



REPUBLIC OF KENYA



KENYA LAW
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**Uno & 3 others v Highcheck Auctioneers & 3 others (Environment & Land
Case E299 of 2022) [2022] KEELC 15580 (KLR) (21 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15580 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E299 OF 2022**

**JO MBOYA, J
NOVEMBER 21, 2022**

BETWEEN

**MARY NJOKI UNO 1ST APPLICANT
SYMON NGAMAU MWANGI 2ND APPLICANT
PETER MWAURA MUTHURA 3RD APPLICANT
CECILIA GATHIGIA MACHARIA 4TH APPLICANT**

AND

**HIGHCHECK AUCTIONEERS 1ST RESPONDENT
LETSHEGO KENYA LIMITED 2ND RESPONDENT
FRED KAMAU CHEGE 3RD RESPONDENT
CHIEF LAND REGISTRAR 4TH RESPONDENT**

RULING

Introduction & Background

1. Vide notice of motion application dated September 17, 2022, the plaintiffs/applicants have approached the court seeking the following orders;
 - i. That this honourable court be pleased to certify this matter urgent, and it be heard ex-parte in the first instance.
 - ii. That pending the hearing and determination of this application, an order of temporary injunction be and is hereby issued restraining the defendants/respondents whether by itself, employees, servants and/or agents or otherwise assigns and/or any person whatsoever acting on its behalf and/or under its mandate and/or instructions from alienating, advertising for sale,



offering for sale, selling, taking possession of, leasing, transferring, or otherwise in any manner whatsoever interfering with all that property known as plot no 21 A,21 B,21 C,21 D Kahawa West Phase II (LR No Nairobi Block 132/244 until this application is heard and determined.

- iii. That Officer Commanding Police Division (OCPD) Kasarani do supervise the enforcement of order (2) above.
 - iv. That pending the hearing and determination of this entire suit, an order of injunction be and is hereby issued restraining the defendant/respondent whether by itself, employees, servants and/or agents or otherwise assigns and/or any person whatsoever acting on its behalf and/or under its mandate and/or instructions from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, or otherwise in any manner whatsoever interfering with all that with all that property known as Plot no 21 A,21 B, 21 C, 21 D Kahawa West Phase II (LR No Nairobi Block 132/244 until this suit is heard and determined.
 - v. That the honourable court be pleased to issue any such orders that may deem expedient and necessary in the circumstance of this case.
 - vi. That the defendants/respondents be ordered to pay the costs of this application.
2. The subject application is anchored and premised on various grounds which have been enumerated at the foot of the application. Besides, the application has been supported by various affidavits sworn by the named plaintiffs/applicants.
 3. For completeness, the supporting affidavit has exhibited and annexed various documents *inter-alia*, a letter of allotment which was stated to have been issued to M/s Peach Services Ltd as well as various agreements in favor of the named plaintiffs/applicants.
 4. On the other hand, the subject Application is also supported by a further affidavit sworn by Peter Mwaura Muthura and which affidavit is sworn on the October 7, 2022.
 5. Be that as it may, upon being served with the subject Application, the 2nd defendant/respondent filed a replying affidavit sworn on the September 22, 2022 and to which the deponent has attached four documents, inter-alia, a copy of a charge instrument dated and executed on the November 25, 2020 between the 2nd defendant/respondent and the 3rd defendant/respondent.
 6. Other than the replying affidavit by and on behalf of the 2nd defendant/respondent, the 3rd defendant/respondent has also filed a replying affidavit sworn on the September 29, 2022. For completeness, the 3rd defendant/respondent has also annexed a total of five documents, inter-alia a copy of certificate of lease and official search pertaining to and concerning the suit property.
 7. Suffice it to point out that when the subject Application came up for hearing, the Parties agreed to canvass and dispose of the Application by way of written submissions. In this regard, directions were thereafter issued that the Application be disposed of by way of written submissions to be filed and exchanged within set timelines.
 8. Premised on the directions by the Honourable court, the Parties herein duly complied and indeed filed and exchanged their respective written submissions.



