



Ngati & 4 others v Mutie & 7 others (Environment and Land Case Civil Suit 63 of 2018) [2022] KEELC 13486 (KLR) (6 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13486 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 63 OF 2018**

JO MBOYA, J

OCTOBER 6, 2022

BETWEEN

**DAVID NGATI 1ST PLAINTIFF
JOSEPH YUDA 2ND PLAINTIFF
JAMES NDETO 3RD PLAINTIFF
BONIFACE MATHEKA 4TH PLAINTIFF
GEOFFREY OCHANDA 5TH PLAINTIFF**

AND

**ELIZAPHAN MUTINDA MUTIE 1ST DEFENDANT
ANDREW M.MBITHI 2ND DEFENDANT
SHEM NYANGAU ONCHOKA 3RD DEFENDANT
KENYA CURIO AND CRAFT JUA KALI ASSOCIATION 4TH DEFENDANT
GODFREY MBUURI GICHUURA 5TH DEFENDANT
CHIEF LAND REGISTRAR 6TH DEFENDANT
ATTORNEY GENERAL 7TH DEFENDANT
NATIONAL LAND COMMISSION 8TH DEFENDANT**

RULING

Background

1. Vide the Notice of Motion Application dated the January 18, 2022, the 1st to 5th Defendants/Applicants herein have approached the court seeking for the following Reliefs;



- i. Spent.
 - ii. That pending the hearing and determination of this Application, this Honorable Court be pleased to Stay any further Proceedings in this matter in the Interest of Justice.
 - iii. That this Honorable court be pleased to issue a Temporary Injunction restraining the Plaintiffs from withdrawing any monies held in the bank accounts in the name of Embakasi Village Craft Jua Kali Association (formerly known as Nairobi Curios Jua Kali Association) whose particulars the Plaintiffs be compelled to disclose.
 - iv. That this Honourable Court be pleased to issue an order of Temporary Injunction that the Plaintiffs jointly and severally whether by themselves, their servants, agents or in any other manner howsoever be and are hereby restrained from managing and/or controlling the management or affairs of the Embakasi Village Craft Jua Kali Association (formerly known as Nairobi Curios Jua Kali Association).
 - v. That this Honourable Court be pleased to issue an order to compel the Plaintiffs to produce for Inspection true and certified copies of statements of any bank accounts and current account bank statements they have been operating on behalf of the society in disguise as officials of Embakasi Village Craft Jua Kali Association from the dates of their openings to date.
 - vi. That the Plaintiffs jointly and severally whether acting by themselves, their servants, agents or representatives or in any other manner howsoever be and are hereby restrained by an order of this court from convening, holding or conducting any meeting of the Embakasi Village Craft Jua Kali Association (formerly known as Nairobi Curios Jua Kali Association and from passing any Resolution thereof pending the hearing and determination of this suit.
 - vii. That the Honorable Court be pleased to make an order that should there be a finding of Misappropriation of monies held in the Bank Accounts belonging to Embakasi Village Craft Jua Kali Association (Formerly known as Nairobi Curios Jua Kali Association) the Plaintiffs jointly and severally be ordered to reimburse the same to the Embakasi Village Craft Jua Kali Association (formerly known as Nairobi Curios Jua Kali Association).
 - viii. That this Honorable Court be pleased to issue an order that the Plaintiffs have no Locus Standi to bring this suit on behalf of the Embakasi Village Craft Jua Kali Association (formerly known as Nairobi Curios Jua Kali Association) and the Plaint be struck out with costs to the Defendants.
 - ix. That the cost of this application be provided for.
2. The subject application is premised and based on the various grounds which have been enumerated in the body thereof and same is further supported by the affidavit by one Andrew M Mbithi and which affidavit is sworn on the January 18, 2022.
 3. Upon being served with the subject application, the Plaintiffs/Respondents filed a Replying affidavit sworn on the February 1, 2022, by the 1st Plaintiff/Respondent. For clarity, it is stated that the said Replying affidavit has been sworn on behalf of all the Plaintiffs/Respondents.
 4. Other than the Plaintiffs/Respondents, who filed the Replying affidavit, details in terms of the preceding paragraph, the 6th, 7th and 8th Defendant/Respondents neither filed any Replying affidavit nor Grounds of opposition to the application under reference.



