Maringa & 21 others v Kanyi & 2 others (Environment & Land Case E037 of 2024) [2025] KEELC 3407 (KLR) (25 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3407 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE E037 OF 2024

LL NAIKUNI, J

APRIL 25, 2025

BETWEEN

MARGARET MARINGA ..... 1ST PLAINTIFF

HELLEN OMITI MACHORA ..... 2ND PLAINTIFF

SAMUEL MUREITHI MUTUOTA ..... 3RD PLAINTIFF

PADDY KAMAU NG'ANG'A ..... 4TH PLAINTIFF

ELIZABETH NJUGUINI WANYOIKE ..... 5TH PLAINTIFF

MARY WANGECI ALI ..... 6TH PLAINTIFF

NABILA KHAN ..... 7TH PLAINTIFF

DENNIS MULILA ..... 8TH PLAINTIFF

JANE WERU ..... 9TH PLAINTIFF

PHILOMENA WAMBUI ..... 10TH PLAINTIFF

CAROLINE OMITI ..... 11TH PLAINTIFF

MIRRIAM NJENGA ..... 12TH PLAINTIFF

JOSEPH NJENGA ..... 13TH PLAINTIFF

PATRICK WAGURA NDUNG'U ..... 14TH PLAINTIFF

LUCKY SAMUEL MULWA ..... 15TH PLAINTIFF

KENNETH MWIRIGI ..... 16TH PLAINTIFF

JULIA K SAMSON ..... 17TH PLAINTIFF

KIMBLEY ASASO ..... 18TH PLAINTIFF

RUKIA ABDULREHMAN MZEE ..... 19TH PLAINTIFF

JULIA MUMBI NJENGA ..... 20TH PLAINTIFF

CORNELIUS KIPLAGAT ..... 21ST PLAINTIFF

ABDI MOHAMED DAHIR ..... 22ND PLAINTIFF

AND

DAVID MUREITHI KANYI ..... 1ST DEFENDANT

MURINGI FARM COMPANY LIMITED ..... 2ND DEFENDANT

SIDIAN BANK ..... 3RD DEFENDANT

RULING

I. Introduction

1. This Honourable Court has been called to make a determination of the Notice of Motion application dated 6th November, 2024. It was instituted by Margaret Maringa, Samuel Mureithi Mutuota, Paddy Kamau Ng'ang'a, Elizabeth Njuguini Wanyoike, Mary Wangeci Ali, Nabila Khan, Dennis Mulila, Jane Weru, Philomena Wambui, Caroline Omiti, Mirriam Njenga, Joseph Njenga, Patrick Wagura Ndung'u, Lucky Samuel Mulwa, Kenneth Mwirigi, Julia K Samson, Kimbley Asaso, Rukia Abdulrehman Mzee, Julia Mumbi Njenga, Cornelius Kiplagat and Abdi Mohamed Dahir, the Plaintiffs/ Applicants herein.

2. The application was brought under the provisions of Order 40 Rules 1 & 2, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap. 21 and all other enabling provisions of Law.

II. The Plaintiffs/Applicants' case

3. The Plaintiffs/Applicants sought for the following orders: -

    a. Spent.

    b. Spent.

    c. That pending hearing and determination of this suit there be and is hereby issued an order of temporary injunction to restrain the Defendants either by themselves, officers, agents, employees, assigns, principles or any person acting on their behalf from disposing of, leasing, renting, or in any manner whatsoever dealing with or interfering with the Plaintiffs' use, ownership and quiet occupation of all the property known as Sub - Division 22068/l/MN and more specifically from selling, auctioning or in any other manner disposing off the suit Properties erected thereon.

    d. That pending hearing and determination of this suit and as an alternative to prayer 3 herein, there be and is hereby issued an order of status quo on all that property known as sub - division number 22068/I/MN.

    e. That the costs of this application be borne by the Defendants jointly and severally.

