Kutto & 3 others v EMO Investment Ltd & another (Environment & Land Case E011 of 2022) [2022] KEELC 3315 (KLR) (15 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3315 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND CASE E011 OF 2022

SM KIBUNJA, J

JUNE 15, 2022

BETWEEN

JOHN KUTTO ..... 1ST PLAINTIFF

FLORENCE A. MURGOR ..... 2ND PLAINTIFF

IMMACULATE KANDIE ..... 3RD PLAINTIFF

SERGOEK HILL GAA LIMITED ..... 4TH PLAINTIFF

AND

EMO INVESTMENT LTD ..... 1ST DEFENDANT

STEPHANUS PETRUS KRUGER ..... 2ND DEFENDANT

RULING

1. The Plaintiffs filed the notice of motion dated the 9th February, 2022 that is indicated to be brought "under *the Constitution*, Order 10 Rule 11 and Order 22 of the Civil Procedure Rules, section 2A & 2B of the Civil Procedure Rules, 2010 (sic)." seeking for the following orders;

    a. "Spent;

    b. THAT, pending the hearing and determination of this application inter partes, a temporary injunction be issued restraining the Plaintiff / Respondent (sic) either by itself or agents/ servants from trespassing into, erecting structures, offering for sale, alienating and to specifically cease all construction on the suit properties or otherwise in any manner interfering with land parcels number land parcels number Land Reference 28962/106, 28962/107, 28962/112, 28962/113, 28962/116, 28962/117, 28962/122, 28962/123, 28962/177, 28962/180, 28962/188 and 28962/187.

c. THAT, pending the hearing and determination of this application inter partes, all the transactions, in particular, the sale and or subdivisions, transfer of the title in respect land parcels number Land Reference 28962/106, 28962/107, 28962/112, 28962/113, 28962/116, 28962/117, 28962/ 122, 28962/123, 28962/ 177, 28962/180, 28962/ 188 and 28962/187 be stayed.

d. THAT a temporary injunction be issued restraining the Defendant/Respondent either by himself or agents/servants from trespassing into, erecting structures, offering for sale, alienating and to specifically cease all construction or otherwise in any manner interfering with land parcels number Land Reference 28962/106, 28962/ 107, 28962/112, 28962/113, 28962/116, 28962/117, 28962/122, 28962/123, 28962/177, 28962/180, 28962/188 and 28962/187 pending the hearing and determination of the suit.

e. Costs of the application be borne by the Plaintiffs (sic)."

The application is based on the seven (7) grounds on its face marked (1) to (7), and supported by the affidavits sworn by John Kutto, and Florence Murgor, the 1st and 2nd Plaintiffs, on the 9th February 2022, and 28th April 2022 respectively. It is the Plaintiffs' case that they have legitimate interests over the listed suit lands, which will hereinafter be referred as the suit lands, having paid the 1st Defendant Kshs.24.7 million at the rate of Kshs. 200,000 per acre. That the 2nd Defendant entered into a separate arrangement to buy some of the land from the 1st Defendant, but a disagreement between the two led to the filing of Eldoret HCCC No. 163 of 2010 that they were not parties to. That parcels LR 9127, 9178, 21792/3, 21792/4 and 5822 were amalgamated/subdivided into parcels LR 28962/106, 107, 112, 116, 117, 122, 123, 177, 180, 186 and 187, which were transferred to the 2nd Defendant by the 1st Defendant. That the defendants have acted fraudulently to illegally deprive the Plaintiffs of their properties by among others entering a consent in Eldoret HCCC No. 163 of 2010 awarding the 2nd Defendant land worth 112 million, which included the 24.7 million paid by the Plaintiffs to the 1st Defendant. That even if some of the members to the 4th Plaintiff may have joined the 2nd Defendant, there is nothing to confirm that the 24.7 million the Plaintiffs had paid to the 1st Defendant was to be converted to some equity with the 2nd Defendant as alleged. That the 2nd Defendant has commenced the process of selling the said parcels and unless restrained the Plaintiffs claim will be defeated.