Deposition By The Parties:

A. 1st To 5th Defendants'/applicants' Case

5. Vide the Supporting Affidavit sworn on the January 18, 2022, the deponent thereof, namely Andrew M Mbithi has averred that same is the duly elected secretary of the 4th Defendant/Applicant and hence same is vested with the requisite capacity and mandate to swear the subject affidavit.
6. Besides, the deponent has averred that despite the fact that the Plaintiffs/Respondents herein are not the lawful and bona fide officials of the 4th Defendant/Applicant, same have however held themselves out as being authorized officials of the said 4th Defendant.
7. Be that as it may, the deponent has averred that the Plaintiffs/Respondents herein purport to have been constituted as the care taker committee of the 4th Defendant/Applicant. However, the deponent avers that the 4th Defendant/Applicant has neither held any election nor convened any annual/special general meeting, to enable same to even constitute a caretaker committee.
8. Nevertheless, the deponent has further stated that contrary to the averments by the Plaintiffs/Respondents, the 1st , 2ND ,3RD and 5th Defendants/Applicants are the lawful officials of the 4th Defendant/Applicant and hence the only persons authorized to run the affairs of the 4th Defendant/Applicant.
9. On the other hand, the deponent has deponed that the Plaintiffs/Respondents herein have also filed various cases, inter-alia, ELC No 614 of 2012, ELC No 1087 of 2015 and ELC 63 of 2018. For clarity, the deponent has added that despite having filed the said suits, the Plaintiffs/Respondents thereafter proceeded to withdraw ELC No 614 of 2012 and ELC No 1087 of 2015, respectively.
10. Other than the foregoing, the deponent has also added that the Constitution of the 4th Defendant/Applicant provides for who the lawful and legitimate officials are and similarly prescribe the manner in which officials of the said association can cease to hold office or better still to be removed from same.
11. Suffice it to note that the deponent has averred that the Plaintiffs/Respondents purported caretaker committee having not been lawfully constituted in accordance with the Constitution, same is therefore illegal and unlawful.
12. Notwithstanding the foregoing, the deponent has added that despite not being mandated to run the affairs of the 4th Defendant/Applicant, the Plaintiffs/Respondents have variously purported to transact business on behalf of the 4th Defendant/Applicant and same have similarly withdrawn various monies from the banks accounts of the 4th Defendant/Applicant.
13. In the premises, the deponent has stated that it is therefore appropriate to bar and prohibit the Plaintiffs/Respondents from running the affairs of the 4th Defendant/Applicant, pending the hearing and determination of the subject suit.
14. Other than the foregoing, the deponent has also implored the court to find and hold that the Plaintiffs/Respondents herein are not seized of the requisite capacity to commence, originate and maintain the subject suit.



b. Response By The Plaintiffs'/respondents':

15. The 1st Plaintiff/Respondent filed a Replying affidavit sworn on the February 1, 2022 and same has averred that the subject application is not only mischievous but also constitutes an abuse of the Due process of the court.
16. In any event, the deponent has further averred that the Plaintiffs/Respondents herein were lawfully and duly constituted as the caretaker committee of the 4th Defendant/Applicant and by virtue of their constitution as the caretaker committee, same have the requisite capacity to sue on behalf of the 4th Defendant/Applicant.
17. On the other hand, the deponent has added that the 1st to 3rd and the 5th Defendants/Applicants are former officials of the 4th Defendant/Applicant, who abandoned the management and the affairs of the 4th Defendant/Applicant, culminating into the Constitution of a caretaker committee comprising of the Plaintiffs/Respondents.
18. On the other hand, the deponent has also averred that the letters which have been annexed by the Applicants to the application herein and essentially, the ones purporting that same are the bona fide official of the 4th Defendant herein are fraudulent and misleading. For clarity, the deponent has contended that same would seek for liberty to cross examine the deponent of the supporting affidavit as well as the authors of the impugned letters.
19. Be that as it may, the deponent has added that the issues raised vide the subject application and essentially the issues pertaining to the Financial status of the 4th Defendant/Applicant as well as the provisions of the Bank statements, are issues that falls outside the Jurisdiction of this court.
20. Finally, the deponent has averred that the dispute before hand relates to who are the bona fide officials of the association, that is the 4th Defendant/Applicant and hence this court is not seized of Jurisdiction to entertain and address the issues raised vide the subject application.