4. The application was premised on the grounds, testimonial facts and the averments made out on the 26 Paragraphed annexed affidavit of MARGARET MARINGA the 1st Plaintiff herein. The Deponent averred that:

   a. The 1st Defendant operated a real estate business under the name of Kenya Projects Budget and Executive Home and in the year 2015, he advertised for sale Serena court B on an off - plan basis.

   b. The 2nd Defendant was a limited liability company registered under the company's act on 24th February, 2017 the said 2nd Defendant had only shareholder and one Director who was the 1st Defendant herein, annexed and marked as 2 was a copy of the CR – 12 form.

   c. They all bought their respective maisonette units from the 1st Defendant and paid the full and entire purchase prices and no balance was owing from either of them to the 1st Defendant as follows: annexed as a bundle and marked as 3.

Plaintiff no	Date of Agreement	Maisonette number
1st Plaintiff (together with one Oscar Otiende Rombo)	16/9/2016 with an addendum dated 8/12 2020	Maisonette no B27
2nd Plaintiff	23/11/2016	Maisonette no 2
3rd Plaintiff (together with Eddah Nthenya Ngumbi)	12/11/2018	Maisonette no 4
4th Plaintiff	15/12/2016	Maisonette no 5
5th Plaintiff	18/12/2018 with an addendum dated 30/10/2019	Maisonette no 10
6th Plaintiff	23/03/2020 with a deed of variation signed in 2021	Maisonette no 13
7th Plaintiff	29/07/2016	Maisonette no 15
8th Plaintiff	10/12/2019 with an addendum dated 01s/09/2020	Maisonette no 19
9th Plaintiff (together with Catherine Gathigia Weru)	17/3/2021	Maisonette no 21
10th Plaintiff (Together with Alex Njoroge Kinuthia	25/07/2016 with a deed of variation dated 20th January, 2021	Maisonette no 25
11th Plaintiff	11/01/2017	Maisonette no 1
12th Plaintiff	19/07/2017 with an addendum dated November, 2020	Maisonette no 30
13th Plaintiff (together with Diana Mariga)	7/5/2019	Masionette no 31
14th Plaintiff (together with Salome Wanjiku Njoroge)	17/10/2018	Maisonette no 32

15th Plaintiff	6/ 1/2017	Maisonette no 33
16th Plaintiff	16/11/2016 addendum dated 13th November, 2020	Maisonette no 18
17th Plaintiff	30/11/2018	Maisonette no 26 & 28
18th Plaintiff	26/07/2017	Maisonette 34 & 35
19th Plaintiff	23/08/2016 with a deed of variation dated 2/11/2020	Maisonette no 38
20th Plaintiff	30/11/2018	Maisonette no 7 & 22
21st Plaintiff	11/07/2017	Maisonette no 3
22nd Plaintiff		Maisonette no 11

d. The maisonette units, (Hereinafter referred to as "The Suit properties" are erected on plot 22068/l/MN which was part of the developed and controlled estate known as 'Serena court B' and the management company according to our agreements for sale is the KP Properties Limited.

e. Both she and her co – Plaintiffs fulfilled all purchaser obligations in the agreements for sale and truly, the 1st Defendant handed over legal possession and occupation of the suit properties to them where they had lived and occupied openly since then, making various alterations to the suit properties as they were not professionally finished at the time of handover.

f. Clause 4.0 obliged the 1st Defendant to register the interests they acquired in the suit properties by way of grant of a sub - lease of 99 years, which completion period was still running despite several follow-ups with the 1st Defendant who insistedthat the Sectional Properties Registry in Mombasa was not yet operational at the time and failed and neglected to register the sub-leases to them.

g. Notwithstanding, the full payment of the purchase price by all the plaintiffs, the 1st Defendant never transferred the suit properties by way of grant of a 99-year sublease nor even tendered a draft of the sub-leases to them.

h. The 1st Defendant trading as Kenya Projects Budget and executive Homes was to draft the standard lease form for our execution whereupon his offices would register the transfer of sub-lease in our favour and hand to us duly registered sub-leases in our respective names:- these costs were part of the purchase price which had also been fully paid (refer to schedule 2 on 2a & 2b above).

i. From the survey report conducted over the entire dated 22nd August, 2023, the Plaintiffs herein discovered that the suit properties were actually erected on Plot 22068/IV/MN and not as represented to them by the 1st Defendant in the agreements for sale to be on property 11526/ l/MN and that the registered owner of the property was the 2nd Defendant, a proxy of the 1st Defendant and they intended to ask this honorable court to pierce the corporate veil of the 2nd