2. The application is opposed by the 2nd Defendant through their three (3) grounds of opposition dated the 8th March, 2022 which are set out herein below:

i. "The claim is statutorily time barred.

ii. The Plaintiff have not established contractual relationship between them and the Defendants. The suit does not therefore disclose any reasonable cause of action.

iii. That the application is an abuse of the court process and the same should be struck out with costs."

The 2nd Defendant also filed a replying affidavit sworn by Charles Chelimo, Chief Executive Officer, on the 16th March 2022, in opposition to the application. That it is the 2nd Defendant's case that the payments of the 24.7 million made by the Plaintiffs to the 1st Defendant were made on diverse dates between 3rd April 2006 and 14th March 2007, without any purchase agreement having been entered into that is capable of enforcement. That it is the 2nd Plaintiff that informed the 2nd Defendant that the 1st Defendant was selling to them some land, but had only raised 24.7 million from the 200 million deposit required before a sale agreement could be made. That the 2nd Defendant then engaged the 1st Defendant and in the meantime

the Plaintiffs' group, then known as Sergoit Hill Limited, constituting of 264 members joined the 2nd Defendant. That the 24.7 million paid by the said group was taken over by the 2nd Defendant, and treated as shares for each member of Sergoit Hill Limited, according to the amount contributed, and the share certificates were issued. That the 2nd Defendant then entered into a contract with the 1st Defendant to purchase LR Nos. 9127,9278, 21792/3, 21792/4 and 8522 measuring 4823 acres and the movable assets thereon at Kshs.800 million, and took possession on the 31st March 2009. That the 3rd Plaintiff previous attempt to have a resolution passed by the 2nd Defendant to have the suit lands subdivided for each member to have title to their parcels has been unsuccessful, and that is what is aimed to be obtained through this suit. That the 1st and 2nd Plaintiffs are not shareholders of the 2nd Defendant, and hence have no contractual basis to file this suit. That the 4th Plaintiff was incorporated in 2013 and cannot seek to enforce rights that arose before it came into being. That the application and the entire suit should be dismissed with costs.

3. That Stephanus Perus Kruger, the 1st Defendant, also opposed the application through the replying affidavit sworn on the 9th March, 2022. That it is his case that as admitted by the Plaintiffs, the suit lands have already been transferred to the 2nd Defendant upon receipt of Kshs.113,579,280 and he has no control over them. That the transfer of the lands to the 2nd Defendant was pursuant to the parties' agreements and upon obtaining the consent of the Land Control Board. That before the transaction with the 2nd Defendant, he had been approached by some people and agreed that they raise a deposit of Kshs.200 million before a sale agreement could be entered into. That the people deposited only Kshs.24.7 million, and no sale agreement was entered with them. That the said people are the ones who introduced the 2nd Defendant to him thereafter, and it was his understanding that they were together in the subsequent transactions. That the 4th Plaintiff was incorporated in 2013 and has no capacity to sue in this matter. That the plaintiffs' claim against him is time barred. That there was no written sale agreement between him and the Plaintiffs, and no consent from the Land Control Board was obtained. That the application should be dismissed with costs.

4. The learned counsel for the Plaintiffs, 1st Defendant and the 2nd Defendant filed their written submissions dated the 28th April 2022, 4th May 2022 and 17th May, 2022 respectively.

5. The Plaintiffs submitted that they have met the threshold for the grant of the interim order of injunction as is set out in the Giella v. Cassman Brown Ltd (1973) EA 358.They submitted that they have established a prima facie case with a probability of success as they have a legitimate interest over land refence 28962/106, 28962/107, 28962/112, 28962/113, 28962/116, 28962/117, 28962/122, 28962/123, 28962/177, 28962/188, 28962/187, and that the 1st Defendant has admitted receiving the sum of Kshs. 24.7 million from the them. Further that Plaintiffs have acquired proprietary interests in the suit properties is protected by Article 40 of *the Constitution* of Kenya. See MRAO LTD V FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS [2003] eKLR and NAWAZ MANJI & 4 OTHERS VS VANDEEP SAGOO & 8 OTHERS (2017) eKLR. The Plaintiffs submitted that they will suffer irreparable injury unless the injunction order is granted and relied on the decision in PANARI ENTERPRISES LTD V. LIJOODI & 2 OTHERS (2014) eKLR where the Court held as follows:

