



**Ethics & Anti-Corruption Commission v Mitema Holdings & 13 others (Environment and Land Appeal E203 of 2021) [2022] KEELC 2699 (KLR) (12 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2699 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E203 OF 2021**

**JO MBOYA, J**

**MAY 12, 2022**

**BETWEEN**

**ETHICS & ANTI-CORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**MITEMA HOLDINGS ..... 1<sup>ST</sup> DEFENDANT**  
**MAYWOOD LIMITED ..... 2<sup>ND</sup> DEFENDANT**  
**NOVA CONSTRUCTION COMPANY LIMITED ..... 3<sup>RD</sup> DEFENDANT**  
**SHITAL BHANDARI ..... 4<sup>TH</sup> DEFENDANT**  
**ROSEMARY WANJIKU IRUNGU ..... 5<sup>TH</sup> DEFENDANT**  
**FATMA ABDALLA AHMED ..... 6<sup>TH</sup> DEFENDANT**  
**HANNAH WANJIKU IHIGO ..... 7<sup>TH</sup> DEFENDANT**  
**ALI MALEKYA MWANZI ..... 8<sup>TH</sup> DEFENDANT**  
**JULIA OJIAMBO ..... 9<sup>TH</sup> DEFENDANT**  
**SAMUEL GATHOGO MWANGI ..... 10<sup>TH</sup> DEFENDANT**  
**FREDRICK KIMANI KIMEMIA ..... 11<sup>TH</sup> DEFENDANT**  
**WILSON GACHANJA ..... 12<sup>TH</sup> DEFENDANT**  
**CONSOLIDATED BANK OF KENYA LTD ..... 13<sup>TH</sup> DEFENDANT**  
**REGISTRAR OF TITLES ..... 14<sup>TH</sup> DEFENDANT**



## RULING

1. The Ruling herein relates to two Applications, namely the Notice of Motion Application dated the June 3, 2021, filed by and/or on behalf of the Plaintiff/Applicant and the Chamber Summons Application dated August 2, 2021, the latter filed by the 13<sup>th</sup> Defendant.
2. For clarity, the Application dated the June 3, 2021, seeks the following Orders:
  - i. ....(Spent).
  - ii. This Honourable Court do issue an order restraining the 4<sup>th</sup> and 10<sup>th</sup> Defendants by themselves, their agents, servants and/or employees or any other person acting on their behalf from selling, leasing, charging, sub-dividing, developing, wasting, transferring or in any other way dealing with L.R No. Nairobi Block 90/599 And Nairobi Block 90/591 and Nairobi Block 90/595 pending the inter-partes hearing and determination of the Application.
  - iii. This Honourable Court do issue an order restraining the 4<sup>th</sup> and 10<sup>th</sup> Defendants by themselves, their agents, servants and/or employees or any other person acting on their behalf from selling, leasing, charging, sub-dividing, developing, wasting, transferring or in any other way dealing with L.R No. Nairobi Block 90/599 and Nairobi Block 90/591 and Nairobi Block 90/595 pending the inter-partes hearing and determination of the suit.
  - iv. The Costs of this Application be provided for.
3. The subject Application is premised on the grounds on the face thereof and same is further supported by the affidavit of one, Rosemary Syokau, sworn on the June 3, 2021 and to which the deponent has attached and/or exhibited a total of 13 documents.
4. Upon being served with the subject Application the 10<sup>th</sup> & 11<sup>th</sup> Defendants duly responded to the Application vide Replying affidavits sworn on the September 22, 2021, wherein same enumerated the manner and circumstances in which the suit properties namely, LR Nos Nairobi Block 90/591 to 595, were transferred and registered in their names.
5. On the other hand, the 13<sup>th</sup> Defendant also filed a Replying affidavit sworn by one Festus Wanyonyi, who described himself as the Credit Administration Manager at consolidated Bank limited, namely, the 13<sup>th</sup> Defendant herein.
6. Nevertheless, the rest of the Defendants herein neither filed Grounds of Opposition nor Replying affidavits to the subject Application.
7. The 2<sup>nd</sup> Application, namely, the Chamber Summons Application dated August 2, 2021, seeks the following orders;
  - a. The Honourable court be pleased to strike out the name of the 13<sup>th</sup> Defendant from the main suit herein.
  - b. The Costs of this Application as well as those of the suit against the 13<sup>th</sup> Defendant be borne by the Plaintiff.
8. Suffice it to note that the subject application herein is premised and/or based on the various grounds contained at the foot thereof and same is further supported by the affidavit of one Festus Wanyonyi, sworn on the August 2, 2021.



