



Ein-Geid Limited v SBM Bank Limited (Environment & Land Case E434 of 2021) [2022] KEELC 3756 (KLR) (30 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3756 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E434 OF 2021**

**JO MBOYA, J
JUNE 30, 2022**

BETWEEN

EIN-GEID LIMITED PLAINTIFF

AND

SBM BANK LIMITED DEFENDANT

RULING

Introduction and Background

1. *Vide* the Notice of Motion Application dated the 16th December 2021, the Plaintiff herein seeks the following Orders:
 - a.(Spent).
 - b. This Honourable Court be pleased to restrain the Defendant by herself or through her servants, agents, licensees and/or employees by way of a Temporary Injunction from Rescinding or Cancelling the three Memoranda of Sale each dated 6th August 2021 in respect of following Properties pending the hearing and determination of this Application Inter-partes;

Title Number CIS-MARA/NGORE NGORE/39

Title Number CIS-MARA/NGORE NGORE/47

Title Number CIS-MARA/NGORE NGORE/54
 - c. This Honourable Court be pleased to restrain the Defendant by herself or through her servants, agents, licensees and/or employees by way of a temporary injunction from advertising, offering for sale by public auction or in any manner whatsoever, or selling the of following Properties pending the hearing and determination of this application Inter-partes;

Title Number CIS-MARA/NGORE NGORE/8



Title Number CIS-MARA/NGORE NGOE/39

Title Number CIS-MARA/NGORE NGOE/47

Title Number CIS-MARA/NGORE NGOE/54

- d. This Honourable Court be pleased to restrain the Defendant by herself or her agents, servants, licensees and/or employees by way of a temporary injunction from rescinding or cancelling the three Memoranda of Sale each dated 6th August 2021 in respect of following properties pending the hearing and determination of this suit;
- Title Number CIS-MARA/NGORE NGOE/39
- Title Number CIS-MARA/NGORE NGOE/47
- Title Number CIS-MARA/NGORE NGOE/54
- e. This Honourable Court be pleased to restrain the Defendant by herself or through her servants, agents, licensees and/or employees by way of a temporary injunction from advertising, offering for sale by public auction or in any maner whatsoever, or selling the of following properties pending the hearing and determination of this suit;
- Title Number CIS-MARA/NGORE NGOE/8
- Title Number CIS-MARA/NGORE NGOE/39
- Title Number CIS-MARA/NGORE NGOE/47
- Title Number CIS-MARA/NGORE NGOE/54
- f. Costs of this Application be borne by the Defendant.
2. The subject Application is premised on the grounds enumerated at the foot thereof and same is further supported by the affidavit of one, Peter Nalianya Chmwile, who describes himself as a Director of the Plaintiff/Applicant and in respect of which same has annexed a total of 9 annextures.
3. Following the filing and service of the subject application, the Defendant duly entered appearance, filed Statement of Defense and also responded to the Application by filing a Replying Affidavit sworn on the 25th February, 2022, as well as a Notice of Preliminary Objection dated the same date.

Depositions by the Parties:

Plaintiff's/ Applicant's Case:

4. *Vide* Supporting Affidavit sworn by Peter Nalianya Chemwile, on the 16th December 2021, same has averred that the Plaintiff herein participated in an auction bid that was carried out and/or undertaken on the 6th August 2021, by and and/or at the instance of the Defendant herein.
5. Further, the deponent has averred that prior to the participation in the Auction bid, same was required to pay a bid fee of Kshs.1, 000, 000/= only, which the Plaintiff duly paid and was thereby authorized to participate in the auction.
6. Besides, the deponent has averred that it was mutually agreed that the bid fee, namely, the sum of Kshs.1, 000, 000/= Only, was to form part of the Deposit of the purchase price, that is, if the bidder, in this case, the Plaintiff was successful.
7. On the other hand, the deponent has averred that in the course of the auction bid, the Plaintiff herein emerged and was declared as the successful bidder over and in respect of L.R No's Title Number CIS-



MARA/NGORE NGORE/8, Title Number CIS-MARA/NGORE NGORE/39, Title Number CIS-MARA/NGORE NGORE/47 and Title Number CIS-MARA/NGORE NGORE/54, herein after referred to as the suit properties.

