



Sigh & 2 others v Registered Trustees of Siri Gurdwara Bazaar (Sikh Temple) (Environment & Land Case E064 of 2022) [2022] KEELC 13845 (KLR) (22 September 2022) (Ruling)

Neutral citation: [2022] KEELC 13845 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E064 OF 2022
JO MBOYA, J
SEPTEMBER 22, 2022**

BETWEEN

**MANJIT SIGH 1ST PLAINTIFF
DHARAM SINGH MATHARU 2ND PLAINTIFF
HARJINDER SIGH KALSI 3RD PLAINTIFF**

AND

**REGISTERED TRUSTEES OF SIRI GURDWARA BAZAAR (SIKH
TEMPLE) DEFENDANT**

RULING

Background

1. The ruling herein relates to three application, namely the application dated the February 18, 2022, the application dated the ril 12, 2022, all of which have been filed by the plaintiffs herein.
2. Vide the first application dated the February 18, 2022, plaintiffs herein has approached the court seeking for the following reliefs;
 - i. March 31, 2022 and finally, the application dated the Ap.....(spent)
 - ii. A temporary injunction do issue restraining the defendants from selling, alienating, transferring or interfering with the properties known as LR No 209/6398 and LR No 209/3271/73 and pending the hearing and final determination of this application.
 - iii. A temporary injunction do issue restraining the defendants from selling, alienating, transferring or interfering with the properties known as LR No 209/6398 and LR No 209/3271/73 and pending the hearing and final determination of the suit.
 - iv. The costs of this application be provided for.



3. The subject application is premised on the various grounds contained on the face thereof and same is further supported by the joint affidavit sworn by the plaintiffs on the February 18, 2022 and to which the plaintiffs have attached a total of five (5) annexures.
4. Upon being served with the foregoing application, the defendants herein filed a replying affidavit sworn on the March 14, 2022 and a supplementary affidavit sworn on the May 10, 2022 and in respect of which same have attached four sets of documents.
5. As pertains to the second application dated the March 31, 2022, plaintiffs herein have approached the honourable court seeking for the following reliefs;
 - a.(spent)
 - b. The trustees of the defendant society particularly Amrik Singh be cited for contempt of court and committed to civil jail for such a period of time as this honourable court may deem fit for having deliberately disobeyed the orders of this honourable court granted on the February 24, 2022.
 - c.(spent)
 - d. The OCS Pangani Police Station do ensure compliance with the honourable's court order of maintaining status quo.
 - e. Any other or further orders of the court be granted toward protecting the dignity and authority of the honourable court.
 - f. Cost of the application be provided for.
6. The application herein premised is on the grounds contained on the face thereof and same is supported by the joint affidavit sworn by the plaintiffs on the March 31, 2022.
7. The defendants herein responded to the said application *vide* replying affidavit sworn on the June 10, 2022 and wherein same have adverted to various issues, *inter-alia*, that by the time the orders of this honourable court for maintenance of status quo were issued, the suit property had already been sold and transferred to a third party.
8. The 3rd application filed herein is the one dated the April 12, 2022 and same has similarly been filed by or on behalf of the plaintiffs/applicants. For clarity, the subject application seeks the following orders;
 - i.spent
 - ii. Notice to show cause to issue to Amrik Singh, Pritam Singh and Harbhajan Singh Jill, the 1st, 2nd and 3rd respondents/contemnors herein to state why the same should not be committed to civil jail for disobedience of the orders of the court issued on the February 24, 2022.
 - iii. That Amrik Singh, Pritam Singh and Harbhajan Singh Jill, the 1st, 2nd and 3rd respondents/contemnors herein , be committed to civil jail and detained in prison for six (6) months or such period as the honourable court will deem fit or both fine and imprisonment for contempt of the honourable court's order issued on the February 24, 2022.



- iv. The OCS Pangani Police Station do ensure compliance with the honourable court's orders issued on the February 24, 2022 and file a status report on the implementation thereof before the honourable court.
 - v. Such further or other consequential orders as the honourable court may deem fit and just.
 - vi. Cost of this application be borne by the respondents/ contemnors.
9. The said application is premised on the grounds contained on the face thereof and similarly, same is supported by an affidavit sworn by the plaintiffs herein on the April 12, 2022.
 10. Other than the supporting affidavit sworn on the April 12, 2022, the plaintiffs herein have also filed a further affidavit sworn on the June 22, 2022, whose import was to respond to the replying affidavit sworn by the defendants/respondents on the May 12, 2022 and June 10, 2022, respectively.
 11. In answer to the said application, the defendants/respondents has filed a replying affidavit sworn on the May 12, 2022.