C. Response By The 6th, 7th And 8th Defendants'/respondents':

21. Despite having been served with the subject application, the 6th, 7th and 8th Defendants/Respondent neither filed any Replying affidavit nor Grounds of opposition.
22. Simply put, the 6th, 7th and 8th Defendants/Respondents did not oppose the subject application.

Submissions By The Parties:

A. Applicants' Submissions:

23. The Applicants herein filed written submissions dated the June 22, 2022, and same raised four pertinent issues for determination. First and foremost, the Applicants have contended that the members of the 4th Defendants/Applicants have been making payments to the 4th Defendant/Applicant's bank account, but the deposit have been variously withdrawn by the Plaintiffs/Respondents, albeit without the authority and mandate of the 4th Defendant/Applicant.
24. At any rate, the Applicants have further added that the withdrawals by the Plaintiffs/Respondents have similarly been carried out and undertaken without the requisite authority and hence the Plaintiffs/Respondent are guilty of misappropriating the funds of the 4th Defendant/Applicant.



25. On the other hand, the Applicants have further submitted that the Respondents herein have constituted themselves as signatory to the Bank account and by virtue of being such signatory, same have misappropriated monies belonging to the 4th Defendant.
26. In the premises, the Applicants have therefore contended that same have established and laid out a prima facie case to warrant the grant of orders of temporary injunction.
27. Secondly, the Applicants have also submitted that to the extent that the Plaintiffs/Respondents are not the lawful and authorized officials of the 4th Defendant, the impugned activities are thus exposing the 4th Defendant/Applicant to irreparable loss.
28. Essentially, the Applicants have contended that the continued withdrawal and misappropriation of the funds belonging to the 4th Defendant/Applicant are bound to occasion Irreparable loss, insofar as the Plaintiffs/Respondents shall not be able to refund any such monies, which shall have been withdrawn from the 4th Defendants/Applicants bank accounts.
29. Thirdly, the Applicants have also submitted that it is imperative that the Plaintiffs/Respondents be ordered to avail and provide true and certified copies of the Bank statements, relating to the accounts of the 4th Defendant/Applicant, which the Plaintiffs/Respondents are operating without lawful authority and/or mandate.
30. At any rate, the Applicants have also submitted that the provision of such Bank account Statements will enable same (1st to 4th Defendants/Applicants) to hold the Plaintiffs/Respondents accountable for any misappropriation of the funds of the Association.
31. Finally, the Applicants have submitted that to the extent that the Plaintiffs/Respondents are not the lawful and bona-fide officials of the 4th Defendant, same are not competent nor mandated to file any suit pertaining to the affairs of the 4th Defendant/Applicant.
32. At any rate, the Applicants have further added that the purported caretaker committee, which the Plaintiffs/Respondents claims to have been constituted, is illegal and unlawful.
33. Premised on the foregoing, the Applicants have contended that it is therefore appropriate for the court to issue and grant the orders sought at the foot of the application dated the January 18, 2022.

b. Plaintiffs'/respondents' Submissions:

34. The Plaintiffs/Respondents herein have filed written submissions dated the July 2, 2022 and in respect of which the Plaintiffs/Respondents have raised two issues for determination.
35. Firstly, the Plaintiffs/Respondents have submitted that this Honorable court is bereft and devoid of jurisdiction to entertain and adjudicate upon the issues raised at the foot of the subject application.
36. However, despite contending that the court is devoid of jurisdiction to entertain the subject application, the Plaintiffs/Respondent have not elaborated the contention premised on lack of jurisdiction.
37. Secondly, the Plaintiffs/Respondents have submitted that the issues raised at the foot of the subject application are issues that ought to be addressed and dealt with vide a Plenary hearing.
38. Consequently, the Plaintiffs/Respondents have contended that the subject application constitutes and is therefore an abuse of the Due process of the court and same ought to be dismissed.



Issues For Determination:

39. Having reviewed the Application dated the January 18, 2022, the Supporting affidavit thereto and the Replying affidavit on behalf of the Plaintiffs/Respondents; and having similarly considered the written submissions filed by the Parties, the following issues do arise and are thus germane for determination;
- i. Whether the Application dated the January 18, 2022 seeking inter-alia orders of Temporary Injunction, albeit in the absence of a suit by the 1st to 5th Defendants/Applicants is competent and legally tenable.
 - ii. Whether the Honorable Court is seized of the requisite Jurisdiction to order and direct Production and dissemination of true and certified copies of the Bank statements, in the manner sought or at all.
 - iii. Whether this Court can make a finding of Misappropriation of monies belonging to the 4th Defendant/Applicant on the basis of an Interlocutory Application.

Analysis And Determination

Issue Number 1 - Whether the Application dated the January 18, 2022 seeking inter-alia, orders of Temporary Injunction, albeit in the absence of a suit by the 1st to 5th Defendants/Applicants is competent and legally tenable.

40. It is common ground that the subject suit was filed and commenced by the Plaintiffs/Respondents, who are therefore the originators of the suit. For clarity, the substantive reliefs sought at the foot of the Plaint are in favor of the Plaintiffs/Respondents.
41. Upon being served with the Plaint and Summons to enter appearance, the 1st to 5th Defendants/Applicants duly entered appearance and thereafter filed a statement of defense dated the June 12, 2019. For clarity, the 1st to 5th Defendants did not implead any counterclaim.
42. Nevertheless, despite there being no counterclaim, the 1st to 5th Defendants have since proceeded to and filed the subject application, wherein same are principally seeking for orders of temporary injunction, pending the hearing and determination of the subject suit.
43. Having not filed any counterclaim, which is essentially a cross suit, the question that does arise is whether the 1st to 5th Defendants herein can legally file an application seeking for orders of temporary injunction.
44. On the other hand, there is also the question pertaining to the doctrine of departure and in particular, that parties are bound by their own pleadings. In this regard, it would be appropriate to determine whether in the absence of a principal pleading containing a prayer for permanent injunction, the Applicants herein can partake of or benefit from an order of temporary injunction.
45. The starting point to addressing the twin questions which have been alluded to in the preceding paragraphs is by referring to the provisions of Order 40 Rule 1 of the [*Civil Procedure Rules, 2010*](#).
46. For convenience, the said provisions are reproduced as hereunder;
1. Cases in which temporary injunction may be granted [Order 40, rule 1.]
Where in any suit it is proved by affidavit or otherwise—



- (a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- (b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

47. My reading of the foregoing provisions connotes that the only person who can apply for or seek to procure an order of temporary injunction is the person who has originated or commenced the suit. In this regard, if the suit is filed by the Plaintiff, whereby same is seeking substantive orders against a Defendant, then only the Plaintiff can file an application for temporary injunction pending the determination of the suit.
48. Conversely, if a Defendant is also keen to procure and obtain any Temporary Relief or intervention in the nature of temporary injunction, then it behooves the Defendant to file a Counterclaim, which is essentially a cross suit.
49. To my mind, where a Defendant has filed a counterclaim, same would be at liberty to seek for and obtain an order of temporary injunction, subject to proof of the established condition for the grant of such orders.
50. However, in respect of the instant matter the 1st to 5th Defendants/Applicants have not filed any counterclaim, but yet same are now seeking orders of temporary injunction. In my considered view, the orders of temporary injunction can only be anchored on some foundation. For clarity, the foundation would be a substantive suit filed by the Applicant and in respect of which same has inter-alia sought for orders of permanent injunction or appropriate Declaratory Reliefs.
51. For coherence, in the absence of a counterclaim/cross suit, to anchor the application for temporary injunction, the application for temporary injunction herein has certainly been made and mounted in vacuum.
52. Secondly, it is trite and established that Parties are bound by that their pleadings. Consequently, no party can seek to procure any orders in a suit, which orders have not been impleaded and captured in the substantive pleadings.
53. On the other hand, no party can also seek to travel far and yonder beyond the four corners of the pleadings that have been filed before a court of law. Such an endeavor, is prohibited by the Doctrine of departure.
54. In respect of the subject matter, the 1st to 5th Defendants/Applicants are asking the court to grant orders of temporary injunction, even though same are alive to the fact that there are no substantive pleadings to anchor the claim for such temporary injunction.
55. Premised on the foregoing, it is my finding and holding that in the absence of a counterclaim/cross suit, the application for temporary injunction by and on behalf of the 1st to 5th Defendants/Applicants, has been mounted and made in vacuum. Consequently, same is legally untenable.
56. As pertains to the Doctrine of Departure, it is also appropriate to take cognizance of the decision in the case of *Independent Electoral and Boundaries Commission & another versus Stephen Mutinda Mule*