8. Following the conclusion of the auction, the deponent has averred that the Plaintiff proceeded to and paid in favor of the Defendant the aggregate sum of Kshs.4, 600, 000/= only, being the requisite 10% Deposit in respect of the 4 properties, which the Plaintiff had bid for.
9. On the other hand, the deponent has averred that after the payments, details in terms of the preceding paragraph, the Plaintiff herein was availed Memorandum of sale in respect of each of the properties that were sold *vide* the public auction and same, (read the deponent) proceeded to and executed each of the memorandum of sale.
10. Thereafter, the deponent has averred that the Plaintiff commenced the process of sourcing for funds with a view to paying off the balance of the purchase price, which balance is stated to have been due and payable within 90 days from the date of the execution of the memorandum of sale.
11. Further, the deponent has averred that the Plaintiff herein procured and/or obtained sufficient funds which enabled same to pay for 3 Properties in full. For clarity, the deponent has averred that the purchase price in respect of L.R No's Title Number CIS-MARA/NGORE NGORE/39, Title Number CIS-MARA/NGORE NGORE/47 and Title Number CIS-MARA/NGORE NGORE/54, were duly paid and/or settled.
12. Other than the foregoing, the deponent has averred that in respect of L.R No. Title Number CIS-MARA/NGORE NGORE/8, that the Plaintiff only paid a total of Kshs 3, 203, 000/= Only, out of the total purchase price amounting to Kshs .28, 925, 000/= only.
13. Based on the foregoing, the deponent has averred that the purchase price in respect of 3 out of the 4 properties, which were sold during the public auction, were duly paid and settled within the 90 day period.
14. As pertains to the other property, namely, LR No. Title Number CIS-MARA/NGORE NGORE/8, the deponent has averred that the Plaintiff proceeded to and applied for a Loan facility from Co-operative Bank Kenya limited, which facility was duly approved *vide* letter dated the 2nd December 2021.
15. Owing to the foregoing, the deponent has averred that same therefore wrote to and in favor of the Defendant and informed the Defendant of the slow pace of the processing of the loan facility, which was to be utilized for purposes of clearing the balance of the purchase price amounting Kshs.25, 952, 500/= only being the amount due and outstanding in respect of L.R No. Title Number CIS-MARA/NGORE NGORE/8.
16. Nevertheless, the deponent has averred that despite having informed the Defendant of the Banking facility which the Plaintiff had sought for and was in the process of procuring, the Defendant instructed and/or engaged a nominated Auctioneer to proceed with the sale and/or disposal of all the 4 properties irrespective of the fact that the Plaintiff had fully paid and settled the Purchase price in respect of 3 properties.
17. Besides, the deponent has averred that to the extent that the Plaintiff had fully paid the purchase price in respect of L.R No's, Title Number CIS-MARA/NGORE NGORE/39, Title Number CIS-MARA/NGORE NGORE/47 and Title Number CIS-MARA/NGORE NGORE/54, same proceeded to and wrote to the Defendant to process and issue the titles for the 3 named properties.



18. However, the deponent has continued to and averred that the Plaintiff's request to be availed and/or issued with titles over and in respect of the 3 properties, has been ignored and/or otherwise, disregarded by the Defendant herein.
19. Based on the threat by the Defendant to sell and/or dispose of the subject properties, coupled with the refusal to release the titles in respect of 3 properties, which the Plaintiff contends to have fully paid for, the Plaintiff was therefore constrained to and indeed lodged the subject suit.
20. Besides, the deponent has averred that to the extent that the Plaintiff has fully paid the Purchase price for and in respect of the 3 named properties, same (Plaintiff), has therefore acquired ownership rights in respect of the 3 named properties which therefore ought not to be alienated and disposed of by the Defendant.
21. In view of the foregoing, the deponent has therefore averred that the Plaintiff has established a *Prima facie* case with overwhelming chances of success and therefore same is entitled to the grant of an order of Injunction, to preserve and/or conserve the status of the Properties, particularly, the 3 named properties.
22. Further, the deponent has averred that having acquired ownership rights and interests over and in respect of the 3 named properties, excluding L.R No. Title Number CIS-MARA/NGORE NGORE/8, the Plaintiff is thus exposed to suffer irreparable loss, if the 3 named properties were to be sold, disposed of and/or otherwise alienated by the Defendant herein.
23. In short, the deponent has implored the court to find and hold that the Plaintiff has laid down and/or established a basis for the grant of the orders of temporary injunction, essentially, in respect of the Three Properties that have been fully paid for.

