



Wambui & another v Equity Bank Kenya Ltd (Environment & Land Case 181 of 2017) [2022] KEELC 13524 (KLR) (29 September 2022) (Ruling)

Neutral citation: [2022] KEELC 13524 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 181 OF 2017
LL NAIKUNI, J
SEPTEMBER 29, 2022**

BETWEEN

HANNAH WAMBUI 1ST PLAINTIFF

EAST AFRICA CARGO LOGISTICS LIMITED 2ND PLAINTIFF

AND

EQUITY BANK KENYA LTD RESPONDENT

RULING

I. Introduction

1. What is before this honorable court for its determination is the notice of motion application dated December 6, 2021. It is filed by the 1st and 2nd plaintiff/applicants. The application is brought to court by dint of sections 1A, 1B and 3A of the Civil Procedure Act cap 21 of Laws of Kenya section 97 of the Land Act, rule 15 of the Auctioneers Rules, order 40 rule 6 of the Civil Procedure Rules 2010, article 159 of the Constitution of Kenya 2020.

II. The 1st and 2nd Plaintiffs/applicants Case

- 2. The 1st and 2nd plaintiffs/applicants seek for the following orders:-
 - a. Spent.
 - b. That pending the hearing and determination of the application herein an order of injunction be granted so as to restrain the defendant by itself, its servants and/or agents from alienating, selling or in any other way dealing with the plaintiffs’ properties known as LR No Mainland North section 2/6032 and plot No Kilifi/kawaga “a”/ Kadzonzo/36.
 - c. That pending the hearing of the suit an order of injunction be granted so as to restrain the defendant by itself, its servants and/or agents from alienating, selling or in any other way



dealing with the plaintiffs' properties known as LR No Mainland North section 2/6032 and plot No Kilifi/kawaga "a"/ Kadzonzo/36.

- d. That costs be provided for.
3. The application is premised on the grounds, testimonial facts and the averments made under the fifteen (15) paragraphed supporting affidavit of Hannah Wambuisworn and dated on the December 6, 2021 and the nine (9) annexures marked as "HW - 1 to 9" annexed hereto.

The deponent holds being the managing director of the 2nd plaintiff/applicant herein hence well conversant with the matters in question and competent to swear this affidavit on behalf of the 2nd plaintiff/applicant.

She averred that the 1st & 2nd plaintiffs/applicants were customers to the defendant and whereby they charged all that properties known as LR No Mainland North section 2/6032 and plot No Kilifi/kawaga "a"/ Kadzonzo/36 (hereinafter known as "the suit properties").

4. She informed court that the 1st & 2nd plaintiffs/applicants were in the business of transportation of cargo from Mombasa to Nairobi and elsewhere.

In the recent of times, the said business had suffered the following adversities:-

- a. When the standard gauge railway started operating a few years ago, the government used its power to monopolize transportation of containerized cargo from Mombasa to Nairobi and the hinterland in favour of Kenya Railways Corporations. Indeed in "High Court petition No 201 of 2018 *Kenya Transporters Association Limited v Kenya Ports Authority and others*" a five (5) bench judge found that the said monopolization amounted to a violation of the private based transporters fundamental rights. The Court of Appeal has however stayed the execution of that judgement. She held that this meant that for the last five (5) years or so the plaintiffs'/ applicants' source of business was reduced by over 70%.
- b. Covid-19 pandemic destroyed whatever little business that was left particularly due to the long lockdown period.

She averred that effectively therefore the plaintiffs had been unable to pay the outstanding loan.

5. She held that the effect of the rulings issued by this court on March 21, 2018 and November 18, 2019 respectively- for a public auction sale to be valid there was need for the defendant to obtain a current valuation report meaning a report which was not more than one (1) year old up to the date of the intended auction sale – the valuation exercise was carried out on October 14, 2019, from that time the defendant had never invited the plaintiffs/applicants to participate in any valuation exercise of any of the two (2) suit properties nor served with any valuation report.
6. Therefore, according to the deponent, it came as a huge surprise when the defendant's auctioneers - Antigue Auctions Agencies served the plaintiffs/applicants with notifications of sale dated November 11, 2021 – she averred that based on advise by her advocate on record, the law required an appropriate notice to be served of at least forty five (45) days before a valid auction sale could be carried out of the immovable property.

