



**Yussuf v Buxton Point Apartment Limited & another (Environment & Land  
Case 200 of 2021) [2022] KEELC 3669 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEELC 3669 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 200 OF 2021**

**LL NAIKUNI, J  
APRIL 28, 2022**

**BETWEEN**

**IBRAHIM HASSAN YUSSUF ..... PLAINTIFF**

**AND**

**BUXTON POINT APARTMENT LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**COUNTY GOVERNMENT OF MOMBASA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**I. Introduction**

1. Before this Honorable court for its determination is the Notice of Motion application dated 29<sup>th</sup> September, 2021 by the Plaintiff/Applicant. It is brought under the Provision of Order 40 Rules 1 and 2 of the Civil Procedure Rules 2010, Section 63 of the of the Civil Procedure Act, cap 21.

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

2. The Plaintiff/Applicant through the afore stated Notice of Motion application has sought for the following orders:-
  - (a) Spend.
  - (b) That the Defendants by themselves their agents, servants and/or assignees be restrained by an order of injunction from trespassing on the Plaintiff's parcel of land number Mombasa/Block XVII/1442 by excavating, carrying out construction or in any way dealing with the Plot until the suit herein is heard and determined.
  - (c) That the Defendants by themselves their agents, servants and/or assignees be restrained by an order of injunction from trespassing on the Plaintiff's parcel of land number Mombasa/Block



XVII/1442 by excavating, carrying out construction or in any way dealing with the Plot until the application is heard and determined.

- (d) That the costs of this application be provided for.
3. The applications is premised on the grounds, testimony, facts and averments of the 10 Paragraphed Supporting Affidavit of Ibrahim Hassan Yusuf sworn and dated 29<sup>th</sup> September, 2021 and six (6) annexures marked as “IHY – 1 to 6”. He deposed that he was the Plaintiff/Applicant herein and therefore competent to swear this affidavit on his own behalf. He informed court he was the brother and personal representative to the estate of Hussein Ibrahim Awale (hereinafter referred to as “The Deceased”) for purposes of instituting and prosecuting this suit. He annexed a copy of the Limited Grant of Letters of Administration *Ad Litem* issued by the Kadhi’s Court through the Registry at Mombasa on 13<sup>th</sup> September, 2021 marked as “IHY-1”.
  4. The Deponent held that the deceased the registered proprietor to all that parcel of land known as Land Reference no Mombasa/Block XVII/1442 measuring 0.0832 Ha. Situated at Buxton area Mombasa he annexed a copy of the Certificate of Lease for 99 years from 1<sup>st</sup> July, 1947 marked as “IHY-2” and site plan marked as “IHY - 3”. He asserted that the estate for the deceased has been paying rates and the same had been up to date to the County Government of Mombasa with all the copies of receipts attached thereto. Further, he informed court that the estate had also planned to build a hospital on the said plot and had started the process of the application for approval – Architectural plan and clearance receipts were shown.
  5. he stated that despite all this, without any colour of right or at all the Defendant in particular with the 2<sup>nd</sup> Defendant fenced off the plot and were currently excavating the area with a view to develop residential houses on it. As a result the estate of the deceased lodged complaint to the Defendants but which had gone unheeded to.
  6. The Deponent informed court that the Defendants were already in the process of building on the said plot at a very fast speed without regard to the Plaintiff’s property and unless they were restrained by an order of injunction, the estate of the deceased’s would suffer irreparable damages. He prayed for the Notice of Motion application dated 29<sup>th</sup> September, 2021 and the orders sought be allowed with costs.

### **III. The 1<sup>st</sup> Defendant’s Replying Affidavit**

7. On 8<sup>th</sup> November, 2021 the 1<sup>st</sup> Defendant filed a 22 Paragraphed Replying Affidavit sworn by Ahmed Alwy Ahmed Badawy dated 5<sup>th</sup> November, 2021 and 12 annexures marked as “BPL-1 to 12” annexed hereto. He deposed that he was a Director of the 1<sup>st</sup> Defendant Company and had the full authority of the Company to make and swear thus affidavit on its behalf. He held that the 2<sup>nd</sup> Defendant was the freehold and absolute proprietor of all that parcel of land known as MOMBASA/BLOCK/XVII/1821 measuring 4.905 ha (Approximately 12.13 acres) Since 28<sup>th</sup> May, 2021 and he annexed a copy of the Certificate of Lease marked as “BPL-1”. He stated that by an agreement of lease dated 11<sup>th</sup> June, 2021, the 2<sup>nd</sup> Defendant let to the 11<sup>th</sup> Defendant for a term of 99 years all that parcel of land – MBA/BLOCK/XVII/1821 through terms and conditions of a Joint venture Enterprises agreement dated 15<sup>th</sup> January, 2020 between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants – Copy of the agreement annexed and marked as “BPL-2”
8. He informed Court that pursuant to the afore stated Joint Venture agreement on 6<sup>th</sup> July, 2021 the Defendant was issued with a Certificate of Lease for Plot no MBA/BLOCK/XVII/1881 for 99 years a copy of it marked as “BPL -3” and at the time of the execution of the sub - lease agreement the land plot was vacant, with vacant block of facts which were unoccupied and thereafter the 1<sup>st</sup> Defendant



commenced the process of demolishing those empty flats and fenced off the land. The 1<sup>st</sup> Defendant has taken possession and commenced building of affordable houses as per the terms and conditions of the joint venture. He averred that the 1<sup>st</sup> Defendant's development were strictly confined to the boundaries of Plot no MSA/BLOCK/XVII/1821 and not into the plot claimed by the Plaintiff known as MSA/Block/XVII/1442 which was not within the 1<sup>st</sup> Defendant's leased property.