9. Upon service of the Chamber summons Application, the Plaintiff herein filed a Response thereto and in respect of which the Plaintiff opposed the Application. For clarity, the Plaintiff has substantially reiterated the averments at the foot of own Application.
10. On the other hand, the rest of the Defendants did not file any response, either by way of Grounds of opposition or by Replying affidavit or at all.

### **Deposition by the Parties:**

#### **Plaintiff's Deposition in Support of the Application Dated the June 3, 2021.**

11. Vide Supporting Affidavit sworn on the June 3, 2021, one Rosemary Syokau, who is an Investigator with the Ethics & Anti-Corruption commission, namely, the Plaintiff/Applicant herein, has averred that the suit properties herein were hitherto part and parcel of L.R No. Nairobi/block 90/229, situate within Loresho area, within the City of Nairobi.
12. Further, the deponent has stated that L.R No. Nairobi/block 90/229 situate within Loresho area, within the City of Nairobi and measuring approximately 1.93 Ha was indeed land that was surrendered by the residents of Loresho Area following the subdivision of Plot No. 5952, LR 11653, for Public use.
13. The deponent has further averred that following the surrender of L.R No. 90/229, the surrender was thereafter accepted by the Government of Kenya and an approved Development Plan number 107, was prepared and the Subject parcel of land was alienated in favour of Nairobi City Council, for Water reticulation works and in particular, for the Construction of a Water Reservoir and related water distribution installation.
14. It has further been averred that upon the alienation of the said parcel of land to and in favor of Nairobi city council, the City council of Nairobi proceeded to and indeed constructed a water Reservoir thereon together with an Office Block, a Pump house and Staff Quarters.
15. On the other hand, the deponent has further averred that the water reservoir together with the installation, which were constructed in the said parcel of land, were indeed constructed on or about the 19978 and that the aforesaid infrastructure have remained in existence thereon to date.
16. Other than the foregoing, the deponent has further stated that the Water Reservoir standing on the said property was meant to act as a Distribution point of water from Sasumua Dam and thereafter distribute same to the Residents of Loresho, Gigiri, Spring Valley, Nyari and Kyuna areas within the city of Nairobi.
17. Nevertheless, the deponent has proceeded to and averred that on or about the year 1995, the 12<sup>th</sup> Defendant, who was then the Commissioner of lands, directed the Director of Physical Planning to prepare Part Development Plans for residential plots, which were to be excised and/or otherwise curved out of the subject Parcel of land.
18. Based on the foregoing, the deponent has averred that the Director of Physical Planning actually proceeded to and prepared of the Development Plans, culminating into the alienation of and/ or the hiving of three plots out of the subject property.
19. It has been averred that as a result of the actions by the 12<sup>th</sup> Defendant, three resulting sub-divisions ( read portions of land) were created out of the subject property, leading to the registration of LR Nos Nairobi/Block 90/584, Nairobi Block 90/585 and Nairobi Block 90/586, respectively.



