



**Mramba & 45 others v St. Elizabeth Academy -Karen Limited & 2 others  
(Civil Suit 67 of 2020) [2022] KEELC 3921 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3921 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
CIVIL SUIT 67 OF 2020**

**LL NAIKUNI, J  
JULY 28, 2022**

**BETWEEN**

**KAZUNGU MRAMBA ..... 1<sup>ST</sup> PLAINTIFF  
ELIZABETH KAMALA ..... 2<sup>ND</sup> PLAINTIFF  
MAGDALINE NYAMBURA & 43 OTHERS ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**ST. ELIZABETH ACADEMY -KAREN LIMITED ..... 1<sup>ST</sup> DEFENDANT  
ANNE WANJIKU MUNENE ..... 2<sup>ND</sup> DEFENDANT  
AYUB KIANJA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**I. Introduction**

1. For the determination by this Honorable Court is an Amended Notice of Motion application dated 14<sup>th</sup> July 2021 and filed on 15<sup>th</sup> July, 2021. It was filed by the Plaintiffs/Applicants herein. It was brought by dint of Section 3A and 64 of the *Civil Procedure Act*, cap. 21 and Order 40 Rule 10 (1) (b) and Order 1 Rule 8 of the *Civil Procedure Rules*, 2010. Significantly, as a preliminary issue of importance is that the Honorable Court takes cognizance of the fact that on 25<sup>th</sup> February, 2021, the Plaintiffs/Applicants had filed the initial Notice of Motion application under the same citation and seeking similar orders from this Court. Subsequently, it is that application, without the leave of Court that they proceeded to amend and filed accordingly. Thus, it is the said Amended Notice of Motion application that the Court is urged and therefore will be dealing with.



## II. The Plaintiffs/Applicants Case

2. The Plaintiffs/Applicants have sought for the following orders
  - a. Spend.
  - b. That the Respondents by themselves, their servants and or their agents be restrained by a temporary injunction from evicting, demolishing, harassing and/or interfering with the Plaintiffs/Applicants' occupation of Plot No. 395/II/MN Utange in the county of Mombasa pending the interparties hearing of this application and the originating summons.
  - c. That the Respondents by themselves, their servants and or their agents be restrained by a temporary injunction from evicting, demolishing, harassing and/or interfering with the Plaintiffs/Applicants' occupation of Plot No. 395/II/MN Utange in the county of Mombasa pending the "inter – parties" hearing of this application and the originating summons.
  - d. That the OCPD Kisauni Police Division and the OCS Kiembeni Police Station be ordered to enforce these orders and further to restrain and/or prevent any other person from wrongfully entering and/or continuing to wrongfully enter and/or evicting and/or demolishing and/or harassing and/or interfering in any manner with the Plaintiffs/Applicants occupation of Plot No. Plot No. 395/II/MN Utange pending the hearing and determination of this application and the main suit of the Originating Summons.
  - e. That costs be in the cause.
3. The application is based on the grounds, testimonies and averments of the eight (8) Paragraphed Supporting Affidavit of Kazungu Mramba the 1<sup>st</sup> Plaintiff/Applicant sworn and dated 25<sup>th</sup> February, 2021 together with one annexure marked as "A" annexed thereof. He deponed that he was an adult male of sound mind and a resident in Utange and also the Chairman of the residents on Plot No. 395/I/MN in Utange within the County of Mombasa.
4. The Applicants claimed they and other families of the indigenous communities from Kenya had occupied the suit land for over 16 years. Their main activity was farming. But despite all this, the Defendants had constantly been threatening to evict them from the suit land. He deponed that after conducting some investigation, they discovered that the chronology of leading to the Defendant claiming ownership of the suit property was in doubt. That the Defendants were not the true owners of the suit property. Indeed, all the social amenities and feeder routes passing through the scheme had been identified by the Community. They now wanted the Court to intervene and issue them with the temporary injunction orders they prayed for in the application.

## III. The Grounds of Opposition

5. On 7<sup>th</sup> March, 2021, Learned Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendants herein, the Law firm of Messrs. Gitonga, Kalawa & Company Advocates while opposing the application, filed seven (7) points Grounds of Opposition dated 19<sup>th</sup> March, 2021. From the Grounds of Opposition, the Defendants claimed:-
  - a. That the application was termed as frivolous, vexatious and an abuse of the court process.