Application Dated February 18, 2022

a. Plaintiffs'/applicants' case:

12. The plaintiffs' case revolves around the joint supporting affidavit sworn on the February 18, 2022, wherein it has been averred that the joint deponents, are members of the defendant/respondent company and are duly authorized and thus competent to swear this affidavit. (underlining supplied).
13. Having averred that same are members of the defendant/respondent company, the deponents have averred that it is imminent that at any time from now, the defendant/respondent is likely to sell and evict the plaintiffs/applicants and other members, including, a school being ran on the suit properties, namely, LR No 209/ 6398 and LR No 209/3271/73, situated along Hombe/Juja Road, Nairobi.
14. Further the deponents have averred that on the January 14, 2022, the defendants/respondents advocates, namely, M/s N.K Mugo & Co Advocates wrote a letter to the plaintiff/applicant asking same to hand over vacant possession of the suit premises on or before the January 31, 2022.
15. On the other hand, it has been averred that the tenants, who were being asked to surrender vacant possession of the suit property on or before the January 31, 2022, has been on the suit premises for the last 36 year and in any event, the tenant runs and/or operates a school with a population of over 110 students in different classes, from Nursery to High school.
16. Other than the foregoing, it has also been deponed that if the threat and/or eviction by the defendant/respondents is actualized, the students who are currently learning in the school being operated on the suit property, would have nowhere to go to.
17. Besides, it has also been pointed out that any disruptions of the students preparation and learning activities, at this time, shall prejudice and or affect the welfare of the students who are bound to sit the national examinations, currently scheduled to be held and or conducted in March 2022.
18. Nevertheless, the deponents have further stated that the lease over and in respect of the suit property contains clause 3 g, in respect of which the lessor (defendant/respondent) agreed to give an option to renew the lease for a further period of 5 years 3 months, at a new rent to be negotiated between the lessor and the and lessee.



19. Further, it has been averred that during the 10th months period, before the expiry of lease, both the plaintiffs/applicants and the defendants engaged into negotiation of sale the said premises to the owners of the school, and other persons, albeit without the knowledge of the members.
20. Be that as it may, the deponents have further stated that the intended sale and/or disposal of the suit property, to third parties was only discovered by the plaintiffs/applicants through social media and that the said intended sale was in breach of clause 3 (h) and (i) of the lease agreement.
21. It is the deponents' further averments that same were further served with a letter dated February 16, 2022 and in respect of which, same were required to vacate the suit premises by end of March 2022.
22. Besides, the deponents have averred that the actions by and on behalf of the defendants/respondent, are not only illegal, but same are calculated to defeat the interest of the plaintiff/applicants, who are stated to be members of the defendants/respondents temple.
23. In any event, it has also been averred that the defendant/respondent, which is a temple has a constitution, which governs the management and affairs of the properties of the temple and in particular, the properties of the temple, cannot be sold and/or disposed of without the authority of the general membership.
24. The deponents have further averred that though the defendants are keen and/or intent to sell and dispose of the suit properties, the authority of the executive council and the general membership, has neither been sought for nor obtained.
25. Notwithstanding the foregoing, the deponents have also averred that if the suit properties are sold, the plaintiffs/applicants herein would not have a place to worship and hence their right and freedom of worship will be violated and/or infringed upon.
26. On the other hand, it has also been averred that premised on the intention of the defendant/respondent to sell and dispose of the suit properties, some members of the defendant/respondent, filed and/or lodged an objection with the registrar of societies, whereupon, same sought for the stoppage of the unlawful sale of the suit properties, until the correct procedures, in line with the Constitution are followed and annual general meeting convened.
27. Based on the foregoing, the deponents herein have averred that by virtue of being members of the defendant temple, same have a lawful and legitimate cause touching on and relating to the protection and preservation of the suit properties.
28. Other than the foregoing, the deponents have also added that unless the orders sought are granted, the defendant/respondent will proceed and actualize the threatened eviction and sale of the suit properties to a third party, which action will culminate into the disturbance of the students of Guru Nanak School, which is currently being operated thereof.
29. In the premises, the deponents herein have averred that same are disposed to suffer irreparable loss, not compensable in monetary terms.
30. In the circumstances, the plaintiffs'/applicants' have thus sought for the various orders contained on the face of the applications to be granted. Essentially, the plaintiffs have sought for the grant of the orders of temporary injunction, as well as a finding of contempt against the registered trustees of the temple.



b. Response by the defendants'/respondents'