20. The Deponent has further averred that as a result of the subdivision of the original parcel of land, namely Nairobi/Block 90/229, the resultant portion of land where the water reservoir remained, was registered as L.R No. Nairobi/Block 90/587.
21. On the other hand, the deponent has averred that LR Nos Nairobi/Block 90/584, Nairobi Block 90/585 and Nairobi Block 90/586, respectively, were thereafter allocated to, transferred and registered in the names of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, respectively.
22. It has further been averred that the said properties namely, LR Nos Nairobi/Block 90/584, Nairobi Block 90/585 and Nairobi Block 90/586, were thereafter sold to and in favor of the 4<sup>th</sup> Defendant on or about the year 1996.
23. Subsequently, the deponent has averred that L.R No's Nairobi/Block 90/584, Nairobi Block 90/585 and Nairobi Block 90/586 respectively, were amalgamated culminating into the creation of one Parcel of Land, namely, L.R No. Nairobi/Block 90/599.
24. Other than the foregoing, the deponent has further averred that the remainder parcel of land namely L.R No. Nairobi/Block 90/587, wherein the Water Reservoir remained standing was further subdivided at the instance of the 12<sup>th</sup> Defendant and thereby creating six (6) plots L.R No. Nairobi Block 90/599 and Nairobi Block 90/591 and Nairobi Block 90/595, respectively.
25. It has been averred that upon the creation of the parcel of lands, ( details in terms of the preceding paragraph), LR No's L.R No. Nairobi Block 90/599 and Nairobi Block 90/591 and Nairobi Block 90/595, were transferred to and registered in the names of the 5<sup>th</sup> to 9<sup>th</sup> Defendants/Respondents.
26. Further, the deponent has averred that after the transfer and registration of the said parcel in the names of the 5<sup>th</sup> to 9<sup>th</sup> Defendants, same were thereafter sold to the 11<sup>th</sup> Defendant, who thereafter transferred same to the names of the 10<sup>th</sup> Defendant to hold same on Trust for himself.
27. On the other hand, it has been averred that the 10<sup>th</sup> Defendant thereafter proceeded to and took out a Loan facility from the 13<sup>th</sup> Defendant, whereupon the titles in respect of the suit properties were used as security.
28. It is further averred that the manner in which the suit properties were hived of and/or excised from the original parcel of land, which was already alienated in favor of Nairobi city Council for purposes of Public use, was irregular, illegal and unlawful.
29. Premised on the foregoing, the Plaintiff has therefore sought to have the Status of the suit Properties preserved and/or conserved, pending the hearing and determination of the suit.

**Response by the 10th and 11th Defendants Respondents:**

30. Vide Replying Affidavit sworn on the 22<sup>nd</sup> September 2021, the 11<sup>th</sup> Defendant has averred that same developed an interest in the purchase and acquisition of LR Nos. Nairobi Block 90/591 to 595, respectively.
31. Further, the 11<sup>th</sup> Defendant has averred that thereafter same proceeded to and entered into Sale Agreements with the previous registered owners over and in respect of the said properties, culminating into the transfer and registration of the said properties into his names.
32. Premised on the foregoing, the 11<sup>th</sup> Defendant has averred that he is a Bona fide Purchaser for value without notice of any defect in the title, prior to and/or before the transfer of same unto himself.



33. On the other hand, the 11<sup>th</sup> Defendant has further averred that it is himself who transferred and/or caused to transfer the suit properties, namely, L.R No. Nairobi Block 90/591 to 595, to and in favor of the 10<sup>th</sup> Defendant to enable same to procure and/or obtain a Banking facility.
34. In a nutshell, the 11<sup>th</sup> Defendant has therefore averred that same was neither party nor privy to any fraud, impropriety and/or illegality in the annexation and/ or excision of the suit Properties from the original parcel of land, which was allegedly reserved for Public use.