> "Land is unique and no one parcel can be equated in value to another though the value of the suit Property can be ascertained, it would be right to say that the plaintiff can be compensated in damages. I hold that the damages are not always a suitable remedy where the plaintiff has established a clear legal right or breach"

And the case of LUCY NJOKI WAITHAKA VS *ICDC NAIROBI HCCC NO. 321 OF 2001*, where the court stated that it is not a laid down rule that where damages may be an appropriate remedy, temporary injunction orders should not be issued. And if that were the case, it would not only be unjust but would also be seen to be unjust. The Plaintiffs submitted that in view of the foregoing, and the fact that the 2nd Defendant has admitted that they are in the process of selling the suit property, the balance of convenience tilts in their favour and therefore this court should grant the interim orders as prayed. That the Plaintiffs have met the 3 tenets of the Giella Case (Supra), and the Court ought to exercise its discretion in their favour. In SHAH V. MBOGO (1967) EA 116 at 123B, the Court of Appeal stated as follows:

> "...this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the Person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."

The Plaintiffs urged the Court to allow the application dated the 9th March, 2022 as prayed, with costs.

6. The 1st Defendant submitted that the Plaintiffs have not presented anything before the Court to satisfy the principles laid out in GIELLA V CASMAN BROWN LTD [1973] EA 358. The 1st to 3rd Plaintiffs purport to have purchased an unascertained portion of land parcel numbers LR. NO. 9127, LR 9278, LR 21798/3, LR21792/4 and LR 5822, owned by the 1st Defendant, for which they made a partial payment of Kshs. 24 Million. That the Plaintiffs did not produce any evidence to support their claim that the suit lands were amalgamated/subdivided to create the suit properties. The Plaintiffs alleged that the aforesaid suit properties were thereafter fraudulently transferred to the 2nd Defendant necessitating the filing of the instant claim. The Plaintiffs have not established a prima facie case for the following reasons: that the suit properties are not in the 1st Defendant's name; that there is no evidence that Plaintiffs entered into a written sale agreement with the 1st Defendant; that the Plaintiffs' claim is time barred as it contravenes the provisions of section 7 of the *Limitation of Actions Act* chapter 22 of Laws of Kenya; that the Plaintiffs did not provide evidence of amalgamation and subdivision of the suit properties; that the Plaintiffs are in contravention of the provisions of section 6 as read with section 8 of the *Land Control Act* chapter 301 of the Laws of Kenya; and no evidence has been adduced to the effect that the 1st Defendant entered into any transaction with the 4th Plaintiff, that was incorporated on 26th August 2013. In light of the conflicting facts aforementioned, this Court cannot with a degree of certainty confirm that indeed the Plaintiffs' claim is sustainable as they have not made out a prima facie case against the 1st Defendant to warrant the orders being sought. The 1st Defendant submitted that the Plaintiffs have not demonstrated what loss they will suffer if the orders sought are not granted, and further that the value of the subject properties in contention are ascertainable, thus the Plaintiffs can be easily compensated. Reliance was placed on the decision in WAMAMU UNITED COMPANY LIMITED V JOSEPH GITHIRA MUCHIRI & 3 OTHERS [2021] eKLR where the Court of Appeal decision in NGURUMAN LTD V JAN BONDE NIELSEN & 2 OTHERS [2014] eKLR was cited with approval as relates to the irreparable injury. The 1st Defendant further submitted that the Plaintiffs will not suffer irreparable harm noting that while they were aware of the fact that proprietary interests over the suit properties was being transferred to the 2nd Defendant, they took well over 16 years to exert their purported rights over the suit properties. Reliance was placed on the decision in FANIKIWA LTD V JOSEPH KOMEN & 5 OTHERS [2013] eKLR where the Court,

while declining to grant interlocutory injunction order had this to say about the delay by the Plaintiffs to seek relief from the Court:

> " I mentioned earlier that this suit was filed on 14 February 2008. In the plaint, the plaintiff pleaded that the defendants moved into the suit land in the year 2002. The present application was filed on 5 February 2013 about five years after the suit was filed. I do not know what urgency has suddenly arisen that was not present from the year 2002 and more specifically from the year 2008 when this suit was filed. Of course for the years that the plaintiff had not been in occupation of his land, it may be assumed that he suffered loss but it does not seem that it is loss which the plaintiff felt was irreparable as it did not take any action to have an injunction until about 11 years after it is alleged that the defendants moved into the suit land. The sudden realization that it will suffer irreparable loss does not conform to its lackadaisical attitude. I am therefore not convinced on the question of irreparable loss.
>
> Moreover, the remedy of injunction is founded in equity and one of the maxims of equity is that "delay defeats equity". With regard to the remedy of injunction, I cannot state it better than to quote the text Hanbury and Maudsley Modern Equity, 10th Edition at page 92 where it is stated as follows: "As we have seen, the plaintiff must come promptly in the case of an ex parte injunction, as any delay illustrates that his case is not urgent. Where the plaintiff has voluntarily delayed his motion for an interlocutory injunction, he is unlikely to establish that his case is such that it would be unreasonable to make him wait until trial...
>
> In Snell's Equity, 30th Edition at p 33 para 3-16 (quoting Lord Camden L.C in Smith v Clay (1767) 3 Bro. C.C. 639n. at 640n) it is asserted that a court of equity "has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence: where these are wanting, the court is passive and does nothing. "My feeling is that the applicant has been guilty of laches which would disentitle the plaintiff from seeking the equitable remedy of injunction."

That the balance of convenience does not tilt in favour of the Plaintiffs owing to the fact that the subject properties are neither in their names nor in the name of the 1st Defendant, and therefore issuing an injunctive order against the 1st Defendant would amount to issuing orders in vain. The 1st Defendant therefore sought for the application to be dismissed.

7. The 2nd Defendant submitted that they had raised a preliminary objection on paragraph 5 of its replying affidavit on ground that the Plaintiffs are attempting to enforce a contract that does not comply with section 3(3) of the *Law of Contract Act*, thus their entire suit ought to be struck out.

The Plaintiffs' claim is time barred since the cause of action in their claim can be discerned to have taken place between April, 2006 to March, 2007 as is evidenced by the Plaintiffs' annexures marked as JK1(a)-(f). That section 7 of the *Limitation of Actions Act* provides that any claim for recovery of land shall be instituted within a period of 12 years from the date of the contract, as was held in the case of EDWARD MOONGE LENGUSURANGA V. JAMES LANAIYARA ANOR [2019] eKLR, that a claim over land has to be instituted within the prescribed time. The Plaintiffs have not established a prima facie case. Whereas the Defendants admit that the members of Sergoit Hill Limited paid Kshs. 24.7 Million, it is clear that the purpose for which the money was paid was not achieved. The 1st Defendant had deposed on paragraph 11 of his replying affidavit sworn on 9th March, 2022 that the said members raised Kshs. 24.7 million between the year 2006 and 2007, out of the 200 million required before a sale agreement could be entered into. That further, at paragraph 6 of the 2nd Defendant's replying affidavit, it was deposed that the representatives of Sergoit Hills Limited informed the 2nd Defendant