Response by the Defendant:

24. *Vide* Replying Affidavit sworn by one, namely, Julius Kimpei, who describes himself as the Debt Recovery Officer of the Defendant, the Defendant has contended that indeed same retained and/or instructed a nominated auctioneer to sell and dispose of the suit properties by way of Public auction.
25. Further, the deponent has averred that pursuant to the instructions of the Defendant, the nominated auctioneer proceeded to and indeed carried out a Public auction on the 6th of August 2021, whereby the suit properties were indeed placed on auction and that the Plaintiff herein emerged as the highest bidder.
26. Nevertheless, the deponent has averred that the sale over and in respect of the suit Properties was a block sale whereby all the property were sold enblock and that such terms were stipulated and/or contained in the Bid Register, which was binding on all the participating bidders.
27. Further, the deponent has averred that the purchase price over and in respect of the suit properties was stated and/or stipulated to be Kshs.42, 200, 000/= only.
28. Be that as it may, the deponent has averred that as at the 4th November 2021, the Plaintiff herein had only paid a total of Kshs.16, 178, 000/= only, as the purchase price in respect of the suit properties, and in this regard, there remained an outstanding balance amounting to Kshs.26, 022, 000/= only, which was due, owing and payable.
29. In the premises, the deponent has continued and stated that as a result of the failure by the Plaintiff to pay and/or settle the balance of the purchase price within the stipulated duration, then the Defendant was obliged to proceed and re-advertise the suit properties for sale and/or disposal.



30. Other than the foregoing, the deponent has contended that owing to the fact that the Plaintiff had not fully paid and/or settled the purchase price over and in respect of the suit properties, the issue beforehand touches on and/or concerns Accounts arising from the contractual relationship between the vendor and the purchaser, and in the premises, the dispute herein does not fall within the Jurisdiction of this court.
31. Premised on the foregoing, the deponent has proceeded to and averred that same has therefore been advised by the Defendant's Counsel that this court therefore is devoid of Jurisdiction. In this case, the deponent has invoked the provisions of Article 162 2(b) of the Constitution 2010, Section 13 of the Environment and Land Court, 2011 and Section 150 of the Land Act, 2012.
32. In the premises, the deponent on behalf of the Defendant has therefore contended that this court is not seized of the requisite jurisdiction and hence the entire suit, as well as the Application ought to and should be struck out.
33. Other than the Replying affidavit, the Defendant has also filed a Notice of Preliminary Objection, wherein same has reiterated the contention that the subject Dispute pertains to and/or concerns matters of Accounts and therefore, same ought to have been lodged before the High Court and not otherwise.

Submissions by the Parties:

34. The matter came up for hearing on the 7th March 2022, whereupon it was agreed that both the Application dated the 16th December 2021, as well as the Notice of Preliminary Objection dated the 25th February 2022, be canvassed and/or be disposed of simultaneously.
35. On the other hand, it was also agreed that the Application and the Preliminary Objection be canvassed by way of written submissions, and in this regard, the Parties were directed to file and exchange written submissions within stipulated timelines.
36. Pursuant to the foregoing, the Plaintiff filed her written submissions on the 28th April 2022, whereas the Defendant filed her written submissions on the 26th May 2022. For clarity, the two sets of Written submissions are on record.
37. Briefly, it is the Plaintiff's submission that on or about the 6th August 2021, same participated in an auction bid, whereby the Defendant's nominated auctioneer was tasked to sell and or dispose of the suit properties by way of Public auction.
38. Further, the Plaintiff has submitted that same participated in the bid and was ultimately, declared as the highest bidder, culminating into the generation of 4 separate sets of Memoranda of sale, each speaking to a separate Title.
39. On the other hand, the Plaintiff has also submitted that after being declared as the successful bidder, during and in the course of the auction, same proceeded to and remitted in favor of the Defendant the sum of Kshs.4, 600, 000/= only, being the 10% deposit, which was required to be paid at the fall of the Hammer.
40. The Plaintiff has further submitted that after the payment of the 10% Deposit, same sourced for and obtained funds which was used and/or utilized to clear the balance of the purchase price in respect of the 3 properties, namely L.R No's, Title Number CIS-MARA/NGORE NGORE/39, Title Number CIS-MARA/NGORE NGORE/47 and Title Number CIS-MARA/NGORE NGORE/54.