¶ 3 others [2014] eKLR, where the court underscored the importance and significance of pleadings as hereunder;

' As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings.

Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called 'Any Other Business' in the sense that points other than those specific may be raised without notice.'

57. Other than the foregoing decision, the necessity to seek for temporary injunction where there is No substantive prayer for permanent injunction, was addressed, considered and deliberated upon vide the case of *Kihara Versus Barclays Bank Ltd [2001] 2 EA 420*. See page 424, paragraph 9 thereof, where Justice Ringera underscored the necessity to have a substantive suit prior to and before seeking for temporary injunction.
58. In the premises, I find and hold that the subject application seeking for temporary injunction to restrain the impugned activities, albeit in the absence of a counterclaim, is misconceived, legally untenable and otherwise bad in law.

Issue Number 2 - Whether the Honorable Court is seized of the requisite Jurisdiction to order and direct Production and dissemination of true and certified copies of the Bank Statements and related Documents, in the manner sought or at all.

59. The 1st to 5th Defendants/Applicants have implored the court to make an order compelling the Plaintiffs/Respondents to produce for their inspection or better still to avail unto same true and certified copies of Statements of any Bank accounts and current account bank statements being operated on behalf of the society.
60. First and foremost, it is appropriate to state that the 1st to 5th Defendants have neither stated nor disclosed the details of the bank accounts or the banking institutions, wherein the impugned accounts are held.
61. In the absence of the bank account details and the banking institutions wherein the impugned accounts are held, it is apparent that any court orders, issued, shall be in vain and in futility.



62. Suffice it to note that a court of law is called upon to issue an order which is directed to a specific and designated person. For clarity, a court of law cannot issue an order at large, that is addressed to no one, in the manner that the Applicants herein are seeking.
63. Notwithstanding the foregoing, it is common ground that any Party, the Applicants not excepted, have a right to procure and be supplied with documents/information, which is necessary to facilitate the enjoyment of their Rights and fundamental freedom. See Article 35 of the [Constitution](#) 2010.
64. However, towards the enjoyment of the right to information as enshrined vide Article 35 of the [Constitution](#) 2010, it incumbent upon any Applicant to strictly comply with the established provisions of the law, inter-alia, the provisions of Sections 8, 9 and 12 of the [Access to Information Act](#), 2016.
65. For completeness, the provisions of Section 8, 9 and 12 stipulates as hereunder;
 8. Application for access
 - (1) An application to access information shall be made in writing in English or Kiswahili and the applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested.
 - (2) Where an applicant is unable to make a written request for access to information in accordance with subsection (1) because of illiteracy or disability, the information officer shall take the necessary steps to ensure that the applicant makes a request in manner that meets their needs.
 - (3) The information officer shall reduce to writing, in a prescribed form the request made under subsection (2) and the information officer shall then furnish the applicant with a copy of the written request.
 - (4) A public entity may prescribe a form for making an application to access information, but any such form shall not be such as to unreasonably delay requests or place an undue burden upon applicants and no application may be rejected on the ground only that the applicant has not used the prescribed form.
 9. Processing of application
 - (1) Subject to section 10, a public officer shall make a decision on an application as soon as possible, but in any event, within twenty one days of receipt of the application
 - (2) Where the information sought concerns the life or liberty of a person, the information officer shall provide the information within forty-eight hours of the receipt of the application.
 - (3) The information officer to whom a request is made under subsection (2) may extend the period for response on a single occasion for a period of not more than fourteen days if—
 - (a) The request is for a large amount of information or requires a search through a large amount of information and meeting the stipulated time would unreasonably interfere with the activities of the information holder; or
 - (b) Consultations are necessary so as to comply with the request and the consultations cannot be reasonably completed within the stipulated time.