Deposition by the Parties:

a. Plaintiffs/Applicants case:

9. Vide Supporting Affidavit sworn on the September 17, 2022 and the Further Affidavit sworn on the October 7, 2022, the 3rd Plaintiff/Applicant has averred and stated that the rest of the Plaintiffs and himself entered into lawful sale agreement with one Kenneth Ndumbi Njoroge, whereby the said Kenneth Ndumbi Njoroge sold to and in favor of the rest of the Plaintiffs/Applicants and the deponent various portions of plot number 21, situate within Kahawa West Area in the City of Nairobi.
10. Further, the deponent has stated that the said Kenneth Ndumbi Njoroge had himself bought or purchased the rights over and in respect of the said plot number 21 from the previous allottee thereof namely M/s Peach Service Ltd .
11. On the other hand, the deponent added that upon the acquisition of plot number 21, Kahawa West, Kenneth Ndumbi Njoroge proceeded to and subdivided the said plot into various subdivisions culminating into the creation of plots numbers 21A, 21B, 21C and 21D respectively.
12. Other than the foregoing, the deponent has averred that upon the sale of the named plots to and in favor of the rest of the Plaintiffs/Applicants and himself, same entered upon and took possession of the sold portions of the plot and thereafter commenced to develop their respective plots.
13. Besides, the deponent has further averred that the rest of the Plaintiffs and himself have variously put up developments on their respective plots and that the developments have been standing on the named plots ever since the year 2017 to date.
14. Be that as it may, the deponent has added that on or about the September 22, 2022, the rest of the Plaintiffs and the deponent came across a notice that was displayed on the suit plot and whereby the 2nd Defendant was advertising the suit plot for sale allegedly on the basis of exercising her statutory power of sale.
15. At any rate, the deponent has averred that none of the Plaintiffs/Applicants and himself had charged their respective plots to the 2nd Defendant to warrant the intended sale and disposal by way of public auction.
16. On the other hand, the deponent averred that the 3rd Defendant, who was purported to have charged the suit property to and in favor of the 2nd Defendant, was unknown to the Plaintiffs.
17. Nevertheless, the deponent further stated that the 3rd Defendant also had no lawful rights and interests over and in respect of the suit property. In this regard, it was contended that to the extent that the 3rd Defendant has no lawful rights and interests over the suit property, same could not therefore purport to charge the suit property to the 2nd Defendant, in any manner whatsoever.
18. Premised on the foregoing, the deponent has averred that if the suit property was charged to and in favor of the 2nd Defendant, the said charge would be illegal, null and void.
19. Further, the deponent has averred that by virtue of being the lawful and legitimate proprietors of the named plots, the rest of the Plaintiffs and the deponent are therefore disposed to suffer irreparable loss, in the event that the threatened sale and disposal of the suit property is not stopped and restrained.
20. Contrarily, the deponent has stated that none of the Defendants/Respondents, shall suffer any prejudice or detriment if the orders of injunction are granted.



21. In the premises, the deponent has therefore contended that the rest of the Plaintiffs and himself have therefore laid before the court sufficient materials and credible basis to warrant the grant of the orders sought.

b. 2nd Defendant/Respondent's case

22. The 2nd Defendant/Respondent has responded to the Application vide Replying Affidavit sworn on the September 22, 2022 and in respect of which the deponent of the affidavit has stated that same was approached by the 3rd Defendant with a view to procuring and obtaining financial accommodation and assistance.

23. Further, the deponent has averred that upon being approached by the 3rd Defendant/Respondent, the 2nd Defendant/Respondent offered to and in favor of the 3rd Defendant/Respondent a financial facility, in the manner sought.

24. Be that as it may, the deponent has averred that the 2nd Defendant demanded that the financial facility be secured vide a security to be offered and availed by the 3rd Defendant.

25. In this regard, the deponent has averred that the 3rd Defendant therefore availed and perfected security over and in respect of LR No Nairobi/Block 132/244.

26. It was further stated that upon the Title over and in respect of the named property being availed, the 2nd Defendant/Respondent prepared a charge instrument, which was duly executed and thereafter registered against the Title of the suit property.

27. Other than the foregoing, the deponent further stated that the 3rd Defendant was obligated to repay the financial facility/accommodation by way of installments.

28. However, it was further stated that the 3rd Defendant defaulted in the loan repayment and that as a result of the default, the 2nd Defendant was obliged to and indeed issued the requisite statutory notices, in a bid to exercise her statutory power of sale.

29. That at any rate, the deponent has added that to the extent that the suit property was lawfully charged to and in favor of the 2nd Defendant/Respondent, same was therefore at liberty to sell and dispose of the suit property, provided that the requisite notices have been issued and served.

