation that the sale of scheme properties would be above board. By this fact alone, the Plaintiff/Applicant has established he has a “prima facie” case with a high chance of succeeding during the full trial.

38. On the issue of whether the Plaintiff/Applicant stood to suffer irreparable damage. It is a fact that the Plaintiff/Applicant who is a Senior employee of the KPAPS had occupied the suit property for over ten (10) years under the Occupation Order for the staff quarters. He was in occupation before the offer for the license agreement had been developed and the 1<sup>st</sup> Defendant was engaged in commercial activities. He argued being privy to the fact that the 2<sup>nd</sup> Defendant/Respondent, where he was a member, had neither applied nor bided for the suit property. Thus, making the sale irregular and contrary to the procurement rules and regulations. Should the injunction orders sought not be granted, the Plaintiff/Applicant would be evicted, lose his pension, the suit would be rendered nugatory, and the sentimental feelings he had developed over the years residing in the suit property could not be compensated by damages. He pleaded with court to tilt the balance of convenience in his favour, since there was no proof of payment of purchase price or execution of transfer. The Honorable Court fully concur with the submissions by the Plaintiff/Applicant.

39. Nevertheless, with regard to the submission advanced by the Learned Counsels for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents herein that while opposing the granting of the orders of injunction sought on the ground that the license agreement upon which the Plaintiff/Applicant relied on to claim he had legitimate expectation was at variance to the suit property in the pleadings, the application and what he actually occupied. They held that he referred to Mbaraki Block 116/1- Mombasa a commercial premises as opposed to the suit property that the Plaintiff/Applicant claimed to have resided on for 10 years. To buttress his case, the Counsel relied on the ratio in the case of **“Sarah Jemuge Toroitich – Versus - The Board of Trustees Teleposta Pension Scheme (2016)eKLR**, where the court held that **“no employee has a right to have a house offered to them to purchase at a preferential price as claimed by the Plaintiff. The only right that is recognized in law is a right to housing.”** This issue is well answered to by the said 2<sup>nd</sup> Defendant/Respondent. Clearly from the facts, apparently it will be noted that the 2<sup>nd</sup> Defendant/Respondent on their own admission stated that there exists a serious surveying problem onto the suit property. Indeed, the 2<sup>nd</sup> Defendants/ Respondents themselves informed this court that when they commissioned a surveyor to check on the beacons and advise them, from the Surveyor’s report it turned out that there was an entrance to Mbariki Sports Club separating Plot No. Mombasa/Block/XXIII/215 and 216 which posed a challenge in the design of their proposed project. Perhaps this would explain why there appeared to be the said variance on the Land reference numbers on the Plaintiff/Applicants pleadings – the Plaintiff and the application which the Defendants have made such an issue out of. Certainly these were not light matters. These are matters to be segregated for more intense and of thorough determination by this court during the full trial.

40. On whether the Plaintiff/Applicant stand to suffer irreparable damage I hold that the apprehended injury likely to be suffered by the Plaintiff is not quantifiable in this dispute, and the case of **Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others (2014)eKLR**, it was held that **“speculative injury will not do; there must be more than an unfounded fear of 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.”**

41. Where damages recoverable in law is an adequate remedy, as it in this case and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants being registered membership trust and/or Saccos may not capable of paying or compensating the Plaintiff/Applicant readily, therefore, this court will exercise its discretion to issue interlocutory orders of injunction to him. In the case of Nguruman case (supra), it was held that **“If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer in the event the injunction is not granted, will be irreparable...The existence of a prima facie case does not permit leap-frogging by the applicant to injunction directly without crossing the other hurdles in between.”**

42. Finally, the balance of convenience from the inferences and the surrounding facts of this case tilts in favour of the Plaintiff/Applicant in granting the orders sought. I have relied on the case of **“Pius Kipchirchir Kogo – versus – Frank Kimeli Tenai (2018) eKLR**, whereby the court defined the concept of balance of convenience as:-

**“The meaning of balance of convenience tilts in 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 be greater than that which may be caused to the Defendants’ inconvenience be equal, it is the Plaintiff’s to 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 which is likely to arise from granting”**

43. Therefore, it is this Honorable Court's view that the balance of convenience is in granting the Plaintiff/Applicant with the injunction orders as the 1<sup>st</sup> Defendant/Respondent has failed to consider the suffering and the inconveniences to be meted onto the Plaintiff/Applicant while selling the property after raising his legitimate expectation that he would be given first priority in the sell transaction having lived on it for such a long duration and being a Senior staff member. Besides, the Plaintiff/Applicant takes a risk of being evicted from the suit property and even losing his hard earned pension. In any case, there is no doubt that there will be no inconvenience nor prejudice which will be occasioned to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents should the orders be granted.

#### **VII. Determination**

44. Ultimately, based on the provisions of Sections 1, 1A, 3 and 3A of the Civil Procedure Act, Cap. 21, Sections 3, 4, 13 of Environment and Land Court Act, No. 19 of 2012, Sections 150 of the Land Act, No. 6 of the 2011 and 101 of the Land Registration Act, No. 3 of 2012 and Articles 159 (1) and (2) and 162 (2) (b) of the Constitution of Kenya confers this Honorable Court with inherent powers upon this court to make such orders as necessary, which I make as follows:-

**a. THAT** the Notice of Motion dated 9<sup>th</sup> March 2021 is allowed whereby a temporary interlocutory injunction order be and are hereby issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, its servants, employees or agents from leasing, offering for sale, transferring, presenting any instrument for registration, dispossessing, evicting the Plaintiff or in any way interfering with the Plaintiff's rights and occupation of premises situated on all that parcel of land known as Land Reference NO. MSA/XXIII/216 pending the hearing and determination of the suit.

**b. THAT** by dint of the provision of Sections 3, 4, 13 of Environment and Land Court Act, No. 19 of 2011, Sections 150 of the Land Act, No. 6 of the 2012 and 101 of the Land Registration Act, No. 3 of 2012 and Articles 159 (1) and (2) and 162 (2) (b) of the Constitution of Kenya this Honorable Court has jurisdiction to hear and determine this matter.

**c. THAT** for expediency sake this matter be fixed for mention on 28<sup>th</sup> April, 2022 for purposes of conducting Pre – Trial Conference and taking an appropriate hearing date for this matter within the next ninety (90) days from the date of this ruling.

**d. THAT** the Costs of this application to be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

**IT IS SO ORDERED ACCORDINGLY.**

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2022**

**HON. JUSTICE L. L. NAIKUNI (JUDGE)**

**ENVIROMNENT AND LAND COURT**

**MOMBASA**

**In the presence of:**

M/s. Yumna the Court Assistant.

Non Appearance for the Plaintiff/Applicant.

Non Appearance for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents.