Petrazo Limited (Formerly Brighton Limited) & another v New Oshwal Distributor Limited & 4 others (Environment and Land Case Civil Suit 031 of 2022) [2022] KEELC 15457 (KLR) (9 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15457 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND CASE CIVIL SUIT 031 OF 2022

LL NAIKUNI, J

DECEMBER 9, 2022

BETWEEN

PETRAZO LIMITED (FORMERLY BRIGHTON LIMITED) .... 1ST PLAINTIFF

FUSION FOOD LIMITED .... 2ND PLAINTIFF

AND

NEW OSHWAL DISTRIBUTOR LIMITED .... 1ST DEFENDANT

PRIME BANK (K) LIMITED .... 2ND DEFENDANT

IN RECEIVERSHIP .... 3RD DEFENDANT

TRITON SERVICE STATION LIMITED (IN RECEIVERSHIP) .... 4TH DEFENDANT

JAGUAR PETROLEUM COMPANY LTD .... 5TH DEFENDANT

RULING

I. Introduction

1. The 1st and 2nd Plaintiffs/Applicants herein, trading in the names and style of "Petrazo Limited (formerly Brighton Limited) and Fusion Food Limited" respectively formally moved this Honorable Court through filing of a Notice of Motion application dated 16th Mach 2022. The application was brought pursuant to the provisions of Sections 1A,1B and 3A of the *Civil Procedure Act*, Cap. 21, Order 40 Rule 1 and Order 51 Rule 1 of the *Civil Procedure Rules* 2010.

2. From the very onset, its instructive to note, without prejudice to the parties in this matter, that the whole subject matter before this Honorable Court is rather convoluted. I say so, as it not only involves a highly contested land and other transactions but also a multitude and complexed duly incorporated

business legal entities. Thence, in the interest of natural justice, Equity and Conscience, it is a matter that demands being handled with utmost degree of prudence, circumspection and care. That is exactly what the Court has undertaken to do whatsoever.

II. The 1st and 2nd Plaintiffs/Applicants' case

3. The 1st and 2nd Plaintiffs/Applicants herein sought for the following orders reproduced herein verbatim; -

    a. Spent.

    b. That pending the inter - parties hearing and determination of this Application this honorable court be pleased to grant an order of temporary injunction restraining the Defendants/ Applicants whether by themselves, their agents, employees or otherwise howsoever from interfering with the Plaintiffs/Applicants quiet possession of all that property known as PLOT NO MSA/ BLOCK XXIII/206 and plot NO. MSA/ BLOCK XXIII/210.

    c. That pending the hearing and determination of this Application this Honorable court be pleased to grant an order of temporary injunction restraining the Defendants/Applicants whether by themselves, their agents, employees or otherwise however from interfering with the Plaintiffs/ Applicants quiet possession of all property known as PLOT NO MSA/ BLOCK XIII/206 and PLOT NO.MSA /BLOCKXXIII/210.

    d. That pending hearing and determination of this suit this Honorable Court be pleased to grant an order of temporary injunction restraining the Defendants /Applicants whether by themselves, their agents, employees or otherwise howsoever from interfering with the Plaintiffs / Applicants quiet possession of all that property known as PLOT NO. MSA/ BLOCK XXIII/206 and PLOT NO MSA/BLOCK XXIII/210.

    e. That this Honorable Court be pleased to issue any other order as it may deem fit to protect the interests of the Plaintiffs/ Applicants and to preserve the subject matter of this suit pending hearing and determination of this suit.

    f. That costs of this Application be borne by the Defendants/ Respondents.