31. The defendant has filed a replying affidavit and further replying affidavit through one, namely, Amrik Singh Chaja Singh, who has averred that same is one of the trustees of the defendant/respondent and therefore authorized to swear the subject affidavit.
32. Further the deponent has averred that the plaintiffs/applicants herein are not members of the defendant/respondent and in any event, same also do not have any tenancy agreement with the defendant/respondent, either as alleged or at all.
33. On the other hand, it has been averred that though the plaintiffs/applicants have contended that same are tenants of the defendant/respondent, over and in respect of the suit properties, the lease agreement which has been annexed and relied upon by the plaintiff/applicants is one which was entered into and executed between the defendant/respondent and Gobind Enterprise Ltd, which is a limited liability company.
34. Further, the deponent has averred that the plaintiffs/applicants herein have not showed and/or established any affinity or nexus with M/s Gobind Enterprise Ltd, that is, whether the plaintiffs/applicants herein are either members, shareholders and/or directors of the said company.
35. Be that as it may, it has similarly been averred that even if the plaintiffs were members, shareholders or directors of Gobind Enterprises Ltd (which has not been established), same would still have no capacity to commence and maintain the subject suit on behalf of a limited liability company.
36. Nevertheless, the deponent has also averred that the lease agreement which the plaintiffs' have referred to and/or relied upon and which has no connection with the plaintiffs, was entered into on the November 1, 2016 and same was to subsist for a period of 5 years and 3 months, w.e.f November 1, 2016.
37. For coherence, it has been averred that the said lease, lapsed and/or terminated on January 31, 2022. In this regard, the deponent has thus contended that the said lease would not therefore afford any interests to and in favour of the plaintiffs/ applicants.
38. Given the foregoing, the deponent has averred that even if the plaintiff/applicants, were connected to and/or party to the lease agreement, which is not the case, the terms of the lease agreement have since lapsed and hence cannot confer any legitimate rights to and/or in favor of the plaintiffs/applicants.
39. Other than the foregoing, it has also been averred that the plaintiffs/applicants herein are not being honest and candid with the court. For clarity, it has been stated that the issue of the sale and disposal of the suit properties was deliberated upon *vide* the annual general meeting of the defendants and the trustees of the defendants were lawfully authorized to sell and dispose of the suit properties.
40. In this regard, the deponent has referred to the mandate which was granted *vide* the meeting held on the July 10, 2011 and November 13, 2016, respectively.
41. Pursuant to the foregoing, the deponent has averred that the annual general meeting of the defendants having authorized the sale and disposal of the suit properties, the duly appointed trustees of the defendants, were therefore at liberty to sell and/or dispose of the suit properties, in line with the authority given by the concerned body.
42. Notwithstanding the foregoing, it has similarly been averred that the suit herein is actually mounted by the plaintiffs/applicants, albeit as proxies of the company known as M/s Gobind Enterprises Limited, which was the tenant, but whose tenancy has since lapsed and/or extinguished.



43. In any event, it has similarly been pointed out that the said company, namely, M/S Gobind Enterprises Limited, who is the proprietor of Guru Nanak School (being the school alluded to by the plaintiffs) has also filed a separate and distinct suit, namely, E048 of 2022, propagating the same issue and making the same claim as the ones herein.
44. Other than the foregoing, the deponent has also averred that the plaintiffs/applicants herein have also filed yet another suit, namely Milimani HCC constitutional petition No E154 of 2022, wherein there is also a pending application for conservatory orders, whose import and tenor relates to the suit properties.
45. For clarity, it has been pointed out that the plaintiffs/applicants are also seeking conservatory orders to conserve the status of the suit properties herein.
46. Premised on the foregoing, the deponent has therefore averred that the subject suit, as well as the application beforehand, are inspired by ulterior motives and driven by bad faith, on the part of the plaintiffs/applicants.
47. Consequently, the deponent herein has implored the honourable court to find and hold that the subject application, which seeks equitable reliefs, ought not to be granted, taking into account the obtaining circumstances and the conduct of the plaintiffs/ applicants.

Second Application:

a. Plaintiffs/ applicants' case:

48. The applicants' case in respect of the application herein is premised on the joint affidavit sworn on the March 31, 2022 and wherein the deponents have averred that upon the filing of the subject suit, same also took out an application for temporary injunction.
49. Further, it has been averred that pursuant to the filing and or lodgment of the application for temporary injunction, same was placed before the honourable judge under certificate of urgency and thereafter the application was indeed certified as urgent.
50. Further, it has been stated that upon the certification of the application for temporary injunction, the court proceeded to and granted interim orders for the maintenance of status quo, whose import and tenor was to preserve the status of the suit properties pending further orders of the court.
51. The deponents have further averred that upon the issuance of the orders of status quo, same were duly extracted and thereafter served upon the trustees of the defendants/respondent and in this regard, an affidavit of service sworn on the March 2, 2022 has been annexed and exhibited.
52. Nevertheless, the deponents have proceeded and averred that despite the issuance and service of the orders of status quo, the trustees of the defendant/respondent herein proceeded to and indeed demolished the building that was standing on the suit properties and thereby effectively, evicted the plaintiffs/applicants and other tenants.
53. According to the deponents, the demolition of the building that was standing on the suit properties, was deliberate and intended to defeat the import of the order given by the honourable court.
54. On the other hand, it has been averred that by the time the building standing on the suit properties was demolished, the defendant/respondent was aware and knowledgeable of the existence of the orders of the honourable court for the maintenance of the status quo.



55. Premised on the foregoing, the deponent has therefore contended that the trustees of the defendant/ temple, are guilty of disobedience of lawful court orders. In this regard, the deponents have implored the honourable court to find and hold that the trustees are guilty of contempt.

b. Response by the Defendants'/respondents':

56. On behalf of the defendants/respondents one, Amrik Singh has sworn a replying affidavit dated the May 12, 2022, and same has averred that the plaintiffs/applicants herein are indeed members of the defendant/respondent temple and that same were aware that the suit properties had long been sold *vide* a sale agreement dated the August 3, 2021, pursuant to the authority given by the annual general meeting.