30. Besides, the deponent has stated that the 2nd Defendant/Respondent is not privy to or aware of any interests by the Plaintiffs/Applicants, over and in respect of the suit property.

31. Finally, the deponent has averred that prior to and before registering the charge over the suit property, the 2nd Defendant/Respondent carried out and undertook the requisite due diligence and it was established that no encumbrance was ever existing in respect of the suit property or at all.

32. Based on the foregoing, the 2nd Defendant/Respondent has averred that the Plaintiffs/Applicants herein do not have any lawful and legitimate rights to and in respect of the suit property or at all.

33. In the premises, the 2nd Defendant/Respondent has therefore implored the court to find and hold that the Plaintiffs herein do not have any lawful and legitimate interests over the suit property, either as claimed or at all.

34. Based on the foregoing, the 2nd Defendant/Respondent has therefore invited the court to find and hold that the Plaintiffs/Applicants Application is devoid and bereft of merits.



c. 3rd Defendant/Respondent's case

35. On his part, the 3rd Defendant/Respondent has sworn and filed a Replying Affidavit dated the September 29, 2022, wherein the deponent has averred that same was allocated the plot in question vide Letter of Allotment issued on the October 27, 1992. In this regard, the deponent has attached/annexed the Letter of Allotment to that effect.
36. Additionally, the 3rd Defendant/Respondent has added that upon being allocated the named plot, same duly complied with the terms of the Letter of Allotment, including payment of the stand premium as well as the ground rents.
37. Similarly, the deponent has averred that upon compliance with the terms of the Letter of Allotment, the office of the Commissioner of Lands proceeded to and prepared the requisite lease instrument, which was thereafter executed by all the concerned parties.
38. Subsequently, the 3rd Defendant has further averred that after the completion of the formal processes, same was issued with a Certificate of Lease, over and in respect of the suit property.
39. At any rate, the deponent has added that on or about the year 2020, same sought to expand his business and to this end, same approached the 2nd Defendant with a view to procuring a financial accommodation and assistance.
40. Further, the deponent has added that the 2nd Defendant thereafter proceeded to and indeed processed and facilitated the financial facility, which was ultimately disbursed to and in his favor.
41. Be that as it may, the deponent has stated that upon appropriation of the loan facility, same commenced repayment towards and in respect of the monthly installments. However, the deponent added that owing to the impact and consequences of covid-19, same was unable to keep up with the requisite payments.
42. In this regard, the deponent added that same lapsed into arrears and as a result of the said arrears, the 2nd Defendant/Respondent issued various notices, in a bid to exercise her statutory power of sale.
43. Other than the foregoing, the deponent herein has also averred that same is the lawful and legitimate owner of the named property. In this regard, the deponent has exhibited a copy of the Certificate of Lease as well as a copy of the charge instrument that was executed and duly registered against the Title of the suit property.
44. Further, the deponent has also averred that the plots in question, that is plot number 21, was lawfully allocated and allotted unto him on the October 27, 1992 and as a result of such allocation, the said plot ceased to be unalienated Government land and hence same was incapable of being allocated to and in favor of M/s Peach Service Ltd.
45. In any event, the deponent has further added that the Plaintiffs/Applicants herein have no lawful rights and interests over the suit property, either as claimed or at all.
46. Premised on the fact that the suit property was duly allocated unto him, the 3rd Defendant/Respondent has averred that the orders of temporary injunction, cannot therefore issue or be issued against himself, either in the manner sought or at all.
47. Nevertheless, the 3rd Defendant/Respondent has added that in the absence of any lawful Title to and in respect of the suit property, the Plaintiffs have not established or proved a prima facie case with overwhelming chances of success or at all.



48. In a nutshell, the 3rd Defendant/Respondent has therefore contended that the subject Application is therefore misconceived and legally untenable. Consequently, the 3rd Defendant/Respondent has implored the court to dismiss the Application herein.

Submissions by the Parties

49. When the Application came up for hearing, the parties herein agreed to canvass and dispose of the Application by way of written submissions.
50. Pursuant to the foregoing, the Honourable court proceeded to and directed that the Application be disposed of by way of written submissions and thereafter timelines were set and circumscribed.
51. Suffice it to point out that the Plaintiffs/Applicants, the 2nd Defendant/Respondent and the 3rd Defendant/Respondent, thereafter proceeded to and filed their respective submissions.
52. For coherence, the written submissions filed by and on behalf of the Parties herein form part and parcel of the record of the court. In this regard, same shall be considered and taken into account in crafting the Ruling herein.