9. He deposed that his Advocates on record conducted official search for the plot no MSA/BLOCK/XVII/1442 claimed by the Plaintiff and which searches revealed that it did not exist on the ground. He held that according to the certificates of searches dated 4<sup>th</sup> November, 2021 and copies attached marked as "BPL - 4 (a) to (c)" indicated Plots MSA/BLOCK/XVII 1442, 1418, 1518, 1519, 1403, 1468, 1473, 1447, 1444, 1435, 1436, 1475 and 1476 were cancelled and consolidated into a single plot no MSA/BLOCK/XVII/1819 which was without any encumbrances in favour of any third party and is owned by the Municipal Council of Mombasa absolutely.
10. The Advocates for the 1<sup>st</sup> Defendant inquired from the 2<sup>nd</sup> Defendant vide a letter dated 2<sup>nd</sup> November, 2012 addressed to the Director Land and Housing Physical Planning Office of the land MSA/BLOCK/XVII/1442 and the sub-lease, and the 2<sup>nd</sup> Defendant confirmed that this land did not exist as the sub-lease had been cancelled due to irregularities in allocation and breach of the terms of the sub-lease by the sub-lease. He held that the 2<sup>nd</sup> Defendant also supplied the 1<sup>st</sup> Defendant's Advocates, with a copy of the sub-lease dated 4<sup>th</sup> July, 1996 between the Defiant Municipal Council of Mombasa and the Brek Kalama Shaban indicating the Plaintiff's predecessor in title to the sub-lease had clearly contravened Clauses 1(b), 1(c), 1(d), 1(e) and 1(f) of the Sub - Lease thereby giving the 2<sup>nd</sup> Defendant an automatic right to re-entry and determination of the sub-lease as clearly stated in Paragraph 3(a) of the sub-lease effectively terminating the said sub-lease.
11. The Deponent informed court that the 2<sup>nd</sup> Defendant further gave the 1<sup>st</sup> Defendant's Advocate correspondence made to the Registrar of Lands to cancel the sub-lease as a result of their irregular alienating and contravention of the lease terms which inter alia included the Plaintiff's alleged sub-lease for plot no MSA/BLOCK/XVII/1442. Additionally the 2<sup>nd</sup> Defendant further supplied the 1<sup>st</sup> Defendant's Advocates with a letter dated 4<sup>th</sup> November, 2019 written by the 2<sup>nd</sup> Defendant to the Chief Executive Officer of the National land Commission to revoke titles irregularly excised off within Buxton Housing Mombasa and which inter alia comprised Plot no MSA/BLOCK/XVII/1442.
12. He deposed that the 2<sup>nd</sup> Defendant further gave the Advocates for the 1<sup>st</sup> Defendant a copy of a letter dated 5<sup>th</sup> February, 2020 by the 2<sup>nd</sup> Defendant to the Chief Executive Officer, Ethics and Anti-Corruptions Commissions calling for the investigations on the titles allegedly sub-let irregularly by the then Municipal Council of Mombasa which included the sub-lease to the Plaintiff. He held that the 1<sup>st</sup> Defendant, was aware that by a Gazette Notice no 4671 dated 26<sup>th</sup> April, 2021 published on 13<sup>th</sup> May, 2021 in Vol. CXXIII no 104 the 2<sup>nd</sup> Defendant notified the public of the invalidity and the irregularity of the created sub-leases including that Plot no MSA/BLOCK/XVII/1442 subject in this suit and therefore with this development the Plaintiff had no justifiable cause of action against the 1<sup>st</sup> Defendant founded on equity as the substance sub-lease was irregularly created and did not at any moment exist in the land and survey records.
13. He informed court that the legality or otherwise of the 1<sup>st</sup> Defendant's project as a joint venture with the 2<sup>nd</sup> Defendant had been heard and determined by Justice Munyao Sila – (ELC no 1 ELC Petition Mombasa) no 28 of 2020 and the Petition dismissed with costs. Thereafter he informed court that the resultant application to the Court of Appeal for injunction pending appeal being Court of Appeal (Mombasa) dismissed by the Court of Appeal (Mombasa) CA no E20 of 2021 was also dismissed by the Court of Appeal in a ruling delivered on the 5<sup>th</sup> November, 2021.



14. In the long run, the Deponent deposed that the Plaintiff had no justifiable claim for injunction before this court and he failed to demonstrate that the 1<sup>st</sup> Defendant's actions were within the cancelled sub-lease by way of a survey report for this reason, he urged court not to grant the orders sought as the 1<sup>st</sup> Defendant would suffer irreparable damage as there was a contractor on site undertaking the works agreed upon in the joint venture agreement as clearly seen from the rulings of the Environment & Land Court no 1 and the Court of Appeal. Besides the Plaintiff had not demonstrated the parameters for the grant of an injunction and even if he succeeded, damage would be an appropriate remedy.