#### **Response by the 13th Defendant/respondent**

35. Vide Replying Affidavit sworn on the July 27, 2021, one Festus Wanyonyi, has averred that the 13<sup>th</sup> Defendant herein is a Banking institution, duly incorporated within the Republic of Kenya and carrying out Banking services.
36. It has further been averred that in the course her daily activities/ services, the 13<sup>th</sup> Defendant was approached by the 10<sup>th</sup> Defendant who sought to procure and/or be granted a loan facility in the sum of Kshs..42, 000, 000/= only.
37. It has further been averred that upon the approach, the 13<sup>th</sup> Defendant reviewed the Request and thereafter generated a Letter of offer to and in favor of the 10<sup>th</sup> Defendant. Consequently, the 13<sup>th</sup> Defendant invited the 10<sup>th</sup> Defendant to perfect the securities, to secure the intended borrowing.
38. Further to the foregoing, the deponent has averred that the 10<sup>th</sup> Defendant thereafter proceeded to and availed the titles in respect of the suit properties, namely L.R No's Nairobi Block 90/591 to 595, and thereafter a Charge was registered against the said titles.
39. Subsequently, the deponent has averred that the 13<sup>th</sup> Defendant proceeded to and disbursed the loan facility in favor of 10<sup>th</sup> Defendant, who appropriated the Loan and undertook to repay same in line with the terms of the Charge Instruments.
40. Be that as it may, the deponent has averred that the loan facility which was disbursed to and in favor of the 10<sup>th</sup> Defendant was duly and fully liquidated and in this regard the 13<sup>th</sup> Defendant executed a Discharge of charge and thereafter returned the original titles to and in favor of the 10<sup>th</sup> Defendant.
41. In the premises, the deponent has averred that following the Discharge of charge and coupled with the release of the original titles, the 13<sup>th</sup> Defendant herein no longer has any claim, Rights and/or interests over and in respect of the suit Properties at all.
42. Based on the foregoing, the deponent has thus averred that the entire suit, as well as the Application filed by the Plaintiff do not disclose any reasonable cause of action, either as known to Law or otherwise.

#### **Response by the 2nd And 3rd Defendants'**

43. The Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants expressly stated that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants shall not be opposing the two (2) Application which were under consideration. For clarity, the Applications which were referred to were application which is the subject of the ruling herein.

#### **Response by the 4th Defendant**

44. Similarly, Counsel for the 4<sup>th</sup> Defendant, informed the court vide proceedings of December 14, 2021 that the 4<sup>th</sup> Defendant shall also not be opposing the Application.



## **Chamber Summons Application Dated the 2nd August 2021**

### **Deposition on Behalf of the 13th Defendant**

45. Vide Supporting Affidavit sworn on the August 2, 2021, one Festus Wanyonyi, on behalf of the 13<sup>th</sup> Defendant has averred that the 10<sup>th</sup> Defendant herein approached the 13<sup>th</sup> Defendant with a request for a Banking facility in the sum of Kshs.42, 000, 000/= only.
46. It has further been averred that following the approach, the 13<sup>th</sup> Defendant reviewed same and thereafter proceeded to and issued an Offer letter to the 10<sup>th</sup> Defendant.
47. On the other hand, it has been averred that vide the Offer letter, the 13<sup>th</sup> Defendant requested the 10<sup>th</sup> Defendant to bring forth and perfect appropriate securities in favor of the 13<sup>th</sup> Defendant, with a view to securing the intended Banking Facility.
48. Pursuant to the foregoing, the deponent has proceeded and averred that indeed the 10<sup>th</sup> Defendant perfected the securities and thereafter charges were registered as against the title documents, to secure the Interests of the 13<sup>th</sup> Defendant.
49. Nevertheless, it has been averred that the Banking facility which was granted to and in favor of the 10<sup>th</sup> Defendant, was subsequently liquidated and/or serviced, culminating into the 13<sup>th</sup> Defendant executing Discharge of charge and releasing the original title Documents back to the 10<sup>th</sup> Defendant.
50. Based on the foregoing, the 13<sup>th</sup> Defendant, has therefore averred that upto and including the filing of the subject suit, same do not have any legal and/or equitable interests therein. For the avoidance of doubt, the 13<sup>th</sup> Defendant has stated that the Loan facility, has since been fully repaid.
51. Consequently, 13<sup>th</sup> Defendant has implored the court to expunge and/or strike out the name of the 13<sup>th</sup> Defendant from the Subject Proceedings and mitigate further costs and Expenses.

### **Response by the Plaintiff:**

52. Vide Replying affidavit sworn by Rosemary Syokau, the Plaintiff/Respondent has opposed the subject application and same has reiterated the contents of the supporting affidavit sworn on the June 3, 2021.
53. For the avoidance of doubt, the deponent of the Replying affidavit has averred that to the extent that the titles in respect of some of the suit properties were charged to and in favor of the 13<sup>th</sup> Defendant, the 13<sup>th</sup> Defendant is therefore a necessary Party in respect of the subject matter.
54. On the other hand, the deponent has further stated and/or averred that there exists a Reasonable cause of action as against the 13<sup>th</sup> Defendant and in this regard, the presence of the 13<sup>th</sup> Defendant is necessary for purposes of effectual and effective determination of the subject dispute.