57. Further, it has been averred that the suit property having been sold, long before the filing of the subject suit and the issuance of the orders of the honourable court, the defendant/respondents herein ceased to have any authority over the suit properties which then vested in favor of the purchaser thereof.

58. At any rate, it has further been averred that the impugned demolitions, which are complained of by the plaintiffs/applicants herein were carried out and/or undertaken by the purchasers of the suit properties, who have not been impleaded herein or otherwise, made parties to the suit herein.

59. To the extent that the demolition complained of was carried out and/or undertaken by a third party who is not a party herein, the contempt orders ought not to issue against the defendant/respondent and in particular, the trustees thereof.

60. Finally, the deponent has also averred that though the plaintiffs/ applicants are seeking for contempt orders against the defendant/respondent, no evidence has been shown and/or placed before the honourable court to show that the trustees of the defendant/respondent herein were the ones responsible for the impugned demolition or at all.

61. Based on the foregoing, the deponent has averred that in the absence of any evidence to connect the trustees of the defendant to the demolition of the building standing on the suit p:roperties, the plaintiffs have not satisfied the requisite ingredients to warrant the grant of the orders sought.

Third Application:

a. Plaintiffs'/ applicants' Case:

62. In respect of the application herein, the applicants' case is predicated upon the affidavit sworn on the April 12, 2022, and wherein it has been stated that despite the defendant/respondent being aware and knowledgeable of the orders issued by the court on the February 24, 2022, the defendant/respondent proceeded to and escalated the demolition of the building standing on the suit properties on the April 8, 2022.

63. In particular, the deponent has averred that on the April 8, 2022, the defendant/respondent brought more machinery and personnel onto the suit property and enhanced the speed of demolition of the building that was standing thereof.

64. Further, it has been started that the rate of demolition was intended to effectively and conclusively defeat the orders of the honourable court.

65. Having made the foregoing averment, the plaintiffs/applicants have therefore sought for near similar orders as the ones sought *vide* the notice of motion application dated the March 31, 2022.



b. Response by the Defendant/Respondent:

66. Similarly, upon being served with the latter application, the respondent herein was obliged to and indeed filed a response *vide* replying affidavit sworn on the June 10, 2022.
67. According to the defendant/respondent, the activities complained of, were being carried out and/or undertaken by a third party, who had purchased the suit properties and whose details are well known to the plaintiffs/applicants.
68. Further, it has been averred that the sale and disposal of the suit properties was sanctioned by the annual general meeting of the defendant/respondent both in the year 2011 and 2016, respectively and that the suit properties were thereafter sold off.
69. Other than the foregoing, the deponent of the replying affidavit has repeated the contents of the replying affidavit sworn on the May 12, 2022 and reiterated the averments that the defendant/respondent ceased to have ownership rights and/ or interests over the suit properties.
70. Finally, the deponent has stated that the application herein has been brought with ulterior motives and same are merely meant to vex the trustees of the defendant/respondent, merely because the plaintiffs/applicants forms part of a Splinter Group, that is fighting the current management/trustees of the defendant/respondent.
71. For clarity, the deponent has added that in pursuit of the ulterior motives, the plaintiffs herein have also filed another petition *vide* Milimani HCC E154 of 2022, raising similar issues as the ones herein.

Submissions by the Parties:

72. The application dated the February 18, 2022, came up for inter-partes hearing on the March 23, 2022, whereupon the honourable court issued directions pertaining to and/or concerning the disposal of same. For clarity, it was ordered that the said application be canvased and be disposed of by way of written submissions.
73. Premised on the foregoing, the honourable court gave timelines for the filing and exchanging of written submissions and thereafter fixed the matter for mention on the May 23, 2022.
74. However, when the matter came up for mention on the May 23, 2022, it transpired that the plaintiffs/applicants herein had similarly filed two other application, namely, the application dated the March 31, 2022 and the one dated the April 12, 2022. Consequently, the honourable court was obliged to issue further directions as pertains to the subsequent applications.
75. For the avoidance of doubt, it was directed that the two applications which were subsequently filed by the plaintiffs/applicant to be canvased and disposed of simultaneously with the previous application dated the February 18, 2022.
76. On the other hand, it was also directed that the applications be disposed of by way of written submissions and thereafter timelines for the filing and exchange of written submissions in respect of the three (3) applications were set and or circumscribed.
77. Suffice it to point out that the parties herein duly complied with the directions and the written submissions were duly filed in respect of the 3 applications which are on record. For clarity, the written submissions, two sets by the defendant/respondent and one by the plaintiffs/applicants are on record.



78. For coherence, the contents of the written submissions and the issues raised therein have all been taken into account and/or duly considered. In this regard, the honourable court shall rely on the said submissions in crafting the subject ruling and the determination to be arrived at.

Issues for Determination:

79. Having reviewed the three sets of applications filed, the supporting affidavits thereto and the responses filed in opposition thereto; and having similarly considered the written submissions filed on behalf of the parties herein, the following issues do arise and are thus pertinent for determination.
- i. Whether the plaintiffs/applicants herein have established and/or proven the existence of a *prima facie* case with overwhelming chances of success.
 - ii. Whether the plaintiffs/applicants herein are disposed to suffer any irreparable loss, if the orders sought are not granted.
 - iii. Whether the plaintiffs/applicants have proven that the activities and/or omissions complained of were undertaken by the defendant/respondent.
 - iv. Whether this is a fit and proper case to cite and punish the defendant/respondent or her trustees for contempt, in the manner sought.