#### IV. The 2<sup>nd</sup> Defendant's Replying Affidavit

15. On 8<sup>th</sup> November, 2021 the 2<sup>nd</sup> Defendant filed a 28 Paragraphed Replying Affidavit sworn by Rose Mbaika Munupe dated 5<sup>th</sup> November, 2021 and twelve (12) annexures marked as "RMM – 1 to 12" annexed hereto. She deposed that she was a Director of Land Administration in the 2<sup>nd</sup> Defendant's Department of Lands Planning and Housing and Land the full authority in view of her capacity and rank to swear this Replying Affidavit on behalf of the 2<sup>nd</sup> Defendant. She held that the 2<sup>nd</sup> Defendant was the absolute proprietor of all that parcel of land known as MSA/BLOCK/XVII/1821 measuring approximately 4.905 Hectares. By a lease dated 11<sup>th</sup> June, 2021 the 2<sup>nd</sup> Defendant let the land to the 1<sup>st</sup> Defendant for a term of 99 years with effect from 15<sup>th</sup> January, 2021 for purposes of a joint venture agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant under the *public Private partnership (PPP) Act* and the 1<sup>st</sup> Defendant urban Renewal Regeneration Programme aimed at upgrading ten (10) of the 2<sup>nd</sup> Defendants dilapidated estate aimed at actualizing the right to adequate and affordable house to the residents of Mombasa County as provided for under Article 43 of the *Constitution* of Kenya in accordance with the Kenya Affordable Housing Programme Development framework guidelines – 2018.
16. She held that Plot no MSA/BLOCK/XVII/1442 by the Plaintiff was among the many plots that were irregularly and wrongfully allocated lived and excised from land reserved and set aside as Buxton Housing Estate in Mombasa County and were subject for cancellation as per the decision of the County Land Planning and Housing Committee.

She held that although they tried to involve the EACC and the NLC to conduct investigations but they were not of any assistance. She affirmed this being a public land, the predecessor to the title by the Plaintiff – one mr Brek Karama Sheiban never fully adhered to the mandatory procedure needed for the acquisition of the public land MSA/BLOCK/XVII/1442 he had no minutes by the allocation committed nor paid ground rent was in breached several clauses of the sub-lease and as a result it was decided to terminate the said lease. The County Executive Committee member for Land Planning Housing and urban renewal on 21<sup>st</sup> April, 2021 wrote to the Land Registrar Mombasa to cancel of those irregular leases and which led to the cancellation of the said certificate of leases. Hence, she held that this certificate of leases do not exist and after the cancellation of the irregular lease for Plot no MSA/BLOCK/XVII/1442 the 2<sup>nd</sup> Defendant took possession by fencing off the property which it handed over to the 1<sup>st</sup> Defendant in vacant possession. After the cancellation these leases were consolidated with others to form MSA/BLOCK/XVII/1819 but the 1<sup>st</sup> Development plot is MSA/BLOCK/XVII/1821. She argued that there was no justification for granting the injunction orders in favour of the Plaintiff or at all and had not established any substantial loss that could not be compensated by an award of damages should he succeed in the main suit.

17. She held that it's the Defendants who were likely to suffer irreparable loss and damage if injunction orders were issued as pleaded as already the 1<sup>st</sup> Defendant had a contractor on site and was busy developing the leasehold interest granted to it by the 2<sup>nd</sup> Defendant and further because of the joint



venture agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants with very strict timelines which the contractor on site has to achieve and fulfill failing which grave and serious contractual penalties would befall on the 1<sup>st</sup> Defendant.

She deposed that the Defendants could not be adequately compensated by damages if the Plaintiff's suit failed as the magnitude of the joint venture project run into billions of shilling and as such she beached the court not to grant any orders in favor of the Plaintiffs.

Indeed, the Deponent urged court to set aside or vary the interim orders granted on 25<sup>th</sup> October, 2021 on account of what was stated hereof or court could vary the orders by directing the Plaintiff to furnish a security bond for costs of Kenya Shillings Two Billion (ksh 2, 000, 000, 000.00) to cater for the costs which should be occasioned by the wrongful grant of such orders.

18. Finally, she averred that the legality or otherwise of the 1<sup>st</sup> Defendant's housing project and the Joint Venture Enterprises between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had already been conclusively determined by the Courts. She urged court to dismiss the application by the Plaintiff with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

### III. Submissions

19. On 25<sup>th</sup> October, 2021 in the presence of all the counsels in this matter, court directed that the Notice of Motion application dated 29<sup>th</sup> September, 2021 be canvassed by way of written submissions. Nonetheless, upon full compliance on 18<sup>th</sup> February, 2022 all the parties were accorded some brief opportunity to fully highlight their filed written submissions. The parties were extremely articulate and relevant to the point. Thereafter the Honorable Court reserved a day for delivery of ruling thereof.

#### A. The Plaintiff/Applicant written and oral submissions

20. On 26<sup>th</sup> November, 2021 the Learned Counsel, the Law firm of Messrs. B.N. Kenzi and Company Advocates filed their written submissions dated 25<sup>th</sup> November, 2021 and which they highlighted on 18<sup>th</sup> February, 2022 before Court. Mr Kenzi submitted that the Plaintiff had met the threshold for grant of the orders of temporary injunction, the Plaintiff annexed ownership documents from the 2<sup>nd</sup> Defendant – the County Government of Mombasa and to whom they had been paying rates to for the past 17 years since the year 2004. He held that the 2<sup>nd</sup> Defendant could not therefore allege there was any irregular allocation to the suit property to the Plaintiff. He argued that the conduct by the 2<sup>nd</sup> Defendant could be estopped from denying the lease to the Plaintiff. He relied and cited the provision of Articles 60 (b) and 64 of the *Constitution* of Kenya which guaranteed security of Land right. He contended that the County Government. The County Government could not purport to take the land away by cancellation an a mere act of de gazzement of the allocation.
21. He further relied on the Provision of Section (1) of the then *Registration of Titles Act* cap 280 now reproduced substantially the provisions under Sections 25 and 26 of the *Land Registration Act*.  
In support of the case, the Learned Counsel cited the decision of '*Mbothu and Others v Waltimu and 11 others* (1986) eKLR and *Gitwany Investment Limited v Tajmal Limited & Others LR* (2006) 2 PP 77 on the sanctity of title deed as a conclusive evidence on the absolute ownership to land, I could only be challenged on grounds of fraud in which the proprietor acquired it and has to be proved in a competent court of law and not through degazettment or gazettment.
22. He held that the Plaintiff retained the sanctity of his title deed which was still valid and if there was any mistake, that lied squarely on the 2<sup>nd</sup> Defendant the County Government of Mombasa.