Issues for Determination

53. Having reviewed the Application herein, together with the Supporting Affidavit filed therewith as well as the Replying Affidavits filed in opposition thereto; 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 Plaintiffs/Applicants have laid and established the existence of a Prima facie case with reasonable prospects of success?
 - ii. Whether the Plaintiffs/Applicants shall be disposed to suffer Irreparable loss, unless the orders sought are granted?
 - iii. Whether the balance of convenience tilts in favor of the Plaintiffs/Applicants or otherwise?

Analysis and Determination

Issue Number 1 Whether the Plaintiffs/Applicants have laid and established the existence of a Prima facie case with reasonable prospects of success.

54. Being an Application for issuance of orders of temporary injunction, it is incumbent upon the Plaintiffs/Applicants to prove and establish the existence of a prima facie case with overwhelming chances of success.
55. For coherence, it has been observed and reiterated, times without number that the existence of a prima facie case is the cornerstone upon which an order of temporary injunction shall issue.
56. Put differently, where a claimant or applicant seeking orders of temporary injunction is unable to prove or demonstrate the existence of a prima facie case with overwhelming chances of success, then the Honourable court has no business enquiring as to whether irreparable loss or otherwise will arise or ensue.
57. In the premises, it thus behooves any claimant/Applicant seeking to procure an order of temporary injunction to first and foremost certify to court on the existence of a prima facie case.



58. Given the significance of a prima facie case, in the grant or refusal of an application for temporary injunction, it is important to understand what then constitutes a prima facie case.
59. To this end, it is appropriate to state that the word prima facie, has been variously defined. Consequently, it suffices to take cognizance of the definition supplied vide the case of *Mrao Ltd v first American Bank Ltd (2002) eKLR*, where the Court of Appeal stated and observed as hereunder:

'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.'

60. Additionally, the meaning and tenor of what constitutes a prima facie case was revisited by the Court of Appeal in the case of *Nguruman v Jan Bonde Nielsen (2014) eKLR*, where the Court of Appeal 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.

We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.

We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.'

61. Having discerned the meaning and tenor of what constitutes a prima facie case, it is now appropriate to interrogate the totality of the evidence placed before the court by the Plaintiffs and to ascertain whether same have proved a prima facie case with overwhelming chances of success.
62. Suffice it to state that the Plaintiffs have contended that plot number 21, Kahawa West Phase II was duly allocated to and in favor of M/s Peach Services Ltd vide Letter of Allotment issued on the September 15, 1998.



63. Further, the Plaintiffs/Applicants have averred that the rights at the foot of the Letter of Allotment were thereafter sold and transferred to one Kenneth Ndumbi Njoroge. In this regard, it has been contended that the said Kenneth Ndumbi Njoroge therefore acquired lawful rights and interests over the named plots.
64. Similarly, the Plaintiffs have contended that thereafter, Kenneth Ndumbi Njoroge subdivided plot number 21 Kahawa West, Phase II into various subplots, culminating into the creation of plot numbers 21A, 21B, 21C & 21D, respectively.
65. On the other hand, the Plaintiffs have contended that upon the subdivision of plot number 21, the said Kenneth Ndumbi Njoroge entered into lawful sale agreements with the Plaintiffs and thereby sold the resultant subdivisions to and in favor of the named Plaintiffs.
66. Premised on the foregoing, the Plaintiffs have therefore contended that same have acquired lawful and legitimate titles, rights and interests over the named subplots.
67. In view of the foregoing, the Plaintiffs have thus contended that same therefore have established and demonstrated the existence of a prima facie case with overwhelming chances of success.
68. Despite the contention by the Plaintiffs, it is imperative to state and underscore that a Letter of Allotment by itself does not confer any legal title and or interest to and in respect of the named property, until and unless the allottee thereof has complied with the terms and conditions stipulated thereunder.
69. In this regard, it is appropriate, to take cognizance of the holding in the case of [Dr Joseph NK Arap Ngok Vs Justice Moiwo Ole Keiwua & 5 Others CA No 60 of 1997](#), where the court observed as hereunder:

What is not shown is the date on which HE the President approved the application for consideration for allocation of the suit property. Mr Otieno-Kajwang who appeared for the applicant argued that the approval by HE the President amounted to his client obtaining the title to the suit property. This argument, of course, cannot stand. It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held.