- (4) As soon as the information access officer has made a decision as to whether to provide access to information, he or she shall immediately communicate the decision to the requester, indicating—
 - (a) whether or not the public entity or private body holds the information sought;
 - (b) whether the request for information is approved;
 - (c) if the request is declined the reasons for making that decision, including the basis for deciding that the information sought is exempt, unless the reasons themselves would be exempt information; and
 - (d) if the request is declined, a statement about how the requester may appeal to the Commission';
- (5) A public officer referred to in subsection
 - (1) May seek the assistance of any other public officer as the first mentioned public officer considers necessary for the proper discharge of his or her duties and such other public officer shall render the required assistance.
- (6) Where the applicant does not receive a response to an application within the period stated in subsection (1), the application shall be deemed to have been rejected.

12. Fees

- (1) No fee may be levied in relation to the submission of an application.
- (2) A public entity or private body from which an application for access to information has been made may charge a prescribed fee for the provision of the information and the fee shall not exceed the actual costs of making copies of such information and if applicable, supplying them to the applicant.
- (3) Subject to subsection (2), the Cabinet Secretary shall make regulations prescribing the fees payable for expenses incurred in providing information to an applicant.

66. From the foregoing provisions, it is evident that before any litigant can resort to court with a view to procuring and obtaining any document/information in the custody of another, it behooves the Applicant to first write to or request the person under whose custody the document/information is held and thereafter await a response.

67. On the other hand, it is explicit that it is only upon a refusal by the holder of the impugned information/document that the applicant can thereafter consider approaching a court of law to compel the disclosure or dissemination of the impugned information.

68. As pertains to the subject matter, there is no deposition or evidence that the Applicants herein have previously written to the Plaintiffs/Respondents or even to their named banks, if any, to supply same with the impugned documents, in accordance with the provision of Section 8 of the [Access to Information Act](#), 2016.

69. To my mind, having not satisfied and or complied with the express and mandatory provisions contained in the [Access to Information Act](#), 2016, the limb of the subject application seeking an order to compel the provisions of the impugned documents is therefore premature and legally untenable.



70. Suffice it to state that the importance to comply with the provisions of the [Access to Information Act](#), 2016 has hitherto been addressed and deliberated upon by various court. Nevertheless, it is appropriate to mention the holding in the case of [Njonjo Mue versus The Chairman IEBC \(2017\)eKLR](#), where the Supreme Court of Kenya observed as hereunder;
- (22) Again that is the correct interpretation of the issue at of hand generally but in the instant matter, the [Constitution](#) provides for the right of access to information which has been operationalized through two pieces of legislation, the [Independent Electoral and Boundaries Commission Act](#) and the [Access to Information Act](#). We also recognize that information held by the State or State organs, unless for very exceptional circumstances, ought to be freely shared with the public. However, such information should flow from the custodian of such information to the recipients in a manner recognized under the law without undue restriction to access of any such information.
- (23) Further, a duty has also been imposed upon the citizen(s) to follow the prescribed procedure whenever they require access to any such information. This duty cannot be abrogated or derogated from, as any such derogation would lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under the [Constitution](#) and the constituting provisions of the law. It is a two way channel where the right has to be balanced with the obligation to follow due process.
71. In a nutshell, if the Applicants herein were keen and desirous to procuring and obtaining the impugned information (whose details have not been availed) then it behooved same to comply with the established procedure before coming into court.
72. However, despite being knowledgeable of the established procedure and essentially the provisions of the [Access to Information Act](#), the Applicants herein have jumped the gun. Clearly, the failure to comply with the law militates against the grant of the relief herein.

Issue Number 3 - Whether this court can make a finding of Misappropriation of Monies belonging to the 4th Defendant/Applicant on the basis of an Interlocutory Application.