The Learned Counsel distinguished the two (2) authorities which the 1<sup>st</sup> and 2<sup>nd</sup> Defendant relied on in their replies being “Constitution Petition (Mombasa) no 28 of 2020 [Justus Chai Mbaru and 12 Others](#) and CA no E20 of 2021 v *County Government of Mombasa and 2 others*”. In that the two had no relevance to this suit being constitution Petition the Petitioner were tenants and not holders of the title deed. They were allegedly in violation of certain constitutional rights not as owners but as tenants. For that reason the facts were at variance with the present case and he urged court to disregard them.

23. On injunction orders the Learned Counsels relied on the famous cases of “*Giella v Cassman Brown* (1978) E.A. and [Nguruman Limited v Jan Boside Nelson and 2 Others](#) 2014 KLR

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

24. On 29<sup>th</sup> November, 2021 the Learned Counsels for the 1<sup>st</sup> Defendant the Law firm of Messrs. Fadhil and Kilonzo Advocates filed their written submissions dated 26<sup>th</sup> November, 2021. M/s. Thuku Advocate on the 18<sup>th</sup> February, 2022 submitted orally by holding that the development by the 1<sup>st</sup> Defendant was on different parcel of Land Known as MSA/BLOCK/XVII 1819 and not MSA/BLOCK/XVII/1442 which she submitted was cancelled by the Land Registrar for having been irregularly allocated and thus the Plaintiff had no title at all. As a way of establishing the root of the title deed or sub-lease held by the Plaintiff the counsel submitted through various documents and correspondences obtained from the 2<sup>nd</sup> Defendant it was established that the title deed among others were cancelled and that the Plaintiff’s predecessor in title Mr Brek Kalama Shaban had breached several provisions of the sub-lease giving the 2<sup>nd</sup> Defendant right to re-enter the suit property and determination of the sub-lease by the Municipal Council of Mombasa.

25. She held that while allocating the certificate of lease to the Plaintiff the mandatory procedure for allocating of public land as stated in the case of “[Abdi Mohamed Kahiya v Fatuma Haji Kasim](#) (2019) eKLR” was not followed and therefore leading to its cancellation. They also relied on case of “[Munyu Maina v Hiram Gathibo Maina](#) Civil Appeal no 233 of 2009” on the legal proposition of the root of a title deed.

She referred court to the Provisions of Section 12(8) (a) and 73 (2) (a) of the [Land Act](#) of 2012 on the right of fore future.

She submitted on the applicability of the doctrine of “*Ex-Turpi Causa Non Oritur*” (meaning no legal right can flow from an illegal act) in relation to the Sub - Lease of Plot no MSA/BLOCK/XVII/1442 – she argued such that no legal right, remedy and/or benefit can flow from an illegal act taking that the Plaintiff’s title was issued irregularly and that the predecessor was in breach of certain condition which led the 2<sup>nd</sup> Defendant to call for its cancellation.

26. Thereafter it issued the sub-lease to the 1<sup>st</sup> Defendant whom they entered into a joint venture agreement. The cancellation was published in the Kenya Gazette to that effect. She relied on the decision of [The estate of Cyrus Kingori Ngogho \(deceased\)](#) 2021 eKLR.

She also argued on the principle of *Res Judicata* and estoppel per Judicatam or Estoppel by record where by the Applicant is estopped from re – litigating on issues which were already pronounced in previous Judgement. In other words it meant this matter had been heard and determination by the Courts – In the Environment & Land Court no 1, before Justice Sila Munyao in “Constitution Petition no 28 of 2020 - [Justus Chai Mbani & 12 Others v The County Government of Mombasa](#) and the Court of Appeal in “Mombasa CA Civil Appeal no E20 of 2021 where the suits were dismissed with costs over the same subject matter.



On whether the Plaintiff was entitled to the orders for injunction the Learned Counsel argued that he had failed to prove he had any prima facie case as the Certificate of Lease to parcel no MSA/BLOCK/XVII/1442 was non-existence having been cancelled by the Land Registrar due to irregularities and unlawfulness in the allocation by the defunct Municipal Council of Mombasa as there was no part development plan prepared before that excision and there no minutes available to firstly the allocation to private persons.

Further the development activities by the 1<sup>st</sup> Defendant are strictly confined to the boundaries of Plot no MSA/BLOCK/XVII/1821 and not MSA/BLOCK/XVII/1442 which does not exist any way. The court is being called to issue temporary orders in vain. She held that there was no ground report, survey map or cadastral map provided by the Plaintiff/Applicant to prove indeed the 1<sup>st</sup> Defendant was developing the subject plot.