She stated that she had also not seen any land bills distributed around the areas surrounding the two (2) suit properties bespeaking the intended public auction sale to be held on December 10, 2021. She had also not seen any advertisement of the sale auctions sale published in any local newspaper as was required by law.



7. Indeed, she informed court that on December 3, 2021 she received a text message from the defendant on her cell phone line stating that one of her accounts had been debited with a sum of USD 101,000 and from this she felt the defendant had conspired to have the plaintiffs'/applicants' properties sold at throwaway price.

She felt that if a proper auction sale was carried out, the suit properties would be able to realize enough money to settle the debt due to the defendant and also leave a surplus for the plaintiffs/applicants.

8. She pointed that if the defendant was allowed to carry on with the illegal public auction on December 10, 2021, the plaintiffs/applicants would gravely suffer huge irreparable losses since the plaintiffs/applicants properties would be sold at a throw away price and thereby leave the plaintiffs/applicants with a huge debt still to pay to the defendant. She averred that the honorable court should not allow any act of illegality to be committed by parties who were even before court. Indeed, it was instructive that the defendant had not even bothered to notify court of its intention to sell off the suit properties.

Finally she deposed that any sale of the suit properties to a third party in contravention of the law would result in such a third party acquiring a nullity of a title and hence such a third party right to be protected. She urged it to allow the application and grant the prayers sought.

III. The Defendant's Replies

9. On February 17, 2022, the defendant in opposing the notice of motion application filed by the 1st and 2nd plaintiffs/applicants filed a twenty six (26) paragraphed replying affidavit by Kariuki Kingori sworn and dated on the even date and nine (9) annexures marked as "KK - 1 to 9" annexed thereto. He deposed being the manager legal services at the Equity Bank Kenya Ltd the defendant/respondent herein and hence conversant with the facts pertaining to this matter and duly authorized and competent to swear the affidavit on its behalf. For this reason therefore, this application was therefore breach of the doctrine of "*res judicata*" having been conclusively and substantially determined by the court.

10. While opposing the application by the plaintiffs/applicants herein held that this matter had been previously and conclusively adjudicated upon by honorable court and various rulings delivered to that effect for instance *vide* an application dated May 24, 2017 seeking for injunction orders and whereby on March 21, 2018 a ruling was delivered giving the defendant green light to proceed on with the auction of the two (2) properties; pursuant to that the defendant carried out a valuation for an auction intended for March 29, 2018.

In the intervening period the plaintiffs/applicants filed an application dated March 18, 2018 and a ruling delivered on September 18, 2019 dismissing the plaintiffs'/applicants' application.

He held on October 7, 2019 the plaintiffs/applicants filed another application seeking injunctive orders restraining the defendant from auctioning the suit properties.

On November 18, 2019 court delivered its ruling dismissing the said application. He averred from the foregoing therefore the plaintiffs/applicants were not to derail the whole process. He stated that essentially the requisite statutory notices had been issued to the plaintiffs/applicants.

11. He stated that the defendant had carried out a valuation on the suit properties pursuant to section 97 of the Land Act 2012 and in compliance with rule 11 (1) (b) (x) of the Auctioneers' Rules 1997 which provided that for a valuation report which was not more than 12 months old prior to the sale was a proper valuation report for purposes of determining the reserve price- a valuation report dated November 26, 2021 was annexed marked as "KK-4" and hence refuted the assertion by the plaintiffs/applicants that report had been done over 2 years earlier.



12. Additionally, he deposed the defendant had instructed their auctioneers – Messrs Robert Waweru Maina T/A Antigue Auction Agencies to issue a redemption notice dated September 25, 2019 and hence the forty five (45) days redemption notice was lawfully and regularly issued. Further he stated that the said auctioneers issued a notification of sale dated November 11, 2021 indicating that the auction of the two (2) suit properties was scheduled to be held on December 10, 2021. Also he informed court that the said auctioneers further advertised the sale of the two (2) suit properties in a local daily dated November 15, 2021 scheduling the sale by auction for December 10, 2021 pursuant to the provisions of rule 15 (d) of the [Auctioneers Rules 1997](#).

A copy of the newspaper advertisement dated November 15, 2021 was annexed marked as “KK-7”.

He further held that the plaintiffs/applicants had not met the principles as well set out in the famous case of “*Giella v Cassman Brown & Co Limited* (1973) EA 358”.