73. It is trite and settled that a court dealing with an Interlocutory Application is not obligated to interrogate the facts therein with a view to arriving at a precipitate and substantive conclusion.
74. For clarity, the mandate to substantively interrogate the issues in dispute is bestowed upon the trial court, whose mandate includes hearing of the evidence, entertaining cross examination and interrogating the documentary evidence, if any.
75. Be that as it may, the Applicants herein have sought to invite the court to make a finding that the Plaintiff/Respondent herein have misappropriated the monies held in the unnamed bank accounts of the 4th Defendant/Applicant and similarly to direct the Plaintiffs jointly and or severally to reimburse the monies that have since been misappropriated.
76. To my mind, what the Applicants are inviting the court to do is to conduct a thorough-going interrogation of the evidence and thereafter make a precipitate finding on misappropriation.
77. Sadly, this court whilst dealing with an interlocutory application has no such powers and mandate. Consequently, such an invitation would be tantamount to inviting this court to usurp the mandate of the trial court, albeit prematurely. To my mind, such invitation must be nipped in the bud.



78. Nevertheless, it is appropriate to point out that whilst dealing with an interlocutory application, the court is enjoined to exercise caution and necessary circumspection. Simply put, the court must not indulge in minute analysis of the evidence or the documents, if any.

79. To underscore the extent and scope of the jurisdiction of a court whilst dealing with an Interlocutory application, it is appropriate to take cognizance of the decision in the case of *Mbutbia versus Jimba Credit Corporation Ltd (1988)eKLR*, where the Court of Appeal observed as follows;

The correct approach in dealing with an application for the injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions. There is no doubt in my mind that the learned Judge went far beyond his proper duties, and has made final findings of fact on disputed affidavits. Supposing that the valuation of the plaintiff's Valuer were to be accepted as showing the true market value of the land in question, after evidence viva voce under cross-examination, how then could the Judge find that the sale at a price of Kshs 200,000/- was not inconsiderably low? At roughly half the price, how could that be maintained as such an obvious situation, that the plaintiff's chances of success were found to have less than a possibility of success?

80. Premised on the foregoing, it safe to state and hold that a court dealing with an interlocutory application cannot be called upon to make a precipitate finding, inter-alia a finding of misappropriation and an order for reimbursement, in the manner sought at the foot of the said application.

81. In the circumstances, I similarly find and hold that the subject application is one that inclines to invite the court to breach and violate the established norms of procedure and therefore to grant substantive orders at interlocutory stage.

82. In a nutshell, I find and hold that the reliefs sought herein, namely, at the foot of the Subject Application, cannot issue at the interlocutory stage. Certainly, not in the manner impleaded.

Final Disposition:

83. Having considered and addressed the issues for determination, which were highlighted in the body of the ruling herein, it must have become evident and apparent that the subject application is devoid of merits.

84. Nevertheless, before making the final pronouncement, it is imperative to observe that the dispute beforehand relates to the determination of who are the bona fide officials of the 4th Defendant/Applicant. Clearly, the determination of such an issue does not lie within the mandate and jurisdiction of the court.

85. In the premises, it behooves the Parties herein to reconsider the dispute and to apply the Doctrine of exhaustion by seeking to have the dispute addressed and deliberated upon in line with the Internal dispute resolution mechanism provided for in the Constitution of the Society.

86. For the avoidance of doubt, the Parties and their advocates are invited to take cognizance of the dictum of the Court of Appeal in the case of *Geoffrey Muthiga Kabiru & 2 others – versus s- Samuel Munga Henry & 1756 others [2015] eKLR*, where the Court of Appeal stated that:

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 fora of last resort and not the first port of call the moment a storm brews...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 the Courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.

87. In view of the foregoing decision, the issues that bely the current suit should ideally be addressed in accordance with the established Dispute resolution mechanism provided for in the Constitution.
88. Be that as it may, I come to the conclusion that the Application dated the January 18, 2022 is not only pre-mature, but same is similarly devoid of merits. Consequently, same be and is hereby dismissed.
89. Nevertheless, Each Party shall bear own costs of the Application.
90. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6th DAY OF OCTOBER 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant

Ms. Wambua h/b for Mr. Aminga Opiyo for the 1st to 4th Defendants/Applicants.

Mr. Mutisya for the Plaintiffs/Respondents

Mr. Allan Kamau for the 6th and 7th Defendants

N/A for the 8th Defendant