Defendant to enable this Honourable court get to a fair determination of the rights of parties herein; annexed and marked as 4 the survey report done of the entire Serena court B which sat on plot 22068//MN.

j. From the Survey report dated 22nd August, 2023, we conducted a search on plot 22068/l/MN on which the suit properties are erected and discovered that the 1st defendant acting as Director of the 2nd Defendant, wherein he was the sole shareholder, had charged the property to secure a loan of a sum of Kenya Shillings Thirty Nine Million (Kshs. 39,000,000/-) vide a charge dated 12th April, 2019 from the 3m Defendant and a further charge dated 23rd July, 2020 for a sum of Kenya Shillings Nine Million One Hundred Thousand (Kshs. 9,100,000/-). Annexed in the affidavit and marked 5 was a land search results over plot 22068/V/MN.

k. She swore this Affidavit to confirm that neither she nor her co – Plaintiffs gave consent or had their consent sought to charge the plot 22068/l/MN to any person, neither have they relinquished their rights to the suit properties erected on plot 22068/l/MN as handed over to them by the 1st Defendant.

l. At them time of registration of the charge on 12th April, 2019, the 1st Defendant had already handed them legal possession of the suit properties, considerable amount of years before the 2nd Defendant whose sole legal owner was the 1st Defendant offered plot 22068/l/MN to the 3rd Defendant to secure a loan for which neither her co - Plaintiffs nor she were beneficiaries.

m. The 1st Defendant was in breach of his contractual duties in by failing to register the 99 year subleases of the suit properties in their name and for breaching constructive trust owed to them as he had part performed the agreements for sale.

n. Further, the 1st Defendant fraudulently by deliberately misrepresenting to us that the suit properties they bought and he handed over were on Plot number 11526/l/MN when indeed it was on plot 22068/l/MN. See annexed copies of the search over Properties and marked as 6 dated 31st August, 2024.

o. It was apparent from the searches that the Suit Property was free from any encumbrance at the period of purchase and that the houses had already been occupied by us years before the charge was registered.

p. Following the realization that they may lose Rights to our properties,we decided to file this suit in pursuit of various prayers against the 1st and 2nd defendant and against the 3rd Defendant to enable this court separate their interests in the suit property and what the 2nd Defendant through its director the 1st Defendant could have offered the 3rd Defendant as security.

q. It was apparent from the searches that the Plots were all free from any encumbrances at the period of purchase and that the suitt properties had already been occuied by them years before the charge was registered.

r. Having sold the leasehold interest of the suit properties them, the 1st Defendant no longer had interest therein capable of securing the charge for the 2nd Defendant in favour of the 3rd Defendant while his obligation to issue 99 years subleases to the them for the properties erected on plot 22068/l/MN were subsisting and pending and further that in any event, the Defendants ought to have separated the pre-existing interests of the Plaintiffs on plot 22068/l/MN.

s. They were apprehensive that the 2nd Defendant and the 1st Defendant encumbered plot 22068/l/MN so that it can be disposed by way of sale and injure/defeat our interests in the suit property and thereby unjustifiably enriching the 1st Defendant who was the sole shareholder of the 2nd Defendant and who was now unjustifiably enriched from the Plaintiffs and now from the 3rd Defendant.

t. They had been in open and quiet occupation on the maisonette units from the time of purchase as purchasers for good value and this was crystallized by the part completion by the 1st Defendant, and they still occupy the said Maisonette units on the Suit Property.

u. Her Co – Plaintiffs and she enjoyed proprietor's and occupier's rights to the suit properties erected on plot 22068/l/MN which was in danger of being indisposed and as there are currently tenants living on Suit premises with their families which were at a danger of being evicted from the Suit Properties should this court allow any alienation of plot 22068/l/MN to proceed.

v. The doctrine of lis pendens applies in this matter and further she advised that following the decision in the case of:- "Co - operative Bank of Kenya Limited – Versus - Patrick Kangethe Njuguna & 5 others [2017] eKLR" quoted in "Euro Bank Limited (in liquidation) – Versus - Twicor Investments Limited & 2 Ords (2020) civil appeal number 160 & 161 of 2017 (consolidated)",the Court of Appeal, the 2nd Defendant cannot proceed to dispose of the Suit Property in satisfaction of whatever debt as long the matter is in active litigation which in this instant case, the suit had not been dismissed or struck out. Annexed in the affidavit and marked as 7 the decision in the case of:- "Euro Bank Limited (in liquidation) – Versus - Twicor Investments Limited & 2Ords (2020)" which the relevant highlighted parts.