41. Other than the foregoing, the Plaintiff has submitted that the only property for which the Plaintiff did not fully pay for was L.R No. Title Number CIS-MARA/NGORE NGORE/8.
42. In view of the foregoing, it is the Plaintiff's contention that same acquired ownership rights over and in respect of the named 3 Properties, which cannot therefore be disposed of and/or alienated by the Defendant, either by way of public auction or otherwise.
43. Besides, the Plaintiff has submitted that having acquired ownership rights over and in respect of the 3 named properties, whose purchase price was fully paid and remitted to the Defendant, same would therefore suffer Irreparable loss, unless the orders of Temporary injunction are granted.
44. In support of the foregoing submissions, the Plaintiff has relied on various decisions including *Saaid Almed v Manasseh Denga & Another* (2019)eKLR, *Joseph Siro Mosioma v Housing Finance Company (k) Ltd & 3 Others* (2008)eKLR and *Nguruman Ltd v Jan Bonde Nielson & 2 Others* (2014)eKLR.
45. On the issue of Jurisdiction, the Plaintiff has submitted that the issues in dispute at the foot of the subject matter relates to the acquisition of ownership rights and/or interest in respect of 3 out of the 4 properties which were sold vide public auction on the 6th of August 2021.
46. Other than the foregoing, the Plaintiff has also submitted that same has also impleaded a claim for Specific Performance, whose purport and tenor is to compel the Defendant to execute the requisite Transfer Instrument and facilitate the transfer and registration of the 3 named properties, whose purchase price was duly paid and/or settled.
47. In the premises, the Plaintiff has submitted that the Environment and Land Court thus has the requisite jurisdiction to entertain, adjudicate upon and/or dispose of the subject matter, contrary to the submissions espoused and ventilated by the Defendant.
48. In support of the foregoing submissions the Plaintiff has invoked and relied on the decision in the case of *Patrick Musimba v National Land Commission & 5 Others* (2015)eKLR.
49. On her part, the Defendant has raised two pertinent issues. First and foremost, the Defendant has contended that the dispute beforehand touches on whether or not the Plaintiff, as the purchaser has paid the entire purchase price over and in respect of the suit properties.
50. According to the Defendant, the dispute is therefore one of Accounts or better still, taking of Accounts as between the Plaintiff and the Defendant and in this regard, the Dispute falls outside the jurisdiction of Environment and Land Court.
51. To fortify the foregoing submissions, the Defendant has invoked and relied in the decision in the case of *Co-operative Bank Ltd v Patrick Kange'ibe Njuguna & 5 Others* (2017) eKLR.
52. Other than the Jurisdictional question, the Defendant has submitted that the suit properties were sold enblock, namely, that the sale was block- based and hence the Plaintiff purchased the suit properties jointly and not severally.
53. Owing to the fact that the suit properties were sold jointly and not otherwise, the Defendant has therefore submitted that the Plaintiff was enjoined to pay the aggregate purchase price within the stipulated timeline and that failure to do so, would invalidate the entire sale.
54. In the premises, it is therefore the Defendant's contention that having failed to pay the aggregate purchase price, over and in respect of the suit properties, the Plaintiff was therefore in breach of the sale contract and thus same has acquired no legal rights and/or title to the suit properties.