that they were unable to purchase the land on their own. The Plaintiffs therefore have no prima facie case against the Defendants having failed to demonstrate an existing pecuniary interests in the suit land. That the 3rd Plaintiff being a shareholder of the 2nd Defendant Company is estopped from filing the instant claim, as it contravenes section 239 of the *Companies Act* chapter 486 of Laws of Kenya, and clause 161 of the 2nd Defendant's Articles and Memorandum of Association, which provides dispute resolution by arbitration. The 2nd Defendant submitted that the 1st, 2nd and 3rd Plaintiffs had no locus standi to file the instant claim on behalf of the 4th Plaintiff and that the verifying affidavit sworn in the claim did not conform to the provisions of Order 4 Rule (4) (sic) and Order 2 Rule 4(sic). That noting the 4th Plaintiff was incorporated in the year 2013, it can only sue for acts and omissions arising after its date of its incorporation. The Plaintiffs have failed to establish the existence of a prima facie case on the basis of the existence of the establishment of a resulting trust, whose effect was to establish a situation where the 2nd Defendant held land worth Kshs. 24.7 million on behalf of the Plaintiffs. The Plaintiffs will not suffer irreparable loss in the event that the court declines to issue an order of injunction since they have not demonstrated that they have the capacity to sue, or have any actionable claim or that their investment is likely to dissipate. On the other hand, the 2nd Defendant will suffer irreparable loss because portions of the suit land were sold, the proceeds thereof applied in acquiring other assets. That the 2nd Defendant has six (6) contractual obligations with 3rd parties, made between 13th May, 2020 and 25th February, 2022. In any event, an interlocutory injunction cannot stop an event that has already taken place, and further the subject properties in this claim are now in the possession of parties that have not been joined to this claim. The 2nd Defendant urged the court to find that the balance of convenience does not tilt in favour of the Plaintiffs, and the application should be dismissed with costs to the 2nd Defendant.

8. The following are the issues for the court's determinations;

   i. Whether the Plaintiffs' claim is statute barred.

   ii. Whether the Plaintiffs have met the legal threshold for the grant an injunction.

   iii. Who pays the costs of the application.

9. The court has carefully considered the grounds on the application, affidavit evidence by all the parties, submissions by counsel, superior courts decisions cited thereon, and come to the following conclusions;

   a. That the grounds and the prayers sought on the notice of motion dated the 9th February 2022, leaves no doubt that the Plaintiffs are seeking orders of injunction pending the hearing and determination of this suit. That however, the provisions of the law and rules cited at the heading of the notice of motion have nothing to do with injunction orders. That among those provisions are Order 10, that deals with "consequence of non-appearance, default of defence and failure to serve" and Order 22 that deals with "execution of decrees and orders". That sections 2A and 2B do not exist in the *Civil Procedure Act*. That the reference to the inapplicable and or non-existent provisions notwithstanding, the court is aware as it should, that applications for temporary injunctions are provided for under Order 40 of the that is headed "temporary injunctions and interlocutory orders" and Order 51 headed "applications" of the Civil Procedure Rules, 2010. That the court will therefore proceed to analyse the facts presented by the parties herein, bearing in mind the Plaintiffs' obligations as per Order 40 of the Civil Procedure Rules.

   b. That though the Defendants raised the issue of limitation of the Plaintiffs' suit in their responses to the application, none of them filed and served a notice of preliminary objection

on that issue or ground. That the 2nd Defendant has submitted on the issue of limitation, and cited the case of BOSIRE OGERO V ROYAL MEDIA SERVICES [2015] eKLR where the court made the following observation:

" The law of limitation of actions is intended to bar the plaintiffs from instituting claims that are stale and aimed at protecting defendants against unreasonable delay in the bringing of suits against them. The issue of limitation goes to the jurisdiction of court to entertain claims and therefore if a Matter is statute barred, the court has no jurisdiction to entertain the same. And even if the issue of limitation is not raised by a party to the proceedings, since it is a jurisdictional issue, the court cannot entertain a suit which it has no jurisdiction over. See the case of Pauline Wanjiru Thuo vs David Mutegi Njuru CA 2778 of 1998."