70. In view of the foregoing established position, there is no gainsaying that it was incumbent upon the Plaintiffs to place before the Honourable court evidence that indeed the allottee or the transferee of the letter of allotment duly complied with the terms and conditions stipulated in the body of (sic) the letter of allotment issued on the September 15, 1998.
71. However, I beg to point out that the Plaintiffs herein did not lay before the court any evidence of the letter of acceptance or payment of the stand premium, either within the stipulated 30 days period or at all.
72. In my considered view, where the terms and conditions contained at the foot of the Letter of Allotment are not complied with within the stipulated timeline or at all, the terms of the letter of allotment lapse and stand extinguished.
73. To this end, it is appropriate to recall, reiterate and endorse the holding of the court in the case of [HH Dr Syedna Mohammed Burbannuddin Saheb & 2 others versus Benja Properties Ltd & 2 others \[2007\] eKLR](#), where the Court observed as hereunder:

' In any event, the letter of allotment relied upon by the Defendant had itself expired, and was therefore invalid. I do not accept Mr Kirundi, Counsel for Defendant's argument, that the



expired letter, when acted upon, had been 'revived' through conduct. The letter had expired. It was dead. There was nothing to 'revive'.

74. In the absence of evidence that the allottee of the letter of allotment dated the September 15, 1998 or the transferee thereof, duly complied with the terms, there exists a likelihood that the impugned letter of allotment indeed lapsed and became none existent.
75. Be that as it may, I am alive to the fact that whilst dealing with an interlocutory application, I am not required to make precipitate findings and conclusions in respect of the evidentiary issues in controversy.
76. Nevertheless, I am also alive to the fact that the court is still enjoined to evaluate and calibrate upon the evidence placed before the court by both parties and to see which side of the divide is persuasive.
77. To this end, the dictum in the case of *Thomas Mumo Maingey (Suing on his own behalf and on behalf of the Franciscans of Our Lady of Good Counsel Sisters Registered Trustees) v Sarah Nyiva Hillman & 3 others [2018] eKLR*, is apt and succinct.
78. For coherence, the Court of Appeal observed as hereunder:
 - ' 23. It was not the role of the court when considering the interim applications to make a final determination on the conflicting affidavit evidence. As Lord Diplock warned in *American Cyanamid Co (No 1) vs Ethicon Ltd [1975] UKHL 1* 'it is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.' This Court expressed a similar view in *Mbuthia vs Jimba Credit Finance Corporation & another [1988] KLR 1* where it was held that 'the correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions.'
79. Nourished and guided by the holding of the Court of Appeal in the decision alluded to in the preceding paragraph, it is my humble finding and holding that the totality of the evidence placed before the court by and on behalf of the Plaintiffs has neither met nor satisfied the requisite threshold.
80. Consequently and in the premises, I am afraid that the Plaintiffs have neither established nor demonstrated the existence of a prima facie case with overwhelming chances of success.
81. Contrarily, it is also appropriate to point out that the 3rd Defendant/Respondent has placed before the Honourable court evidence of a Certificate of Lease, showing that the suit property is duly and lawfully registered in his name.
82. Whereas I am not obligated to interrogate the validity, propriety and legality of the said Certificate of Lease, what becomes evident is that the dispute beforehand pits the Plaintiffs/Applicants whose claims are anchored on a Letter of Allotment versus a holder of a Certificate of Title.
83. I must point that at the appropriate time, the trial court would need to resolve which side of the divide is entitled to protection under the law.
84. However and premised on the foregoing observations, for now it suffices to state and observe that the Plaintiffs have not demonstrated the existence of a prima facie case.



Issue Number 2 Whether the Plaintiffs/Applicants shall be disposed to suffer Irreparable loss, unless the orders sought are granted.