The plaintiffs/applicants had not demonstrated a “*prima facie*” case with a high probability of success.

On the contrary, the plaintiffs/applicants had come to court having faced to comply the court orders and therefore did not deserve any protection by court.

13. He deposed that the plaintiffs/applicants would not suffer any irreparable injury as indeed, the plaintiffs/applicants was a perennial defaulter who had on many occasions abused the authority of the court and had failed to equity with clean hands.

He argued that the balance of convenience tilted in favour of the defendant/respondent since the plaintiff/applicant had on multiple occasions denied, derailed and frustrated the defendant/respondent whilst making no efforts whatsoever to honour their repayment obligations. He stressed that this application was brought in bad faith all intended to deny the defendant/respondent the right to exercise their statutory power of sale secured under section 96 of the [Land Act](#) 2012. He perceived the plaintiffs/applicants as being litigious and on a mission to trampling upon the rule of law. While on flipside the defendant/respondent always complied with the court orders. In conclusion, he urged the honorable court to dismiss the suit with costs.

IV. Submissions

14. On January 26, 2022 in the presence of all the parties were directed by the honorable court to canvass the notice of motion application by way of written submissions pursuant to that all the parties fully complied accordingly. Suffice to say, on March 7, 2022, upon request by the parties, they were each accorded sometimes to verbally highlight their written submissions and this court wish to thank them for their resilience, diligence and devotion to their presentation. Thus, the honorable court did reserve a date for delivery of the ruling accordingly.

A. The Plaintiffs’/applicants’ Written And Oral Submissions

15. On March 2, 2022, the learned counsel for the 1st and 2nd plaintiffs/applicants the law firm of Messrs Gikandi & Company Advocates filed their written submissions.

Mr Gikandi advocate who also submitted orally conceded that indeed the defendant was entitled to the statutory power of sale as provided for by law but held that they ought to exercise it lawfully and



with due process as provided for by law. He relied on the decision of “Thomson Smith Aikman, Alan Malloy & others v Muchoki & others [1982] eKLR” where court stated:-

“The court ought never to condone and allow to continue a flouting of law. Those who flout the law by infringing the rightfully title of others and brazenly admit it ought to be restrained by injunctions, be it so equity will not assist law breakers”.

He recounted the various difficulties the plaintiffs/applicants had undergone in carrying out their business of transportation in the recent past. These included the government policy to monopolize on the transportation and the covid-19 pandemic.

The learned counsel pointed out on the few irregularities and illegalities in relation to the defendant’s attempt to sell the two (2) suit properties through public auction. According to him, though the illegalities had been controverted by the defendant but strongly contended that even if there existed even one act of illegality in the manner in which the defendant was exercising its statutory power of the sale as against the plaintiffs/applicants then perforce of law, the said exercise would be rendered untenable. To support this proposition, the learned counsel relied on the decisions of “Lazarus Estates Limited v Beasley [1956] 1 QB 702 at 712” and “Mistry Amar Singh v Serwano Wofunira Kulubya EA No 74 of 1960” on the legal maxim of “*ex turpi causa non oritur actio*” – to the effect that no court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which was illegal, if the illegalities is dully brought to the notice of the court and if the person invoking the aid of the court himself implicated in the illegality.

16. The learned counsel submitted that the valuation of the suit properties never indicated that the plaintiffs/applicants were notified nor their participation. He held that the report was two (2) years old as it was carried out on October 14, 2019 making it a violation of the provision of section 97 (2) of the Land Act 2012 read with rule 15 of the Auctioneers Rules, No 5 of 1996. He stressed that no auction of the property should be held without a valuation report by the valuer. To him therefore the defendant only intended to sell the properties at a throw away price.
17. The learned counsel further contended that the notification for sale of December 19, 2021 was served on December 1, 2021 going only 9 days which was contrary to the provision of rule 15 (d) of the Auctioneers’ Rules No 5 of 1996 which was mandatory in nature requiring that the said notification could not be less than forty five (45) days. This was an illegality.

He further that it was a requirement for a public auction to take place, it ought to be advertised so that all persons interested in acquiring such a property were given an opportunity to participate on such an auction. In the instant case, the learned counsel argued that the notification dated November 11, 2021 indicating the suit properties would be sold on December 10, 2021; the notices were received on December 1, 2021 hence the intended sale was not properly advertised to the public and the local newspapers.