The locus classicus decision on matters of preliminary objections and or jurisdiction is the celebrated case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 wherein the Court of Appeal held as follows:

QUOTE"

I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

In the case of PETER KIMANI NJENGA V MUGO KAMABUNI MUGO & 3 OTHERS [2018] eKLR the Court made the following observation as relate to a claim being statute barred:

QUOTE"

I have considered the foregoing and I find that limitation being a substantive law, the provisions of section 1A and 1B of the *Civil Procedure Act* cannot be invoked with a view to disregard the provisions of another Act of Parliament. Even if the Limitation of Act was a procedural legislation, section 3 of the *Civil Procedure Act* provides:

In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force."

c. The Defendants have stated in their respective responses to this application that the Plaintiffs' claim herein is time barred as it contravenes the provisions of section 7 of the *Limitation of Actions Act* chapter 22 of Laws of Kenya, which requires that any action for the recovery of land be made before the expiry of twelve (12) years. They submitted that the Plaintiffs' cause of action arose following a series of transactions that took place between April, 2006 and March, 2007. That their claim herein was filed in the year 2021, which was approximately 16 years after the cause of action arose, and is therefore statute time barred. The Plaintiffs on the other hand, responded to the aforementioned allegations in their supplementary affidavit wherein the 3rd Plaintiff deposed that the suit is not barred by section 7 of the *Limitation of Actions Act*, as their cause of action arose after the 1st Defendant transferred the suit properties to the 2nd Defendant. That paragraph 9 of the 2nd Defendant's replying affidavit, show that it took possession of the suit properties on 31st March, 2009. That having considered the facts presented by both sides on this matter, the court is agrees with the Plaintiffs' position that their cause of action

could only have arisen after the 1st Defendant transferred the lands that they believed they had interests on, to the 2nd Defendant, and not before. That was about on or after 15th October, 2011 when the Exit agreement was entered into. This is because there is no evidence presented so far by any of the parties of any disagreement or dispute having arisen between the Plaintiffs and the 1st Defendant over their transaction, before the lands were registered with the 2nd Defendant. To the Plaintiffs, the transfer of the lands to the 2nd Defendant by the 1st Defendant jeopardised and or prejudiced their interests in the suit properties. That it must have been after the Plaintiffs failed to attain their claims through the 2nd Defendants Annual General meetings as detailed in the 2nd Defendant's replying affidavit that they found it necessary to file this suit. As at this stage of the proceeding, the court has no basis of faulting the Plaintiffs in their pursuit, and I therefore find that their claim is not statute barred.

d. The orders of interlocutory injunctions are granted by courts where the applicants meet the threshold outlined in the case of GIELLA v. CASSMAN BROWN & CO. LTD [1973] EA 358, where at page 360 the court held as follows:

"The conditions 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 not normally be 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."

e. That in the matter before the court, the Defendants submitted that the Plaintiffs have failed to establish a prima facie case with chances of success for various reasons including; that the purpose for which the Plaintiffs paid the Kshs. 24.7 million to the 1st Defendant did not materialise; that Plaintiffs did not establish that they have proprietary rights over the suit land that require protection by this Court; that they had not established the existence of any pecuniary interest in the suit land that require the protection of the Court; that the Plaintiffs had not obtained a consent from the Land Control Board, and therefore their transaction contravened the provisions of sections 6 and 8 of the Land Control Board Act; and that the Plaintiffs were attempting to enforce a transaction for the sale of an interest in land which transaction contravenes the provisions of section 3(3) of the *Law of Contract Act*, as no sale agreement existed.

f. That while considering the foregoing arguments, the court has referred to the decision of the Court of Appeal in MRAO LTD V. FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS (2003) KLR 125 where the court held as follows:

"A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case. Court went on to state but as I earlier endeavored to show, and I cite ample authority for it, a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard which is higher than an arguable case".

g. That it is not disputed that the Plaintiffs paid Kshs. 24.7 million to the 1st Defendant. That fact has indeed been admitted by both Defendants, albeit in different words. The Plaintiffs have alleged that the payment of the said amount entitled them to a portion of the 1st Defendant's land measuring about 123.5acres. I note from paragraph 6 (ii) (b) of the replying affidavit filed by the 2nd Defendant that the 1st Defendant owns a total of 4923 acres of land. I also take cognisance of the fact that the 1st Defendant explained the absence of a sale agreement to the intended transaction between himself and the Plaintiffs was due to the fact that the Plaintiffs failed to reach the agreed upon deposit of Kshs. 200 million to necessitate the drawing of a sale agreement. I further note that the 2nd Defendant deposed that the sum of Kshs. 24.7 million was employed towards the purchase of shares for the Plaintiffs and other members of their company, 4th Plaintiff. That though the Plaintiffs have not disclosed when they got to know of the Defendant exit agreement of 15th October 2011, the court finds they have not attempted to explain why they had to wait until the year 2022 to file this suit. In the circumstances, I find that Plaintiffs have not established a prima facie case with a probability of success.