85. Other than the requirement to prove, establish and demonstrate the existence of a prima facie case with overwhelming chances of success, it is also imperative to note that the proof of such prima facie case alone, does not entitle one to the grant of an injunction.
86. Consequently, where a claimant/applicant has demonstrated or established the existence of a prima facie case, same would still be called upon to demonstrate that Irreparable loss will arise or ensue unless the orders sought are granted.
87. In this regard, it was similarly incumbent upon the Plaintiffs to show and provide evidence that indeed same would be disposed to suffer irreparable loss.
88. Nevertheless, having found and held that the Plaintiffs have not demonstrated the existence of a prima facie case with overwhelming chances of success, the question that arises is whether same can therefore be disposed to suffer irreparable loss.
89. To my mind, where the Plaintiffs have failed to prove the existence of a prima facie case, it follows as a matter of course, that no irreparable loss would therefore arise or ensue.
90. Notwithstanding the foregoing, it is also appropriate to state that he/she who wishes to implore the court to find and hold that irreparable loss would occur or arise, must supply evidence of such loss. For clarity, irreparable loss must expressly be deposed to or deposed in the Affidavit.
91. For completeness, such evidence must not be the subject of speculation, conjecture or implication, whatsoever.
92. Be that as it may, the Plaintiffs herein did not provide and or supply any such evidence either in the Supporting Affidavit or the Further Affidavit, the latter which was sworn on the October 7, 2022.
93. In any event, what I gathered from the Supporting Affidavit is that the Plaintiffs/Applicants have developed portions of the suit property and the value of the developments exceed Kes 15,000,000/=
94. To my mind, having been able to ascertain and compute the value of the developments, it is therefore evident and obvious that the impugned developments, on the various portions of the suit property are therefore measurable in monetary terms and hence compensable.
95. In short, it is my finding and holding that the Plaintiffs/Applicants have neither supplied nor availed any evidence of Irreparable loss.
96. Suffice it to point out that irreparable loss is such loss that is incapable of computation and compensation in monetary terms. Consequently, where a loss is capable of arithmetical computation and by extension compensation, then an order of temporary injunction ought not to be granted.
97. In this respect, it is appropriate to reiterate the holding of the Court of Appeal in the case of *Giella vs Cassman Brown & Co Ltd* and in the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 others* [2014] eKLR, where the Court stated that:

' 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.'

98. In my considered view, the Plaintiffs/Applicants herein have not shown what irreparable loss same shall be disposed to suffer.
99. Contrarily, it is my finding and holding that if any loss will arise and or accrue, such loss may very well be remedied by way of monetary compensation, either as against the named vendor who sold to and in favor of the Plaintiffs or better still against the 3rd Defendant/Respondent.

Issue Number 3 Whether the balance of convenience tilts in favor of the Plaintiffs/Applicants or otherwise.

100. If the determination of the subject Application was to boil down to the balance of convenience, I must point out that I would still have found against the Plaintiffs/Applicants.
101. First and foremost, there is evidence that the suit property belongs to and is currently registered in the name of the 3rd Defendant. However, I must observe that the registration of the suit property in favor of the 3rd Defendant has been challenged by the Plaintiffs/Applicants.
102. Be that as it may, the issue at this point in time is whether the court can injunct the registered owner from partaking of and benefitting from his own property.
103. To this end, the holding of the Court of Appeal in the case of Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR is instructive and succinct.
104. For coherence, the Honourable court stated and observed as hereunder:

' It must also be remembered that it is a serious thing to restrain a registered proprietor of a property over what is undeniably his unless there are justifiable grounds to do so'.
105. Secondly, the 2nd Defendant appears to be holding a valid and legitimate Charge over the suit property and same is intent on exercising her statutory power of sale.
106. Between the Plaintiffs and the 2nd Defendant, the balance of convenience would favor the 2nd Defendant/Respondent who disbursed monies to and in favor of the chargor on the basis of the named security.
107. In a nutshell, it is similarly my finding and holding that the balance of convenience does not favor the grant or issuance of the orders of temporary injunction, either in the manner sought or at all.

Final Disposition:

108. Having analyzed and evaluated the various perspectives attendant to and arising from the subject matter, I come to the conclusion that the Plaintiffs/Applicants have neither established nor demonstrated the requisite conditions to warrant the grant of the orders of temporary injunction sought.
109. Consequently and in the premises, I come to the conclusion that the Application dated the September 17, 2022, is devoid and bereft of merits.
110. In a nutshell, the said Application be and is hereby Dismissed with costs to the 2nd and 3rd Defendants only.
111. It is so Ordered.



DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER, 2022.

HON. JUSTICE OGUTTU MBOYA,

JUDGE.

In the Presence of;

Benson - Court Assistant.

Mr. Keith Wesonga for the Plaintiffs/Applicants.

Mr. Onsare for the 2nd Defendant/Respondent.

Mr. Kagunda for the 3rd Defendant/Respondent.

N/A for the 1st and 4th Defendants/Respondent.