- b. That during the pendency of this suit did the Defendants tried to evict, demolish, interfere and harass the Plaintiffs from the suit land.
- c. That the allegations that the Defendants had been on the land for over 18 years was refuted.
- d. That a Notice of Motion is not a pleading and is not capable of being amended, and also its defective as the amendment was made without leave of court. The application was said to be Res Judicata to one filed in ELC 24 of 2018 over Plot No. 395/11/MN which is directly and substantially in issue, and was determined on 29<sup>th</sup> January 2019.
- e. That they could not be claiming the ownership to the suit land yet the Defendants had the title deed with the indefeasible interest and right over it.
- f. That further the Defendants have argued that the grounds in the supporting affidavit do not support the orders sought in the amended application.
- g. That the application was said to be based on speculations and are only meant to delay the determination of ELC 24 of 2018.

The court was urged to strike it out with costs.

## II. The Replying Affidavit by the 1<sup>st</sup> Defendant

- 6. On 7<sup>th</sup> March, 2021 the Defendants filed a 29 Paragraphed Replying Affidavit dated 17<sup>th</sup> March, 2021 and sworn by Anne Wanjiku Munene, the 1<sup>st</sup> Defendant's Managing Director. She deponed that the Defendants engaged in the business of provision of education services for both primary and secondary schools throughout the Republic of Kenya but its registered offices was based at Nairobi, Karen area. She reiterated the contents of the Grounds of the Opposition and further stated that the alleged indigenous communities mentioned in the supporting affidavit were merely land grabbers and squatters.
- 7. Being persons who were escapist and who fabricated facts in order to hoodwink the Honorable Court had invaded the suit property with the sole aim of evicting the rightful owner. She deponed that there is no doubt as to the owner of the suit property since the same is owned by the 1<sup>st</sup> Respondent. She claimed that the Applicants have filed a similar application for adverse possession ELC No. 24 of 2018 and the same was determined by Justice Yano on 29<sup>th</sup> January 2019 in favor of the 1<sup>st</sup> Defendant. The deponent claimed that the application is '*Res Judicata*' to the application that was determined in ELC no. 24 of 2018 and only seeks to relitigate a concluded matter. The Applicants were said to have no claim over the 1<sup>st</sup> Defendant who is the registered owner of the suit property.
- 8. The 1<sup>st</sup> Applicant filed a further affidavit in support of the amended application on 24<sup>th</sup> May 2022. He deponed that the Applicants were in order to amend their application as provided by Order 8 of the [Civil Procedure Rules](#), 2010 to ensure the determination of the real questions in controversy between the parties. It was the application is not "*Res Judicata*" to ELC no. 24 of 2018 as it was determined by court on 19<sup>th</sup> July 2022. It was further claimed that the Applicants have a prima facie case with a probability of success and not mere land grabbers or trespassers.

## IV. Further Affidavit by the Plaintiffs/Applicants

- 9. On 24<sup>th</sup> May, 2022, though without leave of court but which was later on 28<sup>th</sup> April, 2022 granted and hence admitted, the Plaintiff/Applicant filed a 26 Paragraphed Further Affidavit sworn by Kazungu Mramba and dated on 12<sup>th</sup> May, 2022. He refuted that the Amended Notice if Motion dated 14<sup>th</sup> July,



2021 was not fatally defective and improperly on record as alleged and that no leave of Court needed to have been sorted out. They relied on the Provisions of Order 8 Rules 1(i) and 5(i) of the [Civil Procedure Rules](#), 2010 where amendment would be done without leave of court before the pleadings had closed. He contended that in the instant case the pleadings had not closed.

10. He deponed that the issue of Re-Judicata was dealt with by this Court in its ruling of 2<sup>nd</sup> March, 2022 while determining the Preliminary objection dated 19<sup>th</sup> July, 2021. He denied that the Amended Notice of Motion application dated 14<sup>th</sup> July, 2021 was Res-Judicata and it never flouted the Provision of Section 7 of the [Civil Procedure Act](#), 2010. He held that the suit ELC No. 24 of 2018 was not for Land Adverse Possession but one seeking for orders of injunction. Indeed, he asserted that the suit had not been heard and finally determined – it had also not been dismissed but awaiting to be fixed for hearing he insisted. The suit ELC No. 24 of 2018 was totally different from the ELC No. 67 of 2020 (OS) – ELC No. 24 of 2018 –sought for injunction orders on Plot No. 394/II/MN & Plot No. 395/II/MN with different parties while ELC. No. 67 of 2020 (OS) was seeking for relief of Land Adverse Possession on Plot No. 395/II/MN only – the parties were not similar hence they were not Res-Judicata.
11. He deponed that the Applicants had a Prima Facie case with Probability of success as the threshold of Land Adverse Possession was met. They were residents of Plot No. 395/II/MN. He urged the issue of ownership of the suit land will be heard during the full trial.