w. It was therefore imperative that we pray that this Court, protects the Suit Property from further alienation by the 3rd Defendants to enable this Honourable Court determine this matter to its judicious end which includes making a meritorious determination on their pre-existing rights in the suit properties erected on plot 22068/l/MN.

x. If the orders sought were not granted, the 3rd Defendant would proceed to sell the entire plot 22068/l/MN via public auction and our interests in the suit properties erected thereon will be defeated and doing so would render the case filed herewith nugatory and defeat any claim for constructive trust that would arise therefrom.

y. The balance of convenience tilted towards maintaining the status quo of the Suit Properties erected on plot 22068/l/MN as we already have occupiers rights and interests pending determination of the rights of parties herein in the main suit.

z. It was in the interest of justice that this Honorable Court intervened and allows this application to avert the possible loss that the Plaintiffs are likely to suffer should the suit properties be sold.

aa. This Application had been made without any due delay and for the reasons above they prayed that this application be considered ex parte.

ab. The Honourable Court had jurisdiction over this matter.

III. Submissions

5. On 14th November, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 6th November, 2024 be disposed of by way of written submissions

and all the parties complied. Unfortunately, by the time the Court was penning down this Ruling, it could not access the written submissions. Pursuant to that, the Honourable Court proceeded to render the Ruling on its own merit. Eventually, it was delivered on 25th April, 2025 accordingly.

IV. Analysis and Determination

6. I have carefully read and considered the pleadings herein and the relevant provisions of *the Constitution* of Kenya, 2010 and the statures. In order to arrive at an informed decision, the Honorable Court has framed the following issues for determination.

   a. Whether the Notice of Motion dated 6th November, 2024 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.

   b. Who will bear the Costs of Notice of Motion application 6th November, 2024.

Issue No. a). Whether the Notice of Motion dated 6th November, 2024 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.

7. Under this sub – title, the main issue here is whether the Plaintiffs are entitled to be granted the relief of an interlocutory injunction. The application herein is premised under the provision of Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst the provisions of the law. Which provides as follows: -

   Order 40, Rule 1

   Where in any suit it is proved by affidavit or otherwise—

   a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

   b) that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

8. Fundamentally, the principles applicable in an application for an injunction were laid out in the celebrated case of "Giella – Versus - Cassman Brown & Co Limited (1973) EA 358", where it was stated: -

   > " First 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 be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

9. The three conditions set out in "Giella (supra)", need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of "Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others [2014] eKLR": -,

   > " These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages

are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Limited - Versus - Afraha Education Society [2001] Vol. 1 EA 86. 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. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. 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".

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

> " 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"

11. As the Court previously observed in this ruling, the 1st Defendant operates a real estate business under the name and style of Kenya Projects Budget and Executive Home and in the year 2015, he advertised for sale Serena court B on an off-plan basis. The 2nd Defendant was a limited liability company registered under the company's act on 24th February, 2017 the said 2nd Defendant has only shareholder and one Director who was the 1st Defendant herein. They all bought their respective maisonette units from the 1st Defendant and paid the full and entire purchase prices and no balance was owing from either of them to the 1st Defendant.

12. The maisonette units - the 'suit properties' are erected on plot 22068/l/MN which is part of the developed and controlled estate known as 'Serena court B' and the management company according to our agreements for sale is the KP Properties Limited. Both she and her co – Plaintiffs fulfilled all purchaser obligations in the agreements for sale and truly, the 1st Defendant handed over legal possession and occupation of the suit properties to them where they had lived and occupied openly since then, making various alterations to the suit properties as they were not professionally finished at the time of handover.

13. Clause 4.0 obliged the 1st Defendant to register the interests they acquired in the suit properties by way of grant of a sub - lease of 99 years, which completion period was still running despite several follow-ups with the 1st Defendant who insisted that the Sectional Properties Registry in Mombasa was not yet operational at the time and failed and neglected to register the sub - leases to them. Notwithstanding, the full payment of the purchase price by all the plaintiffs, the 1st Defendant never transferred the suit properties by way of grant of a 99-year sub - lease nor even tendered a draft of the sub-leases to them.