55. In view of the foregoing, the Defendant has therefore submitted that the Plaintiff has not exhibited and/or established a *Prima facie* case, to warrant the grant of an order of temporary injunction either as sought or at all.
56. Further, the Defendant has also submitted that to the extent that the Plaintiff has acquired no legal rights and/or title to the suit properties, same would thus not suffer any Irreparable loss.
57. In view of the foregoing, the Defendant has relied on the *Decisions including Giella v Cassman Brown Ltd (1973) E.A 358, Mrao Ltd v First American Bank Ltd & 2 Others (2003)eKLR and Tom Otieno Odongo v Cabinet Secretary, Ministry of Labor, Social Security & Services, (2013)eKLR.*

Issues for Determination:

58. Having reviewed the Application dated the 16th December 2021, the Affidavit in support thereof, the Response by the Defendant thereto and the Notice of Preliminary Objection and having similarly considered the written submissions filed on behalf of the Parties, the following issues do arise and are thus germane for determination;
 - a. Whether this Court is seized and or possessed of the requisite Jurisdiction to entertain and/or adjudicate upon the subject Dispute.
 - b. Whether the Plaintiff has established a Prima facie case with overwhelming chances of success.
 - c. Whether the Plaintiff shall be disposed to suffer Irreparable loss.

Analysis and Determination:

Issue Number 1

Whether this court is seized and or possessed of the requisite Jurisdiction to entertain and/or adjudicate upon the subject Dispute.

59. The Defendant herein has contended that this court is not seized and/or possessed of the requisite jurisdiction to entertain and/or adjudicate upon the subject dispute.
60. Based on the foregoing contention, it is therefore imperative and/or expedient to interrogate the jurisdictional question and thereafter settle same before venturing to address the evidentiary issues and/or the merits of the application for temporary injunction, if such an endeavor would be necessary.
61. At any rate, having raised the issue of jurisdiction, it is therefore incumbent upon this court to ascertain what then does jurisdiction denote and what should happen, where the court and/or tribunal finds that same is not possessed of the requisite jurisdiction.
62. To be able to understand and appreciate the meaning and tenor of Jurisdiction, it is therefore appropriate to take cognizance of the decision of the Supreme Court Of Kenya, in the case of *Republic v Karisa Chengo & 2 others* [2017] eKLR, where the Court observed as hereunder;
 - (35) In the above regard, we note that in almost all the legal systems of the world, the term “jurisdiction” has emerged as a critical concept in litigation. *Halsbury’s Laws of England* (4th Ed.) Vol. 9 at page 350 thus defines “jurisdiction” as “...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal



way for decision.” John Beecroft Saunders in his *treatise Words and Phrases Legally Defined* Vol. 3, at page 113 reiterates the latter definition of the term ‘jurisdiction’ as follows:

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.

From these definitions, it is clear that the term “jurisdiction”, as further defined by *The Black’s Law Dictionary*, 9th Edition, is the Court’s power to entertain, hear and determine a dispute before it.

63. Other than the foregoing, another succinct definition of or discourse on what constitutes Jurisdiction was espoused in the case of [Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service](#) [2019] eKLR, where the Court of Appeal stated as hereunder;
 1. At the heart of this appeal is the issue of jurisdiction. It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?

In common English parlance, ‘Jurisdiction’ denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity *ab initio* and any determination made by such court will be amenable to being set aside *ex debito justitiae*.
64. From the foregoing, it is obvious that a court without jurisdiction cannot entertain and/or adjudicate upon a matter and/or dispute, whatsoever and howsoever. If anything, an Order made by a Court without Jurisdiction would be a nullity and void.
65. Given the centrality of jurisdiction in any issue and/or dispute, it is therefore critical and/or essential to determine whether this Court does have jurisdiction over and in respect of the subject matter or otherwise.
66. At any rate, it suffices to observe that the jurisdiction of a court of law flows from the Constitution and/or Statute and same cannot be conferred by arrogation, innovation and or craftsmanship at the instance of the Court, whatsoever. Simply put, jurisdiction must be anchored in the Constitution or Statute/ Charter establishing the Court, no less no more.