Analysis and Determination

Issue number 1

Whether the plaintiffs/applicants herein have established and/or proven the existence of a *prima facie* case with overwhelming chances of success.

80. The plaintiffs/applicants herein are seeking for the grant and/or issuance of an order of temporary injunction, to restrain and/or prohibit the sale, and alienation of the suit properties by the defendant/respondent herein.
81. Given that the plaintiffs/applicants are seeking for an order for temporary injunction same are therefore enjoined and or obliged to establish and prove specific conditions, which are pertinent before a court of law can proceed to grant the order sought.
82. One of the prerequisite conditions that must be established and proved is the existence of a *prima facie* case with overwhelming chances of success. In this regard, the plaintiffs/applicants herein were obliged to prove this particular conditions.
83. Before venturing to ascertain and/or interrogate whether the plaintiffs have established a *prima facie* case in this matter, it is imperative to discern the meaning and import of what constitutes a *prima facie* case.
84. In this regard, the definition of what constitutes a *prima facie* case was supplied by the Court of Appeal in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR where the court held as follows:

“In civil cases, a *prima facie* case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party 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.”

85. Additionally, the meaning, scope and tenor of what constitutes *prima facie* case, was re-visited in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, where the court observed as hereunder;

“*prima facie*” is a latin phrase for “at first sight”, whose legal meaning and application has been the subject of varying interpretation by courts in many jurisdictions. Phrases like “a serious question to be tried”, “a question which is not vexatious or frivolous”, “an arguable case” have been adopted to describe the burden imposed on the applicant to demonstrate the existence of *prima facie* case. The leading English House of Lords case of the *American Cyanamid Co Ethicon Ltd* [1975] AC 396 is a case in point. The meaning of “*prima facie* case”, in our view, should not be too much stretched to land in the loss of real purpose. The standard of *prima facie* case has been applied in this jurisdiction for over 55 years, at least in criminal cases, since the decision in *Ramanlal Trambaklal Hatt v Republic* [1957] EA 332.

86. Having appreciated and correctly understood the meaning and import of what constitutes a *prima facie* case, it is now appropriate to undertake the interrogation of the plaintiffs/applicants case.

87. Firstly, the plaintiffs herein have contended that same were/are lawful tenants of the defendants/respondents in the suit premises. In this regard, the plaintiffs have stated that same have been tenants for more than 36 years.

88. To this end, it was incumbent upon the plaintiffs to place before the court credible material to justify and/or establish that indeed same have been tenants in the suit premises. For clarity, one would have expected the plaintiffs to place before the court evidence of any tenancy document or lease instrument, if any, executed between the plaintiffs and the defendants.

89. On the other hand, if the plaintiffs were/are also tenants in the premises, it is imperative that same would be tenants carrying out some kind of business or such related activities therein, whether same be a school or otherwise and in this regard one would expect evidence of business permit/license paid to the relevant county government.

90. However, despite the averments that the plaintiffs were/are tenants of the defendants, same have not brought fourth any evidence at all to vindicate and/or prove the said averment. Certainly, if there was any such tenancy documents, nothing would have been easier than for the plaintiffs to produce same before the court.

91. Notwithstanding the foregoing, I have come across a lease document which has been exhibited and/or annexed by the plaintiffs and wherein same are purporting to be lawful tenants. Unfortunately, the lease document exhibited is one which was executed between the defendants herein as the landlords and one, M/s Gobind Enterprise Ltd, as the tenant.

92. At any rate, the same lease document show that same was executed on the November 1, 2016 and the duration shown therein was 5 years and 3 months. Consequently, the term of the lease was bound to lapse and/or extinguish on or about the January 31, 2022.

93. However, it is common ground that the plaintiffs herein in their individual capacities are separate and distinct from M/s Gobind Enterprises Ltd, who is the tenant as shown in the lease document exhibited.