27. On the second limb whether the Plaintiff/Applicant would suffer irreparable loss that could not be compensated by an award of damages – they held no such loss would be occasioned to the Plaintiff/Applicant as he had failed to demonstrate what injury or loss the estate of the deceased swell suffer of the orders sought were not granted. She reiterated the parcel of land which was the subject matter MOMBASA/BLOCK/XVII/1442 was nonexistent pursuant to the cancellation and consolidation of the sub-leases to form. Plot no MOMBASA/BLOCK/XVII/ 1819 and which was published in the Kenya Gazette for the general public to know.

On the contrary it was the 1<sup>st</sup> Defendant/Respondent who stood to suffer irreparable loss and damage if the orders sought were granted as had already commenced the construction works on the ground/site and was busy developing the land pursuant to a joint venture agreement entered with the 2<sup>nd</sup> Defendant it was unlikely the Applicant could compensate the Respondent while if it succeeded they could be compensated by award of damages.

In the long run, they argued that the balance of convenience was not is granting the orders in favour of the Plaintiff/Applicant due to the arguments already advanced herein. She urged Court to dismiss the application with costs.

### **C. The 2<sup>nd</sup> Defendants written Submissions**

28. On 28<sup>th</sup> November, 2021, the Learned Counsel for the 2<sup>nd</sup> Defendants the law firm of Messrs. Kilonzo and Aziz Company advocates filed their written submissions. M/s. Thuku holding brief for mr Kilonzo while opposing the Notice of Motion application dated 29<sup>th</sup> September, 2021 by the Plaintiff/Applicant submitted that through the brother to the deceased held a certificate of lease issued on 1<sup>st</sup> July 2004 in his names for the suit parcel he did not have a good title to the suit property.
29. She argued that the Plaintiff's predecessor in title one Brek Kalama Sheiban the intial sub-lessee from the defunct Mombasa Municipal Council failed to meet the requirements set out in the sub-lease dated 4<sup>th</sup> July, 1996 making him not bear a good title with respect to the parcel land Reference no Mombasa/Block XVII/1442. She pressed that his Certificate of Lease in his possession was a nullity. The Learned Counsel averred the Plaintiff failed to show how that the process he came to be possession of the parcel.
30. To buttress her point, she relied on the cases of "*Henry Mwitari v Commissioner for Lands and another* (2017) eKLR and *Munyu Maina v Hiram Gathicho Maina* Civil Appeal no 233 of 2009" where the court held that through the 2<sup>nd</sup> Defendant had a Certificate of Title but the process of acquiring it was challenged and questionable. Hence it was not sufficient to dangle the said Certificate of Title as proof of ownership as the process of acquisition and history of the root of the title was not proper. The registered proprietor must go beyond the instrument and prove the legality of how he acquired



the title to show that the acquisition was legal, formal and free from any encumbrances including and all interests which would not be noted in the register. Hence, the Learned Counsel contention the title by the Plaintiff was acquired illegally and un-procedurally and was nonexistent at any land or survey records which led to its cancellation in that there was no minutes by the Plot Allocation Committee of the defunct Municipal Council recommending excision of the public utilities. No part development plan (PDP) prepared, and the fact that the Plaintiff predecessor – one Brek Kalama Sheiban had been in breach of certain condition and terms for instances Clauses 1(a), 1(b), 1(c), 1(d), 1(e), and 3(e) of the lease agreement gave the 2<sup>nd</sup> Defendant an automatic right to re-enter the leased plots to determine the leases and hence a meeting was held on 19<sup>th</sup> January, 2021 which recommended termination of the said leases and others. It was recommended the Land Registrar proceeds to cancel all these illegal and irregular leases. The Land Registrar obliged accordingly by publishing a notice in the Kenya Gazette.

31. The Learned Counsel submitted that based on the above the Plaintiff was not capable of protection by the Honorable Court – through an equitable relief of injunction as the title was tainted with illegalities in obtaining the certificate of title for the suit property contrary to the doctrine of *Ex Turpi Causa Non Oritur* – meaning (Action such that no legal right can flow from an illegal act). To support its argument she cited the authorities of *Hussein Dairy Limited v Southern Credit Banking Corporation Limited and another* (2020) eKLR and *Standard Chartered Bank Kenya Limited v Intercom Services Limited & 4 Others* (2014) eKLR hence she emphasized that the court was not under any duty to protect the Plaintiff by issuing the orders sought as that would amount to aiding an illegality.
32. The Learned Counsel further submitted that this suit offended the doctrine of *Res Judicata* – contrary to the Provisions of Sections 7 of the *Civil Procedure Act* cap 21 and relied on the case of “*Pop-In Kenya Limited & 3 Others v Habib Bank AG. Zurich* Civil Appeal no 80 of 1988. Her contention was that there existed another suit of the same parties and same subject matter being ELC. Petition (Mombasa) no 28 of 2020 – *Justus Chai Mbaru & 12 Others v County Government of Mombasa National Land Commission & 19 Others* eKLR where Judgment was delivered on 3d March 2021 by Justice Sila Munyao and the Petition was dismissed with costs. In that judgment the legality of the 1<sup>st</sup> Defendant’s housing project and the Joint Venture Enterprise between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was comprehensively and conclusively determined by the Court and since the project was also a subject in the instant case where the Plaintiff is seeking a perpetual injunction restraining the Defendants from developing, fencing off, excavating, building or any other way dealing with the suit land the matter was *Res-Judicata*. She held the reasoning was well captured under the doctrine of Estoppel Per Judicatam or Estoppel by record where the Applicant is estoppel from re-litigating and/or raising issues which were pronounced upon in the judgment as he was bound to bring litigation to an end. On this point she relied on the cases of *Mohamed Dado Halu v Dhadho Gaddae Godhana & 2 Others* (2017) eKLR and *Henry Wanyama Khaemba v Standard Chartered Bank of Kenya Limited*, Civil Case 560 of 2006.
33. The Learned Counsel further submitted that the Plaintiff/Applicant had failed to meet the requirements for the grant of a temporary injunction orders contrary to the provisions of Order 40 Rules 1, 2, and 3 of the *Civil Procedure Rules* 2010 and set out in the famous decision of *Geilla v Cassman Brown* (1973) E.A. 358, *Mrao Limited v First American Bank of Kenya Limited* (2003) eKLR, *Kenya Electricity Transmission Company Limited v Kibotu Limited* (2019) eKLR.