4. The said application is premised on the grounds, the testimonial facts and the averments of MANOJ. J. SHAH the Director of the 1st Plaintiff/Applicant made out in the thirty (34) Paragraphed Supporting Affidavit sworn and dated the 16th March, 2022 and the fourteen (14) annextures marked as "MS – 1 to 14" annexed thereto. The Deponent averred as follows:-

5. He deponed being a Director in both 1st and 2nd Plaintiffs/Applicants Companies and therefore was duly competent and authorized to swear this affidavit. The 1st and 2nd Plaintiffs/Applicants were limited liability companies duly incorporated under the Laws of Kenya for purposes of carrying out business in this Country and elswhere. He attached thereof copies of the Certificates of Incorporation and the Change of names of the companies Marked as "MS – 1".

6. He deposed that on or about 20th September, 2002, all that parcel of land known as land Reference numbers PLOT NO. MSA/BLOCK XXIII/206 and PLOT NO.MSA/BLOCK XXIII /201 (Hereinafter referred to as "The Suit properties") were legally transferred from their respective previous proprietors to the new proprietor, trading in the names and style of "Triton Petroleum Company Limited" - the 3rd Defendant herein. He attached copies of the Certificate of Lease to that effect Marked as "MS – 2".

7. He averred that in the year 2004, the 3rd Defendant/Respondent herein (now under Receivership) in accordance with the terms and conditions stipulated under the Lease agreement, a copy Marked as "MS – 3" attached herein, permitted its sister company, trading in the name and style of "Triton Service Stations Limited", the 4th Defendant/Respondent herein to develop the suit properties by setting up such business establishments "inter alia" being a petrol station, a restaurant, a convenient store and a service bay thereon.

8. However, he stated that it was until the 19th December 2008, pursuant to a long legal and management process, that the 3rd Defendant/Respondent was put under receivership. Nonetheless, despite all this, the business being carried out on all the suit properties of the 3rd Defendant/Respondent herein, had already commenced and continued smoothly and uninterruptedly under the name of the 4th Defendant/Respondent herein.

9. The Deponent held that on or about the year 2010, the 4th Defendant/Respondent, "Triton Service Stations Limited" entered into a lease Agreement, a copy of the Lease agreement attached and marked as "MS – 4" with the 5th Defendant/Respondent herein who was to take over of all operations of all petrol stations country wide registered under the legal entities trading in the names and style of "Triton Petroleum Company Limited" and "Triton Service Stations Limited" – the 3rd and 4th Defendants/ Respondents herein respectively.

10. He informed Court that on 25th February 2011, a company trading in the names and style of "Jagular Petroleum Company Limited", the 5th Defendant and "Brighton Limited (Currently Petrazo Limited) and Fusion Foods Limited" (the 1st and 2nd Plaintiffs/Applicants herein) entered into a Lease agreement, terms and conditions stipulated thereof a copy of which is marked as "MS – 5 (a) and (b)" and attached herein. Pursuant to that, the 1st and 2nd Plaintiffs/Applicants herein took over the operations of the petrol station and all other business located on the suit properties. The parties agreed that all the rent payable which included staff salary, maintenance of property and utility expenses mutually agreed by both parties and which rent the 1st and 2nd Plaintiffs/Applicants had at all material times settled as per the terms and conditions of the agreement, would be paid directly or through the legal entities and/or outfits known as "Silvercrest Enterprises Limited, Gormet Ventures Limited, Triton Convenient Stores Limited and Triton Gas Stations Limited, Triton Convenient Store Limited" which companies were part of the larger group of companies under Triton Petroleum Company Limited, the 3rd Defendant/Respondent herein.

11. He deposed that upon, a request being made by the Chairman of Triton Petroleum Limited (Under Receivership), the 1st and 2nd Plaintiffs/Applicants also agreed to pay rent by settling the Staff dues of Triton Services Stations. Indeed, the Plaintiffs/Applicants mutually agreed to pay rent for a sum of Kenya shilling twelve million, five hundred thousand (Kshs. 12,500,000.00) to Mr. Yagnesh M Devani as a way of off - setting his outstanding debts and lawyers' fees. This amount was treated as rent and on account 'inter alia' the 1st and 2nd Plaintiffs/Applicants herein were to operate the business on a lease basis.