94. Without belaboring the point, assuming that the plaintiffs are shareholders or directors of the tenant company, (which has not been established), it is elementary learning that a limited liability company is separate and distinct from her shareholders/directors.
95. As pertains to the foregoing hackneyed observation, one needs to recollect and recall the famous decision in the case of *Salmond v Salmond & Co Ltd* (1897) AC in which it was stated *inter alia* as follows:
- “The company is at law a different person and altogether from the subscribers to the memorandum and though it may be that after incorporation the business is precisely the same as it was before and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the shareholders of the subscribers or trustees for them nor are the subscribers as members liable in any shape or form, except to the extent and in the manner provided by the Act.”
96. Premised on the forgoing, the plaintiffs herein, cannot file and/or mount a suit, predicated on the basis of a lease agreement which was entered into with M/S Gobind Enterprises Ltd.
97. On the other hand, the plaintiffs herein have also not shown and/or stated that indeed that same are shareholders or directors of the said company. However, even if such evidence was availed, I have pointed out that the suit on that account, would be premature and stillborn.
98. Secondly, the plaintiffs case is also premised on the contention that same are members of the defendant temple and that the impugned sale and disposal of the suit properties, was being carried out and/or undertaken without the consent and/or authority of the annual general meeting of the defendant/respondent.
99. If indeed, the plaintiffs herein are *bona-fide* members of the defendants/respondents, then it behooved the plaintiffs/applicants to bring forth evidence showing their membership of the defendants. Yet again, no such evidence has been tendered and/or adduced.
100. Thirdly, the plaintiffs have also stated that the impugned sale and/or alienation of the suit property was being carried out without the sanction and/or consent of the annual general meeting of the defendants.
101. Further, it has also been contended that the impugned sale is also contrary to the provisions of the defendant’s constitution. In this regard, the plaintiffs’ have relied on clause 23 (r) of the *Constitution*.
102. Assuming that indeed the plaintiffs are bona fide members of the defendants and the sale of the property of the defendant is being undertaken by the trustees thereof, albeit without complying with the *Constitution*, can the plaintiffs’ file and maintain the suit herein against the trustees of the defendants.
103. To my mind, the defendant herein being a registered society, in the manner conceded by the plaintiffs/applicants in terms of paragraph 20 of the supporting affidavit, has internal dispute resolution mechanism, which are provided for and contained in her *Constitution*.
104. In the premises, if the plaintiffs herein were aggrieved by the actions and/or omissions of the trustees of the defendant/respondent, then no doubt, same ought to have mobilized the requisite membership of the defendant/respondent with a view to convening a special general meeting to address the infractions, if any, complained of.



105. Surely, disputes between members of a registered society and the registered society or the existing management thereof, must first be dealt with in accordance with the established dispute resolution mechanism, provided for and established *vide* the Constitution of the organization.
106. Before such dispute resolution mechanism are exhausted, in accordance with the doctrine of exhaustion, certainly a court of law would be divested and/or deprived of the requisite jurisdiction to entertain and/or adjudicate upon such dispute.
107. To buttress the legal statement articulated and espoused in the preceding paragraph, it is apt to take cognizance of the holding in the case of Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR, where the Court of Appeal stated and observed as hereunder;

We see this as the crux of the matter in this and similar cases. It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution.

We find and hold that the exhaustion doctrine applies even where, as was argued by the appellants herein, what is sought to be challenged is the very authority of the organs before whom the dispute was to be placed. We think there were sufficient safeguards in place for a valid determination of the various plaintiffs' disputes had they filed them within the church set up. And there was always the right, acknowledged by the learned Judge, of approaching the courts after exhaustion of the church mechanisms. By failing to do so, and quite apart from the force of their apprehensions, the appellants effectively failed to exhaust their remedies and essentially short-circuited the process by filing suits prematurely.

108. Fourthly, it is conceded by the plaintiffs that the suit properties belonged to and or registered in the name of the defendant. Consequently, the defendant is conferred with the requisite legal rights and interests to deal with the suit properties, subject only to known statutory limitation. See sections 24, 25 and 26 of the Land Registration Act 2012.
109. Pursuant to the foregoing rights, if the defendant herein upon obtaining the requisite resolution from the majority of the membership, proceeds to sell and/or dispose of the suit property, then such a right cannot be obstructed and/or objected to by the plaintiffs/applicants.
110. In this regard, the bottom line of my argument is that to the extent that the plaintiffs are not the registered owners of the suit properties, same therefore have *locus standi* to seek to and avert the actions of the lawful owner of the suit properties.
111. Fifthly, it is also not lost on the honourable court that the defendant has placed before the honourable court evidence that her membership convened and held two annual general meetings, one on the July 10, 2011 and the other on the November 13, 2016, wherein the general membership authorized and sanctioned the sale and disposal of the suit properties.
112. For the avoidance of doubt, it was pointed out by the defendants that the sale and disposal of the suit properties, was sanctioned because a majority of the membership of the defendant had moved away



from the neighborhood of the suit property and hence there was need to dispose of same and to buy another property conducive to the membership.

113. If indeed the plaintiffs herein are bona fide members of the defendant temple, as claimed, then same would be knowing of the said resolution.
114. Be that as it may, the important aspect that needs to be mentioned is that the plaintiffs herein did not dispute and or rebut the contents of the minutes which were placed before the honourable court and which sanctioned the sale of the suit properties.
115. Finally, evidence has also been placed before the court that pursuant to the resolutions of the annual general meetings of the defendants, (details of which have been alluded to elsewhere herein before), the suit property were indeed sold to a company known as M/S City Park View Apartment Ltd vide sale agreement dated the August 3, 2021.
116. For completeness, the authenticity of the sale agreement, has similarly, not been impeached, impugned or challenged, whatsoever.
117. Clause 1.1.2 of the sale agreement shows that the completion dates of the sale agreement was fixed at 90 days w.e.f August 3, 2021. In this regard, it is common ground that the 90 days lapsed on or about the November 3, 2021.
118. From the foregoing, it is evident and crystal clear that by the time the suit herein was being filed on the February 18, 2022, the suit properties stood sold, alienated and/or disposed of.
119. If the foregoing position is true, on the basis on the documentation placed before the honourable court, then it is apparent that the orders of temporary injunction to restrain the sale, alienation and transfer sought have obviously been overtaken by events and thus rendered moot.
120. In view of the aspects, which have been pointed out and/or enumerated in the preceding paragraphs, it is my humble conclusion that the plaintiffs herein have not established and/or laid before the honourable court evidence of a *prima facie* case.
121. In a nutshell, my answer to issue number 1 is in the negative.