He denied that the Applicants were professional land grabbers and trespassers as alleged and neither were they trying to intimate the 1<sup>st</sup> Defendant. By and large he opined that this land a right under the provision of Sections 7, 9, 13, 17, 37 and 38 of the [Limitation of Action Act](#) Cap, 22 to be making Adverse Possession even for a title of a registered owner of land would be extinguished if a third party who proved that he had been in possession of Land continuously for a period of 12 years and that such possession had been open and notorious to the knowledge of the owner and that the third party had asserted a hostile title and disposed the owner. Time leases to run either when the owner took or asserted his right was admitted by adverse possessor. He held that the 1<sup>st</sup> Defendant had never taken any of these steps to enter into the suit land or assert its right as the owner of it.

## **V. Submissions.**

12. On 26<sup>th</sup> July, 2021 while in the presence of all the parties, directions were taken to the effect that the Amended Notice of Motion application dated 14<sup>th</sup> July, 2021 be canvassed by way of written submissions. Pursuant to that upon full compliance to this direction, this Court reserved a date for delivery of the ruling accordingly.

### **A. The Plaintiff's Written Submissions**

13. On 24<sup>th</sup> May, 2022 the Learned Counsel for the Plaintiffs/Applicants, the Law firm of Messrs. Kedeki & Company Advocates filed their written Submissions dated 24<sup>th</sup> May, 2022. M/s. Waithera Advocate submitted that the Applicants had fulfilled the principles for interlocutory injunction set out in '*Giella – Versus - Cassman Brown*'. The Counsel argued that the Applicants have clearly demonstrated the existence of a right that is under threat from the Respondents together with evidence of demolition. On whether they stand to suffer irreparable damage, counsel urged that the applicants' interest in the suit property is under threat of eviction. On balance of convenience, counsel submitted that the Respondents are unlikely to suffer any injury, unlike the Applicants who were said to suffer greater damage is injunction is not granted.



14. On the Respondents' claim that the suit is 'Res Judicata' to ELC no. 24 of 2018, Counsel submitted that ELC no. 24 of 2018 was not an application for adverse possession but rather a suit for injunction. The Counsel argued that in the present suit the Applicants are seeking adverse possession on Plot No. 395/II/MN, while in ELC No. 24 of 2018 they are seeking injunctive orders on Plot No. 394/II/MN and Plot No. 395/II/MN. The Counsel concluded that the Defendants had not satisfied the conditions needed for 'Res judicata' since the two suits are seeking different prayers and urged court to dismiss the grounds of opposition.

## **B. The Defendants' written Submissions**

15. On 22<sup>nd</sup> June, 2022, the Counsels for the Defendants the Law Firm of Messrs. Gitonga Kalawa & Co Advocates filed written submissions dated 20<sup>th</sup> June, 2022. Mr. Gitonga Advocate submitted that the amended application dated 14<sup>th</sup> July 2021 is "Res Judicata" to "ELC 28 of 2018 *Said Musa Mitsanze & 2 others – Versus - Yusuafali Ismailee Kivanje, St Elizabeth Academy Karen & Others* (2019) eKLR. The court ruled on 29<sup>th</sup> January 2019 that the Applicants had not established a prima facie case with a probability of success and were not granted the injunctive orders sought. The Counsel submitted that the issues in the present suit are directly and substantially related to those in the previous suit and related to the same subject matter LR No. 395/II/MN. The Plaintiffs were said to have concealed to court the fact that some of the Plaintiffs were part of the previous suit, as well as they have relied on the same documents in both suits. The Counsel submitted that the Plaintiffs have not denied the relationship to, and existence of ELC No. 24 of 2018.
16. The present application was said to be a collateral attack to the ruling delivered on 29<sup>th</sup> January 2019 on a similar application dated 5<sup>th</sup> February 2018, as well as not being properly on record as the same was filed without leave of court. The Counsel submitted that the Applicants ought to have sought the leave of court, failure to which should see the same being struck out of court records. The Court of Appeal in "*Kiru Tea Factory Company Limited v Stephen Maina Githiga & 13 others* (2019) eKLR", held that:- "The amended Notice of Motion dated 25<sup>th</sup> May 2018 and the supporting Affidavit thereof be and is hereby struck off the record as being incompetent for having been amended and filed without leave of court." The Learned Counsel submitted that any pleading filed without leave is a nullity and liable to be struck out.
17. On the injunctive orders, the Counsel submitted that a prima facie case is more than just an arguable case, it a case that has s probability of success if not rebutted. Counsel argued that the Applicants are trespassers and can never have a prima facie case against a registered owner, since registration is conclusive evidence of absolute and exclusive rights to land as stated under Section 26 of the *Land Registration Act*. On irreparable loss, the Counsel submitted that the 1<sup>st</sup> Respondent stands to suffer more loss as the registered owner since the Plaintiffs keep invading the suit property claiming to be indigenous owners. The balance of convenience was said to tilt in favor of the 1<sup>st</sup> Respondent and court was urged to deny the application.