She argued that the fact that the suit plot no Mombasa/Block XVII/1442 was non-existent at the moment in any Land and Survey records as it was cancelled with other leases due to irregularities there could be no prima facie case established and hence no infringement of any legal right under Article 40 (6) of the *Constitution* of Kenya.

She pressed that the Applicant failed to provide any cadastral maps, grounds or survey report to show that the 1<sup>st</sup> Defendant was carrying on works or development on the suit property as alleged as the 1<sup>st</sup>



Defendant was carrying out development strictly on parcel no Mombasa/Block XVII/1821 and not Mombasa/Block/XVII/1442.

34. On the second limb she averred that the Applicant had failed to demonstrate any injury that could not be compensated by damages if the orders were not granted. On the contrary she argued it was the Defendants who were likely to suffer irreparable loss and damages if the injunctive orders were issued.

The 1<sup>st</sup> Defendant had a contractor on site and was busy developing the leasehold interest granted to it by the 2<sup>nd</sup> Defendant. Further, she held the Joint Venture agreement but the 1<sup>st</sup> and 2<sup>nd</sup> Defendant had very strict timelines which the Contractor on site had to achieve without failure to which serious contractual penalties would befall the 1<sup>st</sup> Defendant.

35. Indeed, she contended that the Defendants could not be adequately be compensated by damages if the Plaintiff's case failed to succeed as the magnitude of the Joint Venture project run into billions of shillings.

Finally, she submitted that the balance of convenience tilted in favour of not granting the temporary injunction as the Plaintiff had failed to demonstrate how he acquired the title for the suit property as the 1<sup>st</sup> Defendant was not carrying activities on parcel no Mombasa/Block XVII/144 but on Mombasa/Block XVII/1882 she urged court to dismiss the Notice of Motion application dated 29<sup>th</sup> September, 2021 with costs.

#### **IV. Analysis and Determination**

36. I have considered all the filed pleadings, written and oral submissions by the parties herein with reference to the Notice of Motion application dated 29<sup>th</sup> September, 2021 by the Plaintiff/Applicant and all the cited authorities and the relevant provisions of law.

For the Honorable court to arrive at an informed, just and fair decision in the given surrounding facts inferences and legal circumstances, it has framed the following salient four (4) issues for determination. These are:-

- a. Whether the Plaintiff/Applicant vide its filed Notice of Motion application dated 29<sup>th</sup> September, 2021 meets the threshold and standards required for granting temporary interim injunction orders as founded under Order 40 Rules 1, 2 and 3 of the Civil procedure Rules 2010.
- b. Whether this suit and/or notice of motion dated 29<sup>th</sup> September, 2021 by the Plaintiff/Applicant offends the Doctrine of *Res Judicata* under the Provision of Section 7 of the Civil Procedure Act cap, 21.
- c. Whether the parties in this interlocutory stage are entitled to the relief sought.
- d. Who will bear the costs for the Notice of Motion application dated 29<sup>th</sup> September, 2021 by the Plaintiff/Applicants.

**ISSUE no (a) Whether the Plaintiff/Applicant vide its filed Notice of Motion application dated 29<sup>th</sup> September, 2021 meets the threshold and standards required for granting temporary interim**



## **injunction orders as founded under Order 40 Rules 1, 2 and 3 of the Civil procedure Rules 2010.**

### **Brief Facts**

37. Before embarking on the indepth analysis of the framed issues herein, first and foremost the Honorable court feels it imperative to expound on the brief facts pertaining to the matter before it. From the pleadings the Plaintiff is duly appointed Legal Administrator to the estate of the deceased. This was done vide a Limited Letters of Administration Ad Litem prior to his death, the deceased applied to the defunct Municipal Council of Mombasa and on 1<sup>st</sup> July 2004 he was issued with a Certificate of Lease to that parcel of land known as MSA/BLOCK/XVII/1442 measuring 0.0832 ha. It was a term of 99 years from 1<sup>st</sup> July 1947. Ideally the lease is to expire in the year 2046 or thereabout. He indicated having fully complied with all the prerequisite legal requirements including remittances of the annual rents and rates. It was until the year of 2021 that he saw the 1<sup>st</sup> and 2<sup>nd</sup> Defendants onto the suit land carrying out some development that he got anxious, on conducting an official search he learned that this titled deed and others had been cancelled the Land Registrar under the instructions of the 2<sup>nd</sup> Defendant and the land issued to the 1<sup>st</sup> Defendant.
38. The 2<sup>nd</sup> Defendant claims to have caused the leases to be cancelled as being public land were irregularly allocated without adherence to the mandatory procedure for such allocation – further, the 2<sup>nd</sup> Defendant has indicated that the predecessor to the title held by the Plaintiff had breached several terms and conditions stipulated in the sub lease which allowed the 2<sup>nd</sup> Defendant right for re-entry and determination of the lease. They took several steps within their right for instance inviting the National Land Commission (The NLC) and the Ethics & Anti – Corruption Commission (The EACC) to conduct investigations on the irregularities but without much help, hence instructed the Land Registrar to cancel the title deeds. They also caused the cancellation to be published in the Kenya Gazette for the knowledge of the general public. Thereafter, they offered the consolidated land to the 1<sup>st</sup> Defendant whom they had entered into a joint venture for the development of urban housing program in terms of the Provisions of Article 43 of *Constitution* of Kenya for affordable houses. They have vehemently opposed this Notice of Motion application by the Plaintiff on grounds the land does not exist and that the project is for a colossal sum which if the orders are granted they will suffer irreparable loss and where upon if not granted and in the likely event the Plaintiff succeeds in the case he could still be adequately compensated by damages. The balance of convenient tilted and not granting the orders.
39. Further, the Defendants have argued that this subject matter has been already determined by the Environment & Land Court no 1 and the Court of Appeal making the instant case offend the doctrine of *Res - Judicata* under Section 7 of the *Civil Procedure Act*. That is enough of the facts of this case.