Issue Number 2

Whether the plaintiffs/applicants herein are disposed to suffer any irreparable loss, if the orders sought are not granted.

122. Other than the requirement to prove and establish the existence of a *prima facie* case, a claimant for an order of temporary injunction, must also prove that same is disposed to suffer irreparable loss if the order sought for are not granted.
123. Essentially, no order of temporary injunction can issue and/or be granted if the imminent loss is one that is quantifiable, ascertainable and capable of compensation in monetary terms.
124. Premised on the foregoing, it was therefore incumbent upon the plaintiffs to also prove and/or place before the honourable court credible evidence pertaining to the nature of irreparable loss that may accrue and/or arise.



125. What then constitutes irreparable loss. To this end, it is imperative to take cognizance of the definition supplied vide the holding in the case of Nguruman Ltd v Jan Bonde Nielsen & 2 others [2014] eKLR, where the honorable court observed as follows;

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

126. Based on what constitutes irreparable loss, the question is; are the plaintiffs herein, as (sic) tenants in the suit properties disposed to suffer any irreparable loss, if the registered owner of the suit properties sell same.
127. To my mind, if there is any loss capable of being suffered by the plaintiffs in their capacity as (sic) tenants, such a loss, would be akin to breach of contract, for which the damages are quantifiable and payable.
128. On the other hand, if the loss is premised on the sale of the suit properties, without the sanction of the executive council of the defendant, then the loss can be remedied courtesy of a general meeting, to deal with the trustees, in accordance with the Constitution of the defendant herein.
129. Nevertheless, there is evidence that the general membership of the defendant sanctioned the sale or disposal of the suit properties. If this be true, then the plaintiffs as members of the defendants society, will obviously partake of pro-rata sharing of the sale proceeds.
130. In my considered view, I am afraid that the plaintiffs have not placed before the honourable court any evidence of irreparable loss, whatsoever and/ or howsoever. In this regard, there being no evidence of such loss, an order temporary injunction cannot certainly issue.

Issue Number 3

Whether the plaintiffs/applicants have proven that the activities and/or omissions complained of were undertaken by the defendant/respondents.

131. The plaintiffs herein have implored the court to find and hold that the trustees of the defendant, proceeded to and undertook the demolition of the building standing on the suit properties, albeit during the existence of lawful court orders.
132. Premised on the foregoing, the plaintiffs have thus contended that the trustees of the defendant are therefore guilty of contempt and thus are deserving citation by the court.
133. To be able to find and hold that someone, in this case, the trustees of the defendant are guilty of contempt, it is incumbent upon the applicant to place before the court sufficient and credible evidence connecting the contemnor to the act complained off.
134. In this case, it was contended that the trustees of the defendant are the ones who authorized and undertook the impugned demolition of the building standing on the suit properties. In this regard, it



was the obligation of the plaintiffs to show that indeed the demolition complained of, was carried out by the trustees of the defendant and not any other person.

135. However, having examined the two sets of supporting affidavit filed and relied on by the plaintiffs, there is no iota or scintilla of evidence to show that any of the trustees is responsible for the impugned demolition.
136. Perhaps, it was imperative for the plaintiffs to even place before the honourable court evidence that the machinery that were hired and which are being used for the demolition were hired or leased by the trustees of the defendants.
137. On the other hand, the plaintiffs herein could also very well place before the honourable court evidence that the casual workers, working on the site, are actually being paid by the defendant or any of the trustees.
138. To the contrary, evidence has been placed before the Honourable court that indeed the suit properties were sold to M/s City Park View Apartment Ltd, *vide* an agreement dated the August 3, 2021.
139. Besides, from the terms of the said sale agreement, it is apparent that the sale agreement was to be completed and may have been completed on or before the November 3, 2021. In this regard, the purchasers are said to have acquired title to and in respect of the suit property.
140. Further, it has also been stated that it is the purchaser who commissioned and commenced the demolition of the building standing on the suit properties. However, this averment, which is pertinent, has not been controverted by the plaintiffs.
141. Taking it to account the standard of proof required before the court can come to the conclusion that one is guilty of contempt, I am of the humble view that the plaintiffs' have not established and/or met the requisite threshold.
142. To this end, I am reminded of the dictum in the case of *Mutitika v Baharini Farm Ltd*[1985] eKLR, where the honourable Court of Appeal stated and observed as hereunder;

“In our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. We envisage no difficulty in courts determining the suggested standard of proof. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence which can be said to be quasi – criminal in nature”

143. Simply put, I am unable to put my hand on any evidence that connects the trustees of the defendant to the activities complained of. In the absence of such evidence, it would not be safe to cite the trustees for contempt and thereafter deprive same of their freedom and liberty, merely on alarming statements which are devoid of probative value.
144. Consequently, my answer to issue number three is similarly in the negative.