In effect the public auction would not attract as many people as would be expected to participate. On this point he cited the case of “Peter Gichora Mwaura v Joseph Weru Ndungo & another [2007] eKLR” holding that the public auction ought to release enough money to pay off the debt and leave surplus for the plaintiffs/applicants as the capricious and illegally executed public auction sale would leave the loan unpaid and thereby the plaintiffs/applicants would risk further execution actions by the defendants.

In conclusion, the learned counsel urged the court to allow the application and grant the orders as prayed thereof.



B.The Defendant's Oral And Written Submissions

18. On March 4, 2022, the learned counsel for the defendant/respondent the law firm of Messrs Robson Harris Advocates LLP filed their written submissions dated even date. M/s Wangeci Advocate submitted that they would be relying on the averments of their replying affidavit dated February 17, 2022. She provided to details the several legal processes in relation to the causing the suit properties to public auction between themselves and the plaintiffs/applicants to date.

19. The learned counsel raised several issues as follows:-

Firstly, she argued that the instant notice of motion application by the plaintiffs/applicants was in breach of the doctrine of "*res judicata*" contrary to the provision of section 7 (1) of the [Civil Procedure Act](#) cap 21, having been conclusively and substantively determined by the honorable court *vide* the several rulings made by this court on March 21, 2018, September 18, 2019 and November 18, 2019 respectively. To buttress their point they relied on the case of "[Uhuru Highway Development v Central Bank of Kenya & 2 others](#) (1996) eKLR.

She stressed that the instant application was an afterthought and procured in bad faith with the sheer motive of denying the defendant/respondent the right to exercise its statutory power of sale.

Secondly, the learned counsel submitted that the plaintiffs/applicants had not satisfied the criteria for the grant of injunction orders- as well set out in the famous case of:- "*Giella v Cassman Brown & Co* (supra) for the following reasons:-

- a. Based on the legal ratio founded in the cases of "*MRAO Limited v First American Bank of Kenya Limited & 2 others* (2003) eKLR 125" & "*Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR" holding that the plaintiffs/applicants were duly registered chargee in favour of the defendant/respondent but had defaulted from settling down the finances borrowed.

The learned counsel held that the two (2) valuation reports dated March 5, 2021 and November 24, 2021 were conducted by a land valuation firm trading in the names and style of Prestige Management Valuers Ltd.

20. The defendant instructed their auctioneers to issue redemption notice dated September 25, 2019. Hence, the forty five (45) days issued to the plaintiffs/applicants was lawfully and regularly issued.

Further they held that the auctioneers issued a notification of sale dated November 11, 2021 indicating that the auction of the suit properties was to be held on December 10, 2021.

Additionally, on November 15, 2021 the auctioneers advertised the sale of the suit properties in the Daily Newspaper scheduling the sale by auction for December 10, 2021 pursuant to the provisions of rule 15(d) of the [Auctioneers' Rules 1997](#). Thus she held the defendant/respondent had fully complied with all the legal requirements for the exercise of the statutory power of sale under sections 96 of the [Land Act](#) 2012.

To this extent, they submit that the plaintiffs/applicants had not demonstrated a *prima facie* with a high probability of success.

- b. The learned counsel submitted that the plaintiffs/applicants would not suffer irreparable injury which could not be compensated by way of damages. She held that irreparable injury meant that the injury must be one that could not be adequately compensated for in damages.

She relied on the provisions of section 99 (4) of the [Land Act](#) 2012 where if there was an improper or irregular exercise of statutory power of sale by the defendant/respondent then an



award of damages would be sufficient. To support her point, She cited the cases of “*M Wanjohi v Equity Building Society 7 others* [2006] Eklr” and “*Giro Commercial Bank Limited v Halid Hamad Mutesi* [2002]eKLR”.

The assertion by the plaintiffs/applicants to the effect they would suffer irreparable loss as the suit properties would be sold off at a throwaway price was mere allegation without any evidence.

- c. The learned counsel held that the balance of inconvenience tilted in favour of the defendant/respondent and there was a real risk that unless the security was realized the debt shall continue to accrue to outrageous proportion and will outstrip the value of the security held rendering it impossible for the bank to recover the said account.