### **Response By The Rest Of The Defendants:**

55. The rest of the Defendants did not file any Grounds of opposition and/or Replying affidavit to the Chamber summons Application by and/or on behalf of the 13<sup>th</sup> Defendant.
56. In any event, it is important to recall that the counsel the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant indicated that same was not opposed to either of the Applications which were under considerations.



### **Submissions by the Parties:**

57. The subject Application came up for hearing on the November 9, 2021, whereupon directions were issued and/or granted to the effect that the two applications, namely, the Application dated the June 3, 2021 and the August 2, 2021, be heard and disposed of simultaneously.
58. On the other hand, directions were further given that the two Applications were to be canvassed and disposed of by way of written submissions, which were to be filed and exchanged within prescribed timelines.
59. Suffice it to observe, that the Parties herein proceeded to and filed their respective submissions in respect of the two applications. For clarity, the Plaintiff filed her submissions relating to the Application for injunction on the March 22, 2022.
60. On their part, the 10<sup>th</sup> and 11<sup>th</sup> Defendants filed their written submissions in opposition to the Notice of motion Application for injunction on the March 25, 2022.
61. On her part, the 13<sup>th</sup> Defendant filed her written submissions, essentially in respect of the Chamber summons Application, on the February 17, 2022.
62. It is imperative to note that the written submissions which I have alluded to in the preceding paragraphs, form part and parcel of the Court records and that same have been duly appraised, considered and taken into account.
63. Nonetheless, it is worthy to state that the submissions which have been filed have reiterated the positions taken by the respective Parties vide the depositions, which the Court has alluded to and quoted in extenso, in the segments dealing with the Depositions by the Parties.

### **Issues for Determination:**

64. Having reviewed the Applications under reference, the Supporting Affidavit thereto and the responses filed and having similarly, considered the written submissions filed on behalf of the Parties, the following issues do arise and are germane for Determination;
  - i. Whether the Plaintiff has established a Prima facie case with overwhelming chances of success.
  - ii. Whether the Plaintiff is disposed to suffer Irreparable loss if the orders sought are not granted.
  - iii. Whether the Plaintiff's suit Discloses a reasonable cause of action against the 13<sup>th</sup> Defendant.

### **Analysis and Determination**

#### **Issue Number 1 Whether the Plaintiff has established a Prima Facie case with overwhelming chances of success.**

65. Before venturing to address and/or determine whether the Plaintiff herein has established and/or laid out a *prima facie* case with overwhelming chances of success, it is imperative to take cognizance of the definition of what constitutes a Prima facie case.
66. In this regard, it is important to appreciate that the meaning of the word prima facie case, which is a Latin terminology, has previously been discussed and addressed in various decisions.



67. In the premises, I am therefore inclined to refer to and adopt the holding of the Court of Appeal in the case of *Mrao v First American Bank Limited* (2003) eKLR, where the court observed as hereunder;

“A *prima facie* case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude 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.”

68. On the other hand, it is also worthy to note and/or state that the meaning and import of what constitutes a Prima facie case was re-visited by the Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, where the court observed as hereunder;

“Prima facie” is a Latin phrase for “at first sight”, whose legal meaning and application has been the subject of varying interpretation by courts in many jurisdictions. Phrases like “a serious question to be tried”, “a question which is not vexatious or frivolous”, “an arguable case” have been adopted to describe the burden imposed on the applicant to demonstrate the existence of prima facie case. The leading English House of Lords case of the American Cyanamid Co. Ethicon Ltd [1975] AC 396 is a case in point.

The meaning of “*prima facie* case”, in our view, should not be too much stretched to land in the loss of real purpose. The standard of prima facie case has been applied in this jurisdiction for over 55 years, at least in criminal cases, since the decision in *Ramanlal Trambaklal Hatt V. Republic* [1957] E.A. 332.