12. He further informed Court that on 28th February 2013, upon reconciliation of accounts and as per the summary Account attached and Marked as "MS – 6", it was found out that the 5th Defendant/ Respondent owed the 1st and 2nd Plaintiffs/Applicants, a sum of Kenya Shilling twelve million two hundred and ninety-four thousand nine hundred and twenty (Kshs. 12,294,920/). At all material times, from the year 2011, the 1st and 2nd Plaintiffs/Applicants had been occupying the suit premises and operating various business based on the Lease Agreement over the suit properties. It was pointed out that the 1st and 2nd Plaintiffs/Applicants had been complying with the law and always obtained and

paid for all the requisite licenses for the premises. Indeed, Court was notified that the parties herein had continued to engage in business based and mutual trust and cultural friendship basis and long established ties making most of the decisions and agreements being arrived at orally.

13. The Court further learnt that the status of the premises necessitated renovations that caused the 1st and 2nd Plaintiffs/Applicants herein to heavily invest a sum of Kenya shilling two million, one hundred and seventeen thousand, seven seventy - seven hundred and twenty cents only (Kshs. 2,117,777.20). Additionally, he stated that the 1st and 2nd Plaintiffs/Applicants herein further invested a sum of Kenya Shillings eighteen million, one hundred and sixty - three thousand (Kshs. 18,163,000.00) in terms of the repair works undertaken onto the generators, pumps and the underground tanks. He deposed that 1st and 2nd Plaintiffs/Applicants also spent a sum of Kenya Shillings ten million, five ninety - four thousand, eight sixty - five hundred and forty - eight cents (Kshs.10,594,865.48=/) by way of the renovation of the restaurant to a higher standard. By the material time of filing of this suit herein, the Dependent claimed that the 1st and 2nd Plaintiffs/Applicants had in total already spend and invested a sum Kenya Shillings Forty - three million, one seventy thousand five sixty - two hundred and sixty - eight cents only (Kshs. 43,170,562.68) generally towards the various development fixtures made on the suit properties herein.

14. However, while all facts remained constant and operation proceeded smoothly all of a sudden the situation changed. In the month of February 2022, Mr. Manoj Shah, one of the Directors of the 1st and 2nd Plaintiffs/Applicants received a telephone call from one Mr. Ben Kingori, a tenant of the business establishments on the suit properties, indicating that the suit property had been acquired by the 1st Defendant/Respondent and there had been plans to have the 1st and 2nd Plaintiffs/Applicants being evicted and/or vacate the business premises including the Petrol Station. Resultantly, and out of abundance of caution, on 10th February, 2022, the 1st and 2nd Plaintiffs/Applicants caused an official search to be conducted onto the suit properties. According to the deponent herein, the searches revealed that indeed the suit properties had been fraudulently transferred to the 1st Defendant/ Respondent and charged to the 2nd Defendant/Respondent on or about December, 2021. He attached copies of the Certificates of Searches for both suit properties and Marked as “MS – 11”.

15. He emphatically stressed that the transfer of the suit properties was fraudulently, illegally and irregularly done without any basis. The Plaintiffs/Applicants provided the following particulars of fraud meted by the 1st Defendant/Respondent and others involved onto the suit properties. These were:-

    a. That there was a registered Caution against the titles on or about 15th November, 2012, by the Triton Gas Stations Limited which Caution had since been removed fraudulently vide an application dated 16th November, 2021 executed by one Kumar Mashru Sanjan Kishor, a person not known to the 4th Defendant as one of the Directors.

    b. That whilst the proprietor of the suit properties, the Triton Petroleum Company Limited went into receivership on or about 19th December, 2008, it had now emerged that there was a charge registered in favour of the KCB Bank on 10th February, 2009;

    c. That whereas the suit properties had a registered charge against the Bank of India, there were no record on how the same was removed (Sic) and the property transferred free of any encumbrance.

    d. That the process of purchase, acquisition and transfer of the suit properties was clouded in mystery and the records could not with certainty show how the transaction had since happened

and titles of the suit properties vested on the 1st Defendant/Respondent. The production of the records by the 1st Defendant/Respondent would be required.