67. To vindicate the foregoing position, which is trite and obvious, one needs to take cognizance of the Supreme Court decision in the case of *Samuel K Macharia v Kenya Commercial Bank Ltd & Another* (2012)eKLR, where the Supreme Court observed at paragraph 68 as hereunder;

(68) A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

68. Having established the foregoing foundation, I must now interrogate the facts before me and juxtapose same as against the obtaining law and thereafter, settle the Jurisdictional question.

69. From the facts contained in the Plaint, as well as the affidavit in support of the application herein, the Plaintiff contends that same purchased all the 4 properties *vide* public auction carried out and/or conducted on the 6th of August 2021.

70. Further, the Plaintiff has averred and contended that upon the conclusion of the Public auction and in particular, at the fall of the Hammer, same paid to and in favor the Defendant the contractual 10% deposit.

71. It has further been stated that after the payment of the contractual 10% Deposit, the Defendant's nominated auctioneer prepared and generated 4 separate memorandum of sale, speaking to each auction bid and property and which memorandum of sale the Plaintiff duly executed, albeit individually.

72. On the other hand, the Plaintiff has further contended that after the execution of the memorandum of sale, relative to each and every property that was sold, same proceeded to and procured funds, which were paid to and acknowledged by the Defendant.

73. In a nutshell, the Plaintiff contends that same fully paid and settled the purchase price at the foot of three (3) properties, which properties were anchored on separate sale contracts, reflected by the memorandum of sale.

74. Based on the foregoing, the Plaintiff now seeks that this court interrogates the Memorandum of sale that were duly executed and the payments that were made and to thereafter ascertain whether or not the Plaintiff has acquired ownership rights and title to the 3 named properties, whose purchase price is said to have been fully paid.



75. Essentially, the Plaintiff has impleaded a claim based on acquisition of ownership rights and title to and in respect of 3 out of the named 4 properties and same requires a determination from this court.
76. Other than the foregoing, the Plaintiff has also laid a claim for Specific performance, whose import and tenor is to compel the Defendant to execute the requisite Transfer Instruments and effect transfer over and in respect of the 3 out of the named 4 properties.
77. Clearly, the issues raised at the foot of the Plaint and the Application herein, falls squarely within the jurisdiction of the Environment and Land Court in line with the provisions of Articles 162 2(b) of the Constitution 2010, as read together with Section 13 of the Environment and Land Court Act.
78. In short, I find and hold that the Preliminary objection, raised and ventilated by the Defendant herein, is premised on mis-apprehension of the substratum of the dispute before the court. Consequently, the Preliminary objection is misconceived and legally untenable.

Issue Number 2

Whether the Plaintiff has established a Prima facie case with overwhelming chances of success.

79. Having participated in the auction bid and having been declared as the highest bidder, the Plaintiff paid to and in favor of the Defendant the contractual deposit amounting to Kshs.4, 600, 000/= only, which was acknowledged and receipted.
80. On the other hand, after the payment of the Contractual 10%, the Defendant's nominated auctioneer generated 4 separate and distinct memorandum of sale, containing the terms of each and every contract and thereafter requested the Plaintiff to sign and/or execute same.
81. For the avoidance of doubt, the Plaintiff duly executed each individual of memorandum of sale and such execution connotes the existence of 4 separate contracts with distinct terms of engagement.
82. Even though the Defendant has submitted that the suit Properties were sold enblock and hence same are not severable, the existence of 4 separate memorandum of sale, seem to contradict the averments on behalf of the Defendant.
83. On the other hand, though the Defendant had alluded to a Bid Register, which was stated to have contained the terms that the sale was block-based, no such Register was annexed and/ or exhibited to the Court to underscore the said averment, or at all. In this regard, the averment to that effect remains unsupported.
84. I am alive to the fact that being an interlocutory application, the court is not enjoined to make any firm determination on the factual issues that bely the dispute, but, nevertheless the court is called upon to form an opinion, albeit on a Prima facie basis.
85. To my mind, having looked at the 4 separate memorandum of sale, I have come to the conclusion that there exists a strong basis to warrant the contention by the Plaintiff that the auction bids were carried out in respect of each and every individual property.
86. As to whether this proposition would carry the day or otherwise, it is imperative to point out that same must await the plenary hearing, to be conducted by the Trial Court, once the Discoveries shall have been done by the Parties.
87. Secondly, there is no gainsaying that the Defendant herein is holding on to substantial monies which were paid by the Plaintiff and which are contended to reflect the total payment over and in respect of



3 properties and yet despite holding the said substantial monies, the Defendant is still keen to alienate and dispose of all the suit properties.