## **VI. Analysis and Determination**

18. The Honorable Court has keenly considered all the pleadings herein being the applications, the affidavits, written submissions and the authorities, the relevant provisions of the *Constitution* and the law. In order to reach at an informed, just, fair and reasonable decision, the Honorable Court has framed the following issues for its determination. These are:-
- a. Whether the amended Notice of Motion application dated 14<sup>th</sup> July 2021 and filed in Court on 15<sup>th</sup> July, 2021 is properly before court.



- b. Whether the suit herein is “*Sub – judice*” to the suit ELC 28 of 2018 “*Said Musa Mitsanze & 2 others – Versus - Yusuafali Ismailee Kivanje, St Elizabeth Academy Karen & Others*”.
- c. Who will bear the Costs of the application.

**Issue No. a). Whether the amended Notice of Motion application dated 14<sup>th</sup> July 2021 and filed in Court on 15<sup>th</sup> July, 2021 is properly before court.**

19. The Defendants argued that the amended Notice of Motion dated 14<sup>th</sup> July 2021 is defective for being amended without leave of court. That the same is not capable of being amended since it is not a pleading within the meaning of provision Section 2 of the *Civil Procedure Act*, Cap. 21. The Plaintiffs have defended their amended Notice of Motion application dated 14<sup>th</sup> July, 2021 on the ground that the provision of Order 8 Rule 1 (1) & 5 of the *Civil Procedure Rules*, 2010 allowed a party to amend pleadings without the leave of Court before the close of pleadings. They contended that since the pleadings had not been closed, they were at liberty to amend the said application without leave of court.
20. By all legal standards, and I fully concur with the submissions advanced by the Learned Counsel for the Defendants to the effect that a Notice of Motion application is not a pleading in the strict legal sense of the word. It is not a pleading within the meaning of the provision of Section 2 of the *Civil Procedure Act*, Cap. 21. The Section of the law provides that a pleading, ‘includes a Petition or Summons, and the statements in writing of the claim or demand of any Plaintiff, and of the defence of any Defendant thereto, and of the reply of the Plaintiff to any defence or Counter - claim of a Defendant.’ The Plaintiffs/Applicants cannot invoke Order 8 Rule 1 (1) of the *Civil Procedure Rules*, 2010 on amendment of pleadings, since a Notice of Motion is not a pleading. In my view, all applications moved as either Notice of Motion and Chamber summons are simply interlocutory legal modes and means towards attaining certain short term reliefs during the pendency of the proceedings. They are heard and determined within the lifetime of a suit whereby a ruling is delivered. They do not conclude the suit. On the contrary, pleadings are heard and determined at the finality of a suit with delivery of a Judgement. Primarily, the leave of Court is relevant in order to allow court take charge of a proceedings and ensure that the principle of Natural Justice (no one is condemned unheard) and the principles of not ambushing the other party are adhered with at all costs.
21. However the Applicants can find refuge in Section 100 of the *Civil Procedure Act*, 2010 that grants court general powers to amend, it states, ‘The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.’ The court has power to amend an interlocutory application within the power granted by Section 100 of the *Civil Procedure Act*, Cap. 21. Nonetheless, these powers have to be invoked by the party seeking or intending to cause an amendment. The Plaintiffs/Applicants did not move court to seek an amendment, rather they amended without leave of court. These amendments go to the root of the application and affect the interim orders that were initially granted by court on ex - parte on 25<sup>th</sup> February 2021 when the application was brought before court under certificate of urgency. The ostensible amended Notice of Motion dated 14<sup>th</sup> July 2021 refers to Plot No. 395/II/MN, as opposed to Plot No. 395/I/MN that was referred to in Notice of Motion dated 25<sup>th</sup> February 2021. That would have drastic effect ‘*pari materia*” to the main suit. In my view, it would tantamount to stealing a match against the other party – the Defendants in this case. And the more reason the leave of Court would be required in the given circumstance where Court keeps a close watch on what is happening.