Undoubtedly the plaintiffs/applicants was indebted to the defendant/respondent and which had not been settled having defaulted perennially.

On the contrary the defendant/respondent has always complied with the court orders throughout the proceedings.

This in conclusion the learned counsel held that the plaintiffs/applicants had not satisfied the principles for grant on an interlocutory injunction and hence prayed for the notice of motion application to be dismissed with costs.

V. Analysis And Determination.

21. The honorable court has carefully and keenly assessed the filed pleadings- the notice of motion application dated December 6, 2021, the affidavit replies, oral and written submissions, the myriad authorities by the parties herein and the relevant provisions of the *Constitution* of Kenya and statutes.
22. For the honorable court to reach an informed just, fair and reasonable decision the honorable court has framed the following salient issues for its determination. These are:-
 - a. Whether the plaintiffs/applicants through the filed notice of motion application dated December 6, 2021 has met the established threshold for granting injunction orders as founded under order 40(1) (2) & (3) of the *Civil Procedure Rules 2010*.
 - b. Whether the defendant herein has fully complied with the legal requirement to exercise its statutory power of sale for the suit properties.
 - c. Who will bear the costs of the application?

Issue No. (a) Whether the plaintiffs/applicants through the filed notice of motion application dated December 6, 2021 has met the established threshold for granting injunction orders as founded under order 40(1) (2) & (3) of the *Civil Procedure Rules 2010*.

23. Briefly the plaintiffs/applicants are the registered and absolute owners to the suit properties. They deal with transportation business and are customers to the defendant/respondent.

They charged the title deeds with the defendant/respondent. Arising from various reasons they have never been able to settle the outstanding debt. For instance they cited the government policy to monopolize on the transportation of containers by causing all the containers be transported by the standard gauge railway from the coastal region to the mainland.

Additionally, the outbreak of the covid-19 pandemic and the lockdown to business drastically affected their business. They have challenged the illegalities on the way the defendant have attempted to exercise their statutory power of sale of the properties through public auction.



On the other hand the defendant holds that the plaintiffs/applicants has been acting in bad faith and only frustrating them from recovering their money.

24. Now turning to the issue under this sub – heading. The court wishes to point out that , it’s now well established that for one to be granted injunction orders one has to satisfy the principles set out in the now well celebrated case of:- “*Giella v Cassman Brown Co Ltd* (supra)”

- a. The applicant had established a *prima facie* case with a probability of success;
- b. The applicant stood to suffer irreparable loss which would not be adequately compensated by an award of damages; and
- c. If the court was in doubt, the application would be determined on a balance of convenience.

Suffice it to say, the main question before court is whether the plaintiff/applicant from the onset bears any “*prima facie*” case to enable court consider the other sequential ingredients warrant granting the orders sought. The basic definition of what a *prima facie* case entails was clearly defined in the case of:- “*Mrao Limited v First American Bank of Kenya Ltd & 2 others* (2003) KLR 125, “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 would 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. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but 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.”

25. From the surrounding facts and inferences, this court is not persuaded that the plaintiffs/applicants have satisfied the ingredients to be granted injunction. Indeed, they do not have any “*prima facie*” case at all to be considered for granting of the injunction orders. Consequently, they will not suffer any irreparable loss while the balance of convenience tilts in favour of the defendant/respondent herein.

Not wanting to re – invent the wheel here and based on the principle of “*stare decisis*” (judicial precedent), I am compelled to fully rely on the ruling which is on record delivered on the same issues and subject matter by my brother Hon. Justice C.K Yano on November 18, 2019. The honorable court held as follows on paragraph 9 of the said ruling:-

“Having looked at the evidence on record, this court finds that the plaintiffs have clearly not made out a *prima facie* case. It is apparent that the plaintiffs have been out to derail the whole process involving the sale of the suit property including failure to comply with orders previously issued by this court. In the circumstances, this court cannot exercise its discretion on favour of the plaintiffs.

26. Subsequently, where “a *prima facie* case” is not established, as it is in the instant case, the court need not consider the other ingredients of irreparable injury and balance of convenience. This legal position was held by the Court of Appeal in “*Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, “These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. Also See the decision of “the *Kenya Commercial Finance Co Limited v Afraba Education Society* [2001] Vol 1 EA 86. 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."