h. That it is trite that to be successful in an application for injunction, an Applicant must surmount all the hurdles outlined in the Giella Case (Supra). A party that is incapable of surmounting any one of the said hurdles is not entitled to the grant of an order of injunction. In the case of KENYA COMMERCIAL FINANCE CO. LTD V. AFRAHA EDUCATION SOCIETY [2001] VOL. 1 EA 86 the court held that the three tests set out in the Giella Case (supra) are the three pillars on which rests the foundation of any order of injunction; interlocutory or permanent. These three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. The Plaintiffs herein have not successfully attained any of the three hurdles, and have consequently not met the threshold for the grant of the injunctive relief sought in their application.

i. That further to the foregoing, superior courts have made additional observations in the interpretation and extension of the principles set out in the Giella Case, like in the case of SUSAN WANGARI MBURU & 5 OTHERS V ELDORET WATER AND SANITATION COMPANY LIMITED & ANOTHER [2020] eKLR where the court stated as follows:

"Apart from the three principles set out in the Giella case, the court should also look at the circumstances of each case as was held in the case of JAN BOLDEN NIELSEN v HERMAN PHILLIIPUS STEYA ALSO KNOWN AS HERMANNUS PHILLIPUS STEYN & 2 OTHERS (2012) eKLR where Mabeya J remarked as follows:

'I believe that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set out in the Giella Vs Cassman Brown case. The court may look at the circumstances of the case generally and the

overriding objective of the law. In Suleiman vs Amboseli Resort Ltd (2004) e KLR 589 Ojwang Ag. J (as he then was) at page 607 delivered himself thus:

"Counsel for the defendant urged (sic) that the shape of the law governing the grant of injunctive relief was long ago, in Giella –vs- Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with

counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover Internationale made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780 – 781:

"A fundamental principle of ...that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong'..."

Traditionally, on the basis of the well accepted principles set out by the court of Appeal in Giella Vs Cassman Brown the court has had to consider the following questions before granting injunctive relief.

i. Is there a prima facie case...

ii. Does the applicant stand to suffer irreparable harm...

iii. On which side does the balance of convenience lie? On which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice...

When dealing with an application for injunction you must consider which option has a lower risk of injustice for a party. Would it be in the interest of justice to grant an order of injunction or decline to do so."

That even after considering the additional test as set out in the above decisions, I am convinced that a finding to decline to issue an order of injunction and stay in favour of the Plaintiffs in the instant application carries the lower risk of injustice, if it should turn out later that the court's assessment of the facts presented are inaccurate.

j. That though the Plaintiffs' application is found to be without merit, the court is of the considered view that due to the history and relationship between the parties, the costs in the application be in the cause not withstanding the provision of section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya.

10. That flowing from the foregoing, the Plaintiffs' notice of motion dated the 9th February 2022 is without merit and is dismissed with costs in the cause.

It is so ordered.

DATED AND **VIRTUALLY DELIVERED** THIS 15th **DAY OF JUNE 2022.**

S. M. KIBUNJA,J.

ELC ELDORET.

IN THE PRESENCE OF;

PLAINTIFFS **...**Absent**.....**

DEFENDANTS **...**Absent**.....**

COUNSEL .....Ms. Kemboi for Odwa for 1st defendant.....

.....Ms. Tororei for Plaintiffs.....

.....Ms. Kipnyekwei for 2nd Defendant.....

ONIALA - COURT ASSISTANT.

S.M.KIBUNJA,J.

ENVIRONMENT & LAND COURT - ELDORET.