88. To my mind, the memorandum of sale, which underlines and/or underscore the same contract, do not contain and/or reflect any clause pertaining to forfeiture.
89. In view of the foregoing and coupled with the claim that full payments were remitted over and in respect of 3 properties, I come to the conclusion that the Plaintiff herein has shown and/or exhibited that same has some scintilla of legal rights and/or claim to the stated 3 properties.
90. In short, it is my finding and holding that the Plaintiff has established and/or proven a *Prima facie* case.
91. To this end, it is appropriate to take cognizance of the decision in the case of *Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 others* (2003) KLR 125, where the Court of Appeal at page 137 held:-

“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 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.”

Issue Number 3

Whether the Plaintiff shall be disposed to suffer Irreparable loss.

92. Having found and established that the Plaintiff has proven the existence of a *prima facie* case, the next critical issue to be ascertained and/or established is whether the threatened alienation, sale and disposal of the named 3 properties, would occasion irreparable loss to the Plaintiff.
93. To my mind, having reportedly paid the full purchase price over and in respect of the 3 out of the named 4 properties, in line with the memorandum of sale and having acquired some scintilla of legal rights, the sale and/or alienation of the named properties would extinguish the Plaintiff's claim thereto and thus place the subject Properties beyond the reach of the Plaintiff.
94. In the premises, if the threatened actions by and or at the instance of the Defendant are allowed to proceed, it then means that the Plaintiff's claim, rights and/or interests, over the suit properties, if any, would have dissipated.
95. In the circumstances, it is apparent and/or evident that the Plaintiff has similarly established and/or showed that same shall be disposed to suffer Irreparable loss.
96. In any event, what constitutes and/or amounts to Irreparable loss was sufficiently defined and delineated *vide* the decision in the case of *Nguruman versus Jan Bonde Nielson & 2 Others* (2014)eKLR, where the court observed as hereunder;

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.



Final Disposition:

97. Having addressed and/or dealt with issues that were outlined for determination, I come to the conclusion that the Notice of Motion Application dated the 16th December 2021 is substantially meritorious.
98. In the premises, same be and is hereby allowed in on the following terms;
- a. A Temporary Injunction be and is hereby issued to restrain the Defendant by themselves or through their servants, agents, licensees and/or employees by way of a temporary injunction from advertising, offering for sale by public auction or in any manner whatsoever, or selling the of following properties pending the hearing and determination of the Suit herein.
Title Number CIS-MARA/NGORE NGORE/39
Title Number CIS-MARA/NGORE NGORE/47
Title Number CIS-MARA/NGORE NGORE/54
 - b. An Order of Temporary Injunction be and is hereby issued to restrain the Defendant by themselves or through their servants, agents, licensees and/or employees by way of a temporary injunction from rescinding or cancelling the three Memoranda of Sale each dated 6th August 2021 in respect of following properties pending the hearing and determination of this suit;
Title Number CIS-MARA/NGORE NGORE/39
Title Number CIS-MARA/NGORE NGORE/47
Title Number CIS-MARA/NGORE NGORE/54
 - c. The Defendant is however at liberty to advertise and/or otherwise dispose of L.R No. Title Number CIS-MARA/NGORE NGORE/8.
 - d. Cost of this Application to abide the cause.
99. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JUNE 2022.

OGUTTU MBOYA,

JUDGE.

In the Presence of;

Kevin Court Assistant

Mr. Khayega for the Plaintiff/ Applicant.

Mr. Obura Oniala for the Defendant/ Respondent