69. Further the Court of Appeal proceeded to and made the following observation;

“We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.

We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges.

The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.

70. From the foregoing definition, what is thus imperative is that the Plaintiff must place before the Court such facts, which on the face of it, show and/or establish that indeed the Plaintiff/Applicant’s rights over the subject matter in dispute have been breached, violated and/or infringed upon, to warrant intervention by the court.

71. On the other hand, the Plaintiff is also called upon to establish and/or lay out a basis towards proving ownership and/or title in respect of the disputed property, albeit on a prima facie case.



72. Premised on the foregoing, it is therefore appropriate to discern and/or authenticate whether the Plaintiff, has indeed met and/or satisfied the threshold of a prima facie case, to warrant the grant of the orders sought.
73. I beg to point out that the Plaintiff herein has placed before the Court sufficient material and/or facts to show that L.R No. Nairobi/Block 90/229, hereinafter refer to as the original parcel of land, was indeed surrendered to the Government of Kenya by residents of Loresho Area and same thereafter constituted public property.
74. On the other hand, the Plaintiff has also placed before the court uncontroverted evidence that upon the surrender of the original parcel of land to the Government, same was alienated to and in favor of Nairobi City Council for purposes of establishment of a Water reservoir and incidental installations, for purposes of ensuring distribution of water to Loresho Area and its Environs.
75. Having been alienated to and in favor of Nairobi City Council for a specific and designated purpose, namely, the construction of a Water Reservoir, the original parcel of land stood alienated and/or reserved, for all intents and purposes.
76. In the premises, the original parcel of land which was already alienated and reserved ceased to be un-alienated Government land, which could thus be alienated by and/or at the instance of the 12<sup>th</sup> Defendant herein, either in the manner he did or at all.
77. For the avoidance of doubt, what amounts to and/or constitutes un-alienated Government land was duly defined vide Section 2 of the *Government Land Act*, Chapter 280 Laws of Kenya (now repealed) as hereunder;
- “unalienated Government land” means Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment.
78. Based on the foregoing, it is my observation that where land has been alienated and/or reserved for a Particular purpose, prima facie, such land does not lend itself out for further alienation.
79. If any case law was required to fortify and/or buttress the foregoing legal statements, this Court would quickly adopt and endorse the holding of the Court in *Kenya Anti-Corruption Commission v Online Enterprises Limited & 4 others* [2019] eKLR, where the court stated as hereunder;
- “The above judicial authorities are in consonant with the plaintiff’s case. The 5<sup>th</sup> defendant had no authority to alienate land that had been reserved for Kenya Railways as has been proved by the evidence and the documents produced.. The defendants claimed that they were bona fide purchasers for value without notice.’
80. Based on the foregoing, it is my finding, without going into depth, that the Plaintiff/Applicant has laid out a case, which shall warrant investigation by this Honourable court, with a view to authenticate the propriety, legality, validity and bona fides of the process leading to the excision of portions of the original property, which stood alienated, with a view to confirming whether the resultant titles are lawful or otherwise.
81. Be that as it may, I must remind myself that while dealing with an Application for temporary injunction, I am not obliged to make conclusive finding of facts, but nevertheless, I must calibrate the facts placed before me, with a view to forming a prima facie opinion.