14. The 1st Defendant trading in the name and style of Kenya Projects Budget and executive Homes was to draft the standard lease form for our execution whereupon his offices would register the transfer of sub-lease in our favour and hand to them duly registered sub-leases in their respective names:- these costs were part of the purchase price which had also been fully paid (refer to schedules 2 on 2a & 2b above). From the survey report conducted over the entire dated 22nd August, 2023, the Plaintiffs herein discovered that the suit properties were actually erected on plot 22068/IV/MN and not as represented

to them by the 1st Defendant in the agreements for sale to be on property 11526/l/MN and that the registered owner of the property was the 2nd Defendant, a proxy of the 1st Defendant and they intended to ask this honorable court to pierce the corporate veil of the 2nd Defendant to enable this Honourable court get to a fair determination of the rights of parties herein; annexed and marked as 4 the survey report done of the entire Serena court B which sat on plot 22068//MN.

15. From the Survey report dated 22nd August, 2023, they conducted a search on plot 22068/l/MN on which the suit properties are erected and discovered that the 1st Defendant acting as Director of the 2nd Defendant, wherein he was the sole shareholder, had charged the property to secure a loan of a sum of Kenya Shillings Thirty Nine Million (Kshs. 39,000,000/-) vide a charge dated 12th April, 2019 from the 3rd Defendant and a further charge dated 23rd July, 2020 for a sum of Kenya Shillings Nine Million One Hundred Thousand (Kshs. 9,100,000/-). Annexed in the affidavit and marked 5 was a land search results over plot 22068/V/MN.

16. She swore an Affidavit to confirm that neither she nor her co – Plaintiffs gave consent or had their consent sought to charge the plot 22068/l/MN to any person, neither have they relinquished their rights to the suit properties erected on plot 22068/l/MN as handed over to them by the 1st Defendant. At the time of registration of the charge on 12th April, 2019, the 1st Defendant had already handed them legal possession of the suit properties, considerable amount of years before the 2nd Defendant whose sole legal owner was the 1st Defendant offered plot 22068/l/MN to the 3rd Defendant to secure a loan for which neither her Co - Plaintiffs nor she were beneficiaries.

17. According to the Plaintiffs, the 1st Defendant was in breach of his contractual duties in by failing to register the 99-year subleases of the suit properties in their name and for breaching constructive trust owed to them as he had part performed the agreements for sale. Further, the 1st Defendant fraudulently by deliberately misrepresenting to them that the suit properties they bought and he handed over were on Plot number 11526/l/MN when indeed it was on plot 22068/l/MN. See annexed copies of the search over Properties and marked as 6 dated 31st August, 2024. It was apparent from the searches that the Suit Property was free from any encumbrance at the period of purchase and that the houses had already been occupied by them years before the charge was registered.

18. In the case of "Mbuthia – Versus - Jimba credit Corporation Ltd 988 KLR 1", the court held that;

> "In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the party's cases."

19. Similarly, in the case of "Edwin Kamau Muniu – Versus - Barclays Bank of Kenya Ltd" the court held that;

> "In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria."

20. In the present case, it is clear that the Plaintiffs feel threatened by the actions of the Defendants/ Respondents, who according to the Plaintiffs were trying to deprive the Plaintiffs of the suit property. Having sold the leasehold interest of the suit properties the Plaintiffs, the 1st Defendant no longer had interest therein capable of securing the charge for the 2nd Defendant in favour of the 3rd Defendant while his obligation to issue 99 years subleases to the them for the properties erected on plot 22068/l/MN were subsisting and pending and further that in any event, the Defendants ought to have separated

the pre-existing interests of the Plaintiffs on plot 22068/l/MN Regarding this first condition though, the Plaintiffs/ Applicants have demonstrated a prima facie case with a probability of successat the trial as enunciated in the case of "Giella -Versus - Cassman Brown & Co. Limited (Supra)".