22. For court to allow the said amended Notice of Motion application the consequences would be extreme severe. The interim orders that have kept being extended by court would have to be discharged with and new orders granted in the interest of Justice, equity and conscience. This cannot be the case, the Plaintiffs/Applicants cannot be allowed to casually amend applications and expect court to be flexible with granting of interim orders at any time in every stage of hearing the interlocutory application. The only remedy left is for the Applicants to withdraw the application amended without leave of court and file and serve a fresh application all together for the usual adjudication. Since the application dated 25<sup>th</sup> February 2021 has been abandoned by the amended application, the interim orders granted under it are discharged, and the same is dismissed with costs to the Respondents. For this reasons therefore the amended Notice of Motion dated 14<sup>th</sup> July 2021 that was amended without leave of court must be struck out with costs to the Defendants/Respondents.

**Issue No. b). Whether the suit herein is ‘Sub judice to ELC 24 of 2018 - Said Musa Mitsanze & 2 others – Versus - Yusuafali Ismailee Kivanje, St Elizabeth Academy Karen & Others.**

23. Under this sub heading, the Honorable Court has been called upon to make a determination as to whether the suit is Sub – Judice to the suit ELC No. 24 of 2018. The Defendants/Respondents have argued that the amended Notice of Motion dated 14<sup>th</sup> July 2021 is *Res Judicata* to the Notice of Motion dated 5<sup>th</sup> February 2018 ruled by Justice Yano on 29<sup>th</sup> January 2019 in ELC 24 of 2018 in the defendants’ favor. However, taking into consideration that the court has struck out the amended Notice of Motion dated 14<sup>th</sup> July 2021 and given the fact that ELC 24 of 2018 is still a live matter, it is the opinion of court to consider whether this present suit is “Sub judice” to “ELC 24 of 2018 Said Musa Mitsanze & 2 others - Versus - Yusuafali Ismailee Kivanje, St Elizabeth Academy Karen & Others”, based on the evidence based before it.

24. The provision of Section 6 of the Civil Procedure Act, provides that:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.

25. Having stated the relevant provision of the law, we now closely examine the pleadings herein juxtapose those filed in the Civil suit ELC 24 of 2018 to determine whether the ingredients of *Res Judicata* arise. On whether the subject matter is the same – under Civil Suit ELC 24 of 2018 which was instituted *vide* a Plaint filed on 5<sup>th</sup> February 2018 and seeks a relief of a permanent injunction against the Defendants from evicting, demolishing or interfering with the Plaintiffs’ occupation of all that parcel of land Known as Land Reference Numbers Plot No. 394/II/MN and Plot No. 394/II/MN respectively. The present suit on the other hand was instituted *vide* an Originating Summons dated 8<sup>th</sup> June 2020 which seeks for a title of Land adverse possession interest over all that parcel of Land Known as Land Reference Numbers 395/II/MN the property registered in the names of the Defendants herein. Clearly from the face value, the two suits herein the subject matter of litigation is the same title which is L.R 394/II/MN.