**Issue Number 2 Whether the Plaintiff is disposed to Suffer Irreparable loss if the order sought are not granted.**

82. The Second critical issue for determination relates to whether the Plaintiff/Applicant is disposed to suffer Irreparable loss, if the orders of temporary injunction are not granted.
83. Similarly, just like *prima facie* case, Irreparable loss has also attracted several discourse in a bid to ascertain the meaning, import and scope thereof.
84. In this regard, I beg to refer to the succinct definition of what constitutes Irreparable loss which was applied by the Court of Appeal in the often-cited case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, where the Court observed as hereunder;
- “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.
85. Premised on the foregoing, the question that needs to be addressed and/or answered in respect of the subject matter is whether a failure to grant the order of temporary injunction will occasion Irreparable loss to the Plaintiff/Applicant.
86. Before endeavoring to answer the foregoing question, it must be noted that the Plaintiff/Applicant herein is actually a Constitutional body created pursuant to the provisions of *the Constitution* of Kenya, 2010 with a specific mandate, inter-alia, Recovery of Public Assets that were Corruptly acquired.
87. In respect of the subject matter, the Plaintiff has filed the suit with a view to recovering what is said to have been Public property, but which was (sic) unlawfully alienated and in the premises the loss that will arise and/or accrue, is not personal to the Plaintiff, but same is general to the residents of Loresho Area and by extension the city county of Nairobi.
88. On the other hand, it cannot be gainsaid that to the extent that the 4<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants currently hold titles to the suit properties, same are at liberty to alienate, dispose of, charge and/or otherwise encumber the suit properties, in such a manner that would place the suit properties beyond the reach of the Plaintiff herein.
89. Other than the likelihood of the suit titles being placed beyond the reach of the Plaintiff, there is another aspect that may arise. For coherence, where the suit properties are transferred to third parties, there shall be a likelihood of multiplicity of suits and/or amendments, whose net effect will prejudice the interests of the Plaintiff and the general public.
90. Taking into account the foregoing, I am obliged to find and hold that indeed the Plaintiff has demonstrated that same shall be disposed to suffer irreparable loss.
91. Perhaps, it is necessary to mention that the 10<sup>th</sup> and 11<sup>th</sup> Defendants had stated that the grant of the orders of injunction would culminate into their eviction from the suit properties and thereby violate their legitimate rights and/or interests thereto.
92. However, I must point out that the nature of the orders sought by the Plaintiff in terms of the subject Application, are geared towards preservation and conservation of the suit properties and to bar their alienation pendete lite.



93. Other than the foregoing, the 10<sup>th</sup> and 11<sup>th</sup> Defendant had also contended that same bought and/or acquired the suit properties from previous owners, without notice of any defect in the title. Consequently, the 10<sup>th</sup> and 11<sup>th</sup> Defendants have impleaded the Doctrine of bona fide purchaser for value without notice.
94. Notwithstanding the foregoing, it is imperative to observe that at this interlocutory stage, the circumstance under which the 10<sup>th</sup> and the 11<sup>th</sup> Defendants acquired the suit properties need not be subjected to exhaustive scrutiny.
95. Be that as it may, the issues raised by the 4<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants, pertaining to the legality and propriety of their titles, would have to await a plenary hearing, when the Parties shall be obliged to tender oral Evidence and be subject to Cross Examination, where appropriate.
96. In a nutshell, I come to the conclusion that the Plaintiff has similarly, demonstrated that same shall be exposed to suffer irreparable loss.

**Issue Number 3 Whether the Plaintiff's suit Discloses a reasonable cause of action against the 13<sup>th</sup> Defendant**

97. The 13<sup>th</sup> Defendant, which is a Banking institution incorporated in Kenya and which specializes in provision of banking services, has indicated that same was approached by the 10<sup>th</sup> Defendant with a request for provision of a banking facility.
98. Further, the 13<sup>th</sup> Defendant has also posited that upon the approach by and/ or at the instance of the 10<sup>th</sup> Defendant, same reviewed the request and thereafter generated a Letter of offer in favor of the 10<sup>th</sup> Defendant herein.
99. On the other hand, the 13<sup>th</sup> Defendant has also stated that after the issuance of the Letter of offer, the 10<sup>th</sup> Defendant perfected securities in favor of the 13<sup>th</sup> Defendant, with a view to securing the intended Banking facility.
100. Subsequently, the 13<sup>th</sup> Defendant has contended that after satisfying the conditions contained at the foot of the Letter of offer and the consequential charge instrument, the 13<sup>th</sup> Defendant disbursed the sum of *kes.*42, 000, 000/= Only, in favor of the 10<sup>th</sup> Defendant.
101. Notwithstanding the foregoing, the 13<sup>th</sup> Defendant has further averred that after the appropriation of the disbursed monies, the 10<sup>th</sup> Defendant fully and effectually repaid the monies at the foot of the Banking facilities.
102. Premised on the foregoing, the 13<sup>th</sup> Defendant has stated and which Evidence has not been controverted, that same proceeded to and executed a discharge of charge and thereafter released the original titles back to the 10<sup>th</sup> Defendant.
103. It must be noted that as a Financier, the interests of the 13<sup>th</sup> defendant was only in the recovery of the monies disbursed at the foot of the banking facility and the moment the said monies were fully recovered by the financier, in this case the 13<sup>th</sup> Defendant, same would have no further stake in the discharged security.
104. On my part, I have not heard the Plaintiff to claim that the 13<sup>th</sup> Defendant also participated in (sic) fraudulent and illegal acquisition of the suit premises. For clarity, no such averment has been made in the Plaintiff.