Issue Number 4

Whether this is a fit and proper case to cite and punish the defendant/respondent or her trustees for contempt.

145. The evidence that has been placed on record suggest that the plaintiffs herein, are being used by the tenant, namely M/s Gobind Enterprise Ltd, to propagate a claim, whose effect is to protect the interest of the said 3rd party.



146. I am alive to the fact that this issue is debatable, but the golden thread that runs across the entire affidavit filed in support of the application, *inter-alia* the operations of the school, which does not belong to the plaintiffs herein, but to M/s Gobind Enterprise Ltd, constitutes a grave pointer to the observation herein.
147. Secondly, it is also apparent that the plaintiffs herein are not being honest and candid with the court and that is why, the plaintiffs are pretending to be lawful tenants, but when it comes to showing evidence of such tenancy, same exhibit a lease document between the defendants and M/s Gobind Enterprise Ltd.
148. Clearly, something is a miss.
149. Thirdly, the plaintiffs herein seems to constitute a splinter group, who are not happy with the management and the running of the affairs of the defendant by the existing trustees and are therefore out to use the court process for collateral purpose.
150. In fact, the sinister motive that inspire the contempt application herein can be well understood by taking into account the fact that the said plaintiffs herein have also filed a separate constitutional petition *vide* Milimani HCC petition No E154 of 2022, challenging the authority of the current trustees to manage the affairs of the defendant.
151. Fourthly, it is also evident that the sale, alienation and disposal of the suit properties, which is the subject of challenge, was sanctioned by the general membership of the defendants.
152. Consequently and in the premises, it appears that the trustees are now being exposed to punishment, at the instance of the plaintiffs, for doing that which was sanctioned by the executive council/ general membership of the defendant/respondent.
153. To my mind, the circumstances obtaining in this matter, do not warrant the citation and punishment, in the manner sought by the plaintiffs/applicants.
154. If anything, the plaintiffs herein, who have stated *vide* Milimani HCC petition No E154 of 2022, to be members of the defendants herein, but who are dissatisfied with the management of the current trustees have an alternative recourse to achieve their goal.
155. Such recourse, is well underscored *vide* the [Constitution](#) of the defendant/respondent.
156. Suffice it to point out, that where there exists known and established recourse, the honourable court should be reluctant and cautious in resorting to the jurisdiction to punish for contempt.
157. To this end, I am fortified by the holding in the case of [Re Maria Annie Davies](#) [1889] 21 QBD 236, and 239, where the honourable court observed as hereunder

“Recourse ought not to be had to process of contempt in aid of a civil remedy where there is any other method of doing justice. The observations of the later master of the rolls in the case of *re clement* seem much in point: ‘it seems to me that this jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched, and exercised, if I may say so, with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is not other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. I say that a judge should be most careful to see that the cause cannot be mode of dealing with persons brought before him.

On accusations of contempt should be adopted. I have myself had on many occasions to consider this jurisdiction, and I have always thought that, necessary though it be, it is



necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found. Probably that will be discovered after consideration to be the true measure of the exercise of the jurisdiction”

158. In view of the dictum in the above cited case and given the fact that the sale appears to have been duly sanctioned by the general membership of the defendant, it is my humble view that this is not an appropriate case, to invoke and resort to contempt proceedings.
159. Similarly, I would have been reluctant to cite and punish the trustees of the defendant. However, having found and held that contempt was not proven, this latter finding becomes surplusage.

Final Disposition

160. Having analyzed and considered the various issues that were raised by the parties, it is now appropriate to render the final and dispositive orders.
161. However, before doing so, it is important to mention that the issues that color the subject proceedings, appear to be a dispute between members or a segments of the members of the defendant against the current leadership of the defendant temple, which obviously are not issues for determination by a court of law in the first instance.
162. In this regard, the parties may very well consider the doctrine of exhaustion.
163. The second issue that is also worthy of mention, is the fact that the plaintiffs herein do not seem to be candid with the court as far as their status vis a vis the suit property are concerned. In this regard, there is a glimpse of lack of candor on the part of the applicants.
164. Such conduct, if proven by the honourable court ought to be suitably punished to deter commission of perjury. In any event, such conduct must similarly, be frowned upon by a court of law.
165. Having made the foregoing sentiments, it is now appropriate to make the final orders. In this regard, I make the following orders;
- i. The notice of motion application dated the February 18, 2022, March 31, 2022 and April 12, 2022 be and are hereby dismissed for being devoid of merits.
 - ii. Costs of the three applications be and are hereby awarded to the defendant/respondent.
 - iii. The interim orders of status quo hitherto granted on February 24, 2022 and thereafter variously extended be and is hereby discharged.
166. It so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant

Mr. Owuor Thucher h/d for Mr. Singh for the Plaintiffs/Applicants.

Mr. Ondiek for the Defendants/Respondents.