26. On whether the parties are the same from the two suits – the answer in affirmative. In the Civil Suit ELC 24 of 2018 the Plaintiffs are named as Said Musa Mitsanze, Hamisi Chengo and Eric Mzungu. Whilst, in the present suit the applicants are, Kazungu Mramba, Elizabeth Kamala, Magdaline Nyambura and 43 others. In fact, upon keen scrutiny of the Authorities to Plead and Act on Behalf dated 8<sup>th</sup> June 2020, clearly its seen that it's the same group of people litigating in these two suits filed at different Courts. For example, I have seen Eric K. Muzungu as a Plaintiff in ELC No. 24 of 2018 and also as an applicant in the present suit and his name is number 46 in the Authority to Act on Behalf of the parties. Another example, in both the present suit and in ELC 24 of 2018 there is the names of Tom Obore, Ramadhan Juma and Kazungu Charo as litigants, just to name a few. While the Defendant and registered owner St. Elizabeth Academy - Karen remains the same, in the present suit they are the 1<sup>st</sup> Defendant while in ELC 24 of 2018 they are the 2<sup>nd</sup> Defendant herein.
27. The Counsel for the Plaintiffs admits to the existence of ELC 24 of 2018 which is similar to the present suit. In his submissions he argues that the present suit seeks title in form of Land adverse possession over all that parcel of Land Reference Numbers 395/II/MN while in the Civil suit ELC 24 of 2018 the applicants seeks injunctive orders over LR 394/II/MN and 395/II/MN. The Supreme Court of Kenya in *Kenya National Commission on Human Rights – Versus - Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)*, stated therein as follows: -
- “The term ‘Sub - Judice’ is defined in *Black’s Law Dictionary* 9th Edition as: “Before the Court or Judge for determination.” The purpose of the Sub - Judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of Res Sub-Judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”
28. It is my view that the applicants herein should not be allowed to continue wasting Court’s time by filing two similar suits in the same court and also to subject the Defendants to defend two different suits themselves, as it goes against the spirit and intention Under the overriding objective of the court under Section 3, 13 and 19 of *Environment and Land Act*, No. 19 of 2011. The applicants are running from one court to another seeking orders that will be favorable to them. I reiterate the same should not be allowed. The provision of Section 6 of the *Civil Procedure Act*, Cap. 21 bars this court for hearing and determining this suit as it is inherently similar to the Civil Suit ELC No. 24 of 2018. Nonetheless, the only remedy that the applicants have is for court to stay the proceedings before this suit until ELC 24 of 2018 is heard and final determined.

#### **Issue No. Who is bear the Costs of the application**

29. It is now settled that issues of Costs are at the discretion of Court. Costs mean any award granted to a party at the conclusion of any legal action, proceedings or process in any litigation. The Proviso of the provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 provides that costs do follow the event. By event here, it means the result of the said legal action, proceedings or process.



30. In the instant case, where the Amended Notice of Motion application dated 14<sup>th</sup> July, 2021 is dismissed for having been filed without the leave of Court, the Plaintiff should bear the costs thereof.

## **VI. Conclusion & Disposition**

31. The upshot of all this and upon conducting indepth analysis of the framed issues herein, this Honorable Court finds on preponderance of probability and notwithstanding the provisions of Article 159 (2) (d) of the Constitution to wit:-

“Justice shall be administered without undue regard to procedural technicalities.....”

that the Amended Notice of Motion Application by the Plaintiffs /Applicants herein is not curable as it is unprocedural, an abuse of the due process and law. The law on amendment of pleadings is couched in mandatory terms. It cannot be a technicality. Hence, the Amended Notice of Motion dated 14<sup>th</sup> July, 2021 without leave of Court can not succeed. For avoidance of doubt, the Honorable Court do hereby make the following orders:-

- a. That the amended Notice of Motion application dated 14<sup>th</sup> July 2021 be and is hereby struck out for being amended without the leave of this Honorable Court which is mandatory requirement.
- b. That the interim orders issued on 25<sup>th</sup> February 2021 by this Honorable Court in relation with the Notice of Motion application dated 25<sup>th</sup> February 2021 filed by the Plaintiffs/Applicants herein be and are hereby vacated henceforth.
- c. That the Plaintiffs/Applicants herein to bear the costs of the Notice of both the Notice of Motion application dated 25<sup>th</sup> February 2021 and the ostensible Amended Notice of Motion application dated 14<sup>th</sup> July 2021.
- d. That the suit herein be and is hereby stayed until the Civil Suit - ELC No. 24 of 2018 is heard and determined to it's finality by the trial Court thereof.

32. It is so ordered accordingly.

**RULING DELIEVERED, SIGNED & DATED THIS.....28<sup>TH</sup> .....JULY.....2022**

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

**ENVIRONMENT & LAND COURT AT**

**MOMBASA**

In the presence of:-

- a. M/s. Yumnah, the Court Assistant.
- b. M/s. Waithera Advocate for the Plaintiffs/Applicants
- c. No appearance for the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendants/Respondents.