105. Other than the foregoing, I have also not seen any claim that is directed as against the 13<sup>th</sup> defendant to warrant the retention of the 13<sup>th</sup> Defendant. In my humble view, Parties are not retained in suits for cosmetic and/ or perfunctory purposes.
106. In the premises, the impugned titles having been discharged by the 13<sup>th</sup> Defendant, who has clearly stated that same has no more interest in respect of the said titles, no further proceedings can be sustained and/or maintained against the 13<sup>th</sup> Defendant.
107. Put differently, it is my finding and holding that the Plaintiff's suit does not disclose a reasonable cause of action as against the 13<sup>th</sup> Defendant.
108. Notwithstanding the foregoing, I must take the necessary caution that the court ought only to strike out a suit and/or the name of a Party where the suit is clearly hopeless and irredeemably bad and that where a suit can be infused with life, then same ought to be sustained.
109. Nonetheless, I am satisfied that the Suit by the Plaintiff/Applicant as against the 13<sup>th</sup> Defendant, who has no claim and/or interests over the suit properties, is indeed hopelessly and irredeemably bad and calls for summary procedure.
110. In a nutshell, I find and hold that the Application dated the 2<sup>nd</sup> August 2021 is merited.
111. In support of the foregoing observation, I adopt and endorse the finding of the Court in the case of *Ali Adi Dere v Hash Houliers Ltd & Another* (2018) eKLR, where the court stated as hereunder;

“ I find that there is no cause of action against the 2<sup>nd</sup> defendant, and the suit against it is struck out with costs to the 2<sup>nd</sup> defendant, the plaintiff having refused to withdraw the suit on invitation by the 2<sup>nd</sup> defendant.

On the basis of the foregoing analysis, I find that the position of the 2<sup>nd</sup> Defendant herein was merely one of a financier whose interest was limited to recovery of the monies lent to the 1<sup>st</sup> defendant for purposes of acquiring the motor vehicle subject of the suit herein and which interest was secured by a joint registration of the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant as owner so the motor vehicle’.

#### **Final Disposition:**

112. Having addressed and/or dealt with the issues for determination which were outlined herein before, it is now appropriate and/or expedient to render the Dispositive order.
113. Consequently and in the premises, I now make the following Orders;
  - a. The Application dated the June 3, 2021, be and is hereby allowed in terms of prayer 3 only.
  - b. The Chamber summons Application dated the August 2, 2021 be and is hereby allowed in terms of prayer 1 only.
  - c. Cost of the Application dated the June 3, 2021 be and are hereby awarded to the Plaintiff/Applicant.
  - d. Nevertheless, each Party shall bear own costs of the Application dated the August 2, 2021.
  - e. In a nutshell, the court proceeds to strike out the name of the 13<sup>th</sup> Defendant from the main suit, albeit with no orders to cost while on the other hand, the Application for Temporary injunction is essentially allowed in terms of prayer 3 only as pointed out elsewhere herein before.



114. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY 2022.**

**HON. JUSTICE OGUTTU MBOYA**

**JUDGE**

**In the Presence of;**

Kevin Court Assistant

Ms. Maina h/b for Shamalla for the Plaintiff/Applicant

Mr. Artur Ingutia for the 2nd & 3rd Defendant

Mr. Ongegu for the 10th & 11th Defendants

Mr. Shikhu h/b for Mr. Kakhula for the 4th Defendant

Mr. Obuya for the 9th Defendant

Mr. Nyanchoga for the 13th Defendant