Now turning to the issues framed under the sub-heading its trite law that an Applicant has to demonstrate having fulfilled the principles set out in on the famous case of *Giella Cassman (Supra)*. I must determine whether the Plaintiff/Applicant is entitled to a temporary injunction orders prayed for. In deciding whether to grant the orders or not it is trite law that I should be guided on well-established principles enunciated in the locus classicus now famous precedent of *Giella v Cassman Brown* (1973) E.A. Page. 358 whose holding is as follows:-

“The condition for the grant of an interlocutory injunction are now, I think well settled in East Africa.

First, an applicant must show a prima facie case with a probability of success.



Secondly an interlocutory injunction will be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.

Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”.

40. But before proceedings further, the fundamental issue to ponder is whether the Plaintiff/Applicant has made a “Prima facie” case in his case with a probability of success. In the case of *Mrao v First American Bank Of Kenya Ltd. & 2 Others* (2003) eKLR 125 cases which have also been extensively referred to by the Learned Counsel for the Proposed Defendant, “a *Prima facie*” case was well described as follows:-

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

41. Thus, the Honorable Court concludes that the Plaintiff/Applicant has succeeded in establishing “*Prima facie*” case to be considered for the temporary injunction sought. On arriving at that conclusion, the Honourable Court has relied on the decisions of *Kenya Horticultural Exporters Pg. 1977 Limited v Pape* 1986 KLR 705, *Nguruman Limited v Jan Bonde Neilson & 2 Others* 2014 eKLR. (*Supra*).

Upon the application of these principles to the instant case the Honorable Court and the parties have not disputed that the deceased was issued and allocated Certificate of Lease to land parcel MSA/BLOCK/XVII/1442 by the defunct Municipal Council of Mombasa way back in 1<sup>st</sup> July 2004 close to sixteen years past. He was issued with a title and he took possession. All along he would be make his remittances for the rates and rents and issued with the official receipts. Indeed, he has indicated wanting to construct a hospital with architectural plans and site plan which were all approved by the 2<sup>nd</sup> Defendants.

42. This court finds it rather shocking for the 2<sup>nd</sup> Defendant to wake up one morning and realize that there exists mistake or omission on how the sub-leases were acquired to the predecessor and that this being public land the mandatory procedure was not followed – no minutes by the Committee and breached of the terms of the sub-lease by the predecessor. The court wonders assuming those are correct facts why not involving the affected persons?

It is trite law that all title deeds are conclusive evidence of ownership as founded under the provisions of Section 25 and 26 of the *Land Registration Act* and Section 23(1) of the *Rent Tribunal Act* the cancellation or rectification based on whether it was by fraud omission of minutes has to be by an order of court Section 80(1) and (2) of the *Land Registration Act*. The burden of proof in this case is in the one allegation Section 107 and 109 of the *Evidence Act* cap 80. This process can only be verified and full trial but not through affidavit at an interlocutory stage, without belaboring the point on the decision taken by the 2<sup>nd</sup> Defendant to cause the cancellation of these leases, and the alleged gazettment, this court is satisfied that the Plaintiff has established a prima facie case.

43. On the second limb, the Plaintiff has had this title for over fifteen (15) years. He has been remitting the Land rates and rent. He had developed legitimate expectation to construct a hospital on it perhaps after applying for a change of user. Definitely he had incurred a substantive sum and likely to suffer loss. I find the argument by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants that they have already incurred over billion of shillings on it due to the duly executed joint venture for affordable housing rather insensitive. Had they not conducted a feasibility study or risk management test on the project to appreciate that there was



already an overriding interest encumbrance the presence of the Plaintiff under Section 28(1) of the Land Registrar Act and likelihood of protracted litigation. By the way this court would have been quite anxious to hear a counter offer to the Plaintiff on taking an alternative parcels of land if they are very concerned about the joint venture project and its stringent time frame.

Finally, the balance of convenience tilts in favour of the granting the injunction orders as prayed by the Plaintiff until this matter is heard and finally determined.

**ISSUE no (b) Whether this suit and/or notice of motion dated 29<sup>th</sup> September, 2021 by the Plaintiff/Applicant offends the Doctrine of Res Judicata under the Provision of Section 7 of the Civil Procedure Act Cap, 21.**

44. There has been an argument that this matter was already determined by ELC-1 in the Constitution Petition no 28 of 2020 Justus Chai Mbaru (*Supra*) and the Court of Appeal no E. 20 making this case offend the doctrine of *Res-Judicata* under Section 7.