21. The court has further considered the annextures on record against the second principle for the grant of an injunction, that is, whether the Plaintiffs/ Applicants might suffer irreparable injury which cannot be adequately compensated by an award of monetary damages. With regards to the second limb of the Court of Appeal in "Nguruman Limited (supra)" , held that:-

> " On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

22. On the issue whether the Applicants will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Applicants must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. It is not hidden that the Applicants' property. The Applicants are apprehensive that the 2nd Defendant and the 1st Defendant encumbered plot 22068/l/MN so that it can be disposed by way of sale and injure/defeat our interests in the suit property and thereby unjustifiably enriching the 1st Defendant who was the sole shareholder of the 2nd Defendant and who was now unjustifiably enriched from the Plaintiffs and now from the 3rd Defendant.The Plaintiffs/ Applicants has to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of "Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (2018) eKLR" provides an explanation for what is meant by irreparable injury and it states:-

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

23. Quite clearly, the Applicants would not be able to be compensated through damages being that had been in open and quiet occupation on the maisonette units from the time of purchase as purchasers for good value and this was crystallized by the part completion by the 1st Defendant, and they still occupy the said Maisonette units on the Suit Property. The Applicants have therefore satisfied the second condition as laid down in "Giella's case".

24. Thirdly, the Applicants have to demonstrate that the balance of convenience tilts in their favour. In the case of "Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (Supra)" which defined the concept of balance of convenience as:

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

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

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

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

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

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

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

27. The balance of convenience lies with the Plaintiffs/ Applicants in this case. Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the claim of the Applicants and it will be in the interest of both the Applicants and the Respondents that the suit property is preserved until the hearing and determination of the suit.

28. In the case of:- "Robert Mugo wa Karanja – Versus - Ecobank (Kenya) Limited & Another [2019) eKLR" where the court in deciding on an injunction application stated;

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

29. I am convinced that if orders of temporary injunction are not granted in this suit, the property in dispute might be in danger of being dealt in the manner set out in the application and apprehended by

the Plaintiffs/Applicants. In view of the foregoing, I strongly find that the Plaintiffs/Applicants have met the criteria for grant of orders of temporary injunction.

Issue No. c). Who will bear the Costs of Notice of Motion application 27th May, 2024.

30. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 Laws of Kenya holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of "Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and "Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise.

31. I have well stated in previous precedence and most especially in "Sagalla Lodge Limited – Versus - Samwuel Mazera Mwamunga & another (Suing as the Executors of Eliud Timothy Mwamunga – Deceased) [2022] eKLR", that:

> " 58. The Black Law Dictionary defines "Cost" to means, "the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other".
>
> The provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. The issue of Costs is the discretion of Courts. From this provision of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in this case is that the Notice of Motion application dated 7th December, 2021 by the Plaintiff has succeeded and hence they are entitled to costs of the application and that of the Defendants dated 21st December, 2021."

32. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. In the case of "Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In the present case, the Honourable Court elects to have the costs in the cause

V. Conclusion and Disposition

33. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to the principles of Preponderance of Probabilities and the balance of convenience. Clearly, the Plaintiff/Applicant has a case against the Defendants/ Respondents.

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

    a. That the Notice of Motion application dated 6th November, 2024 be and is hereby found to have merit and is allowed.

    b. That an order of Temporary injunction do issue restraining the Defendants either by themselves, officers, agents, employees, assigns, principles or any person acting on their behalf from disposing of, leasing, renting, or in any manner whatsoever dealing with or interfering

with the Plaintiffs' use, ownership and quiet occupation of all the property known as Sub - Division 22068/l/MN and more specifically from selling, auctioning or in any other manner disposing off the suit Properties erected thereon pending the hearing and determination of the main suit.

c. That there shall be a mention on 7th May, 2025 before Justice Hon, Olola for purposes of conducting a Pre – Trial Conference pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010 and other appropriate directions thereof.

d. That the cost of the Notice of Motion application dated 6th November, 2024 shall be in the cause.

It is so ordered accordingly.

RULING DELIVERED THROUGH THE MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 25TH DAY OF APRIL 2025.

HON. MR. JUSTICE L. L. NAIKUNI

ENVIRONMENT AND LAND COURT AT MOMBASA

Ruling delivered in the presence of:-

a. M/s. Kalekye, the Court Assistant.

b. M/s. Caroline Mwai for the 3rd Defendant/Respondent.

c. No appearance for the Plaintiffs/Applicants; and the 1st & 2nd Defendants/ Respondents.