For all these reasons, the honorable court finds that the plaintiffs/applicants have failed to demonstrate that they ought to be granted the interim temporary injunction orders sought.

Issue No (b) Whether the defendant herein has fully complied with the legal requirement to exercise its statutory power of sale for the suit properties.

27. From the adduced facts herein, it is not in any doubt to the mind of this honorable court that the defendant/respondent has fully complied with the provisions of section 96 (2) of the Land Act No 3 of 2012. As stated herein the plaintiffs/applicants are the registered and absolute owners to the suit properties. They deal with transportation business and are customers to the defendant/respondent. They charged the title deeds with the defendant/respondent. Arising from various reasons they have never been able to settle the outstanding debt. For instance they cited the government policy to monopolize on the transportation of containers by causing all the containers be transported by the standard gauge railway from the coastal region to the mainland. Additionally, they also relied on the outbreak of the global covid - 19 pandemic and the lockdown to business drastically affected their business. They have challenged the illegalities on the way the defendant have attempted to exercise their statutory power of sale of the properties through public auction.

On the other hand, it has been evident that the defendant had been attempting to effect and adhere with the provision of the law while exercising their statutory power of sale but in vain. Their efforts to recover their finances have been frustrated through numerous litigation process at the behest of the plaintiff/applicant herein.

28. The provision of section 97 (1) (2) & (3) of the Land Act 2022 & rule 11 (b) (x) of the Auctioneers' Rules which provided that a valuation report relied upon must be conducted within twelve (12) months prior to the purported sale of the property.

Section 99 (4) of the Land Act 2012:- – "a person prejudiced by unauthorized, improper or irregular exercise of the power of sale shall have remedy damages against the person exercising that power"

Upon asserting the facts before this court, the court is satisfied that there was indeed proper and regular exercise of statutory power of sale by the defendant/respondent.

On the issue that the defendant wants to sale the property at a throwaway price. Here, I am compelled to adopt the decision cited by the defendant/respondent of "Isaac O Litali v Ambrose W Subai & 2 others HCCC No 2092 of 2000 to the effect:-

"I am of the opinion that once land has been given as security for a loan, it becomes a commodity for sale by that very fact and any romanticism over it is unhelpful. I say so for nothing is clearer in a contract of charge than that default in payment of payment of the debt will result in the sale of security in that respect, land is no different from a chattel such as a motor vehicle or any other form of security and needless to state, there is no commodity for sale whose loss cannot be adequately compensated by an appropriate quantum of damages".

29. It is my view that the court is therefore fully satisfied ed that while the plaintiffs/applicants are not entitled to the orders sought, the defendant/respondents have been fully adhering to the provisions of the law as stated herein.



Issue No (c) Who will bear the costs of the application?

30. It is trite law that the issue of costs are at the discretions of the court. Costs means the awards granted to a party after the conclusion of any legal action, cause, process and proceedings in any litigation.

The provision of section 27 (1) of the *Civil Procedure Act* cap 21 provided that, the costs follow the event. The event here means the results of the legal action, cause, process and proceedings.

31. In the instant case the plaintiff/applicant have failed to prove their case warranting being granted the orders sought from the notice of motion application dated December 6, 2021. Therefore, its just fair and reasonable that the plaintiffs/applicants bear the costs of the said application.

VI. Conclusion And Disposition

32. In the long analysis having deliberated in detail on the issues framed herein, this court proceeds to make the following orders:-

- a. That the notice of motion application dated December 6, 2021 be and is hereby dismissed.
- b. That the defendant be and is hereby at liberty to proceed to exercise its statutory powers of sale for the suit properties as provided for by law under the provisions of section 96 (1) & 97 (i) of the *Land Act* No 3 of 2012 and rules 15 (1) (x) of the *Auctioneers Rules*.
- c. That the costs of the application to be borne by the plaintiffs/applicants herein.

RULING DELIVERED, SIGNED & DATED AT MOMBASA THIS 29TH DAY OF SEPTEMBER 2022.

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

ENVIRONMENT AND LAND COURT

MOMBASA

In the presence of:

- a. Mr. Ben the Court Assistant;
- b. M/s. Gwahalla Advocate holding brief for Mr. Gikandi Advocate for the Plaintiffs/Applicants;
- c. M/s. Wangechi Advocate for the Defendant/Respondent.