The Honorable Court has been urged to strike out the suit by the Plaintiff as the same offends the doctrine of *Sub-judice* and *res judicata* contrary to the Provisions of Sections 6 and 7 of the Civil Procedure Act cap 21 and hence it's an abuse of the due process of court and law.

Ideally, this Principle has been provided for by the Provisions of Under Section 7 of the Civil Procedure Act cap 21. *Inter alia*:-

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

Explanation. —(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

45. From the above legal provisions, the following are the ingredients that constitutes and the bar of the Doctrine of *Res Judicata* to be effectively raised and upheld an account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms:-

- a. The suit or issue was directly and substantially in issue in the former suit.



- b. That former suit was between the same parties or parties under whom they or any of them claim.
  - c. Those parties were litigating under the same title.
  - d. The issue was heard and finally determined in the former suit.
  - e. The court that formerly heard and determined the issue was competent to try the subsequent suit or this suit in which the issue is raised.
46. It is trite law that “*Res judicata*” is a point of law and a true preliminary objection, if proven to exist a court ought to allow its procession and dismiss the entire suit. The Court of Appeal in *IEBC v Maina Kiai & 5 others* (2017)eKLR observed that:-

‘*Res Judicata* is a matter properly to be addressed in limine as it does possess jurisdictional consequence because it constitutes a statutory peremptory preclusion of a certain category of suits. ...Thus for the bar of *Res Judicata* to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or this suit in which the issue is raised.

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

47. While applying these principles this court has established that as clearly, the parties herein are different from those in the instant case. I have made some attempt in reading through these decisions and find out that the parties were tenants and not title holders hence the circumstance were slightly different. Further, what was stake there were on the legality of the joint venture between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. I highly doubt and unless other stated or pointed out the issue of the title and ownership was deliberated in those proceedings. For these reason I find that this doctrine of *Res Judicata* does not apply here at the moment awaiting the full trial where perhaps matter once crystalize the court may take a different position.



**ISSUE no (c) Whether the parties in this interlocutory stage are entitled to the relief sought.**

48. There is no doubt that the deceased applied to the defunct Municipal Council of Mombasa and on 1<sup>st</sup> July, 2004 he was issued with a Certificate of Lease to the suit property for a term of 99 years from 1<sup>st</sup> July 1947. It was to expire on in the year 2046.
49. Therefore, from the Court's view point, the Plaintiff's brother Hussein Ibrahim Awale – the deceased held a good title. For unclear circumstances and/or grounds the 2<sup>nd</sup> Defendant claim to have cause the cancelation of the leases alleging of the leases alleging that being public land they were issued illegally. Further, they alleged the predecessor never adhered with the required condition although they took some steps by inviting some agencies to conduct investigation but they were not successful. It's out this desperation they instructed the Land Registrar to cancel the Leaser, and which was done through publication in the Kenya Gazette. They cause consolidation of this land and others and offered it to the 1<sup>st</sup> Defendant to undertake a Joint Venture project for the development of an Urban Housing Program inters of the Provision of Article 43 of Constitution of Kenya for affordable houses.
50. The major question that comes to mind is whether the Plaintiff has a *Prima Facie* case and if so did the Defendants really follow the proper procedure that led to the consolidation and cancellation of the leases? It this the best they could do in the legal terms? What remedy does the Plaintiff have in the given circumstances? Prior to having a full trial in order to hear evidence based on empirical facts and documentary proof, in the meantime and/or interlocutory stage then , it's this court's finding that the Plaintiff/Applicant is entitled to protection through being granted the temporary interim injunction orders.

**V. Conclusion and disposition**

51. Based on the indepth analysis to the framed issues herein pertaining to the Notice of Motion application dated 29<sup>th</sup> September, 2021, I do now wish to conclusively make the following direction/orders:-
- a. That the Notice of Motion application dated 29<sup>th</sup> September, 2021 by the Plaintiff be and is hereby allowed for being meritorious with costs.
  - b. That a declaration that this suit instituted by the Plaintiff herein against the Defendant does not offend the doctrine of "*Res Judicata*" thus offending the provisions of Section 7 of the Civil Procedure Rules, 2010 as the ELC (Mombasa) Petition no 28 of 2020 as the same was solely on the legality of the concept of Joint Venture Enterprises agreement duly entered between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant on the 6<sup>th</sup> July, 2021 and not on the issue of land Ownership which the main issue in this suit.
  - c. That for the sake of expediency of this suit, in direct the mater to be heard and determined within the next ninety (90) days from the date of this ruling.
  - d. That there should be at least a one (1) hour Site Visit ("*Locus in Quo*") prior to the full hearing of this case scheduled on 10<sup>th</sup> June, 2022.
  - e. That parties are accorded 21<sup>st</sup> days upon which to have fully complied with the provision of Order 11 of Civil Procedure Rules, 2010 on Case Management.
  - f. That the costs of the Notice of Motion application dated 19<sup>th</sup> September, 2021 be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein.



**RULING READ, SIGNED AND DELIVERED AT IN COURT THIS ...28<sup>TH</sup> DAY OF APRIL 2022.**

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

**ENVIRONMENT AND LAND COURT**

**MOMBASA**

**In the presence of:**

M/s. Yumnah Hassan, Court Assistant.

Mr. Kenzi Advocate for the Plaintiff.

M/s. Thuku Advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