16. He further averred that the alleged transfer of the suit properties were not only done fraudulently but was part of a well – choreographed scheme to frustrate and deny the 1st and 2nd Plaintiffs/Applicants an opportunity to carry on with its business and recoup their legal and valid investments.

17. He stated that on or about December 2021 and 1st Defendants wrote them a demand letter dated 9th March 2022 claiming an outstanding rent. To them this was just but a move to have them bundled out of the suit premises. This was being done, despite of them having heavily invested, developed and immensely contributed to its current market value.

18. In summary, the 1st and 2nd Plaintiffs/Applicants herein deposed that:-

    a. The entry of the 1st and 2nd Plaintiffs/Applicants into the suit properties was never by fraud or craft means but through a well negotiated business framework with them being granted priority and/or option right of the purchase of the said properties had the legal owners opted to sell the said properties.

    b. In the course of the leasehold term, they had heavily invested onto the suit properties. As tenants they ought to have been notified and informed of the intention to sell it.

    c. They wished to have the unprocedural, wrongful, unjust and illegal actions by the 1st Defendant/Respondent be checked and bated as it would interfere with right to property under the provision of Article 40 of *the Constitution* of Kenya, 2010 and make them lose the possession of the said suit properties as well as their hard earned investments on them.

    d. The 1st and 2nd Plaintiffs/Applicants never owed the 1st Defendant/Respondent or any other entity rents or any utility bills as claimed.

    e. The 1st and 2nd Plaintiffs/Applicants came to Court with clean hands for equitable reliefs and they were worthy of protection by Court.

19. The deponent argued that should the orders sought from the instant application not be granted, the 1st and 2nd Plaintiffs would suffer irreparable loss and damages. He urged Court in the interest of Justice to allow the application and grant the prayers sought in order to preserve the suit properties.

III. The Replying Affidavit, Grounds of Opposition and Preliminary Objection by the 1st Defendant/Respondent

20. Being in opposition of the Notice of Motion application filed by the Plaintiffs/Applicants, the 1st Defendant/Respondent proceeded on two pronged approach. On 18th May 2022, the 1st Defendant/Respondent filed both a Notice of Preliminary objection and a Replying Affidavit. The objection was under the following grounds:-

A. The Preliminary Objection.

21. That that the application dated 16th March 2022 was ill misconceived in law for failure of 1st and 2nd Plaintiffs/Applicants to seek leave of Court to commence and continue proceedings against the 3rd Defendant/Respondent contrary to the provision of Section 560 of the *Insolvency Act*, No 18 of 2015; and

22. Hence the Court lacked jurisdiction to hear the matter. Thus, the proper Court was the Commercial Court.

B. The Replying Affidavit by the 1st Respondent

23. On 18th May, 2022, the 1st Defendant/Respondent herein filed a twenty nine (29) Paragraphed Replying Affidavit dated 17th May 2022 deponed by UMESHKUMAR CHANDARIA it's director together with a bundle of annextures Marked as "MM – 1" annexed thereto. He stated that he was a Director of the 1st Defendant/Respondent herein and hence competent and duly authorized to swear this affidavit on its behalf. He deponed that the 1st and 2nd Plaintiffs/Applicants and 5th Defendant/Respondent entered into a Lease agreement in the year 2011 dealing with the properties belonging to 3rd Defendant/Respondent while it was in receivership since the year 2008 thus rendering the transaction null and void ab initio as it lacked the Receiver's approval. He averred that the Law did not recognize private agreements entered by the 1st and 2nd Plaintiffs/Applicants herein and the 3rd, 4th and 5th Defendants/Respondents wherein their roles and legal obligations had already by operation of the Law, been taken over by the Official Receiver. The purported agreements did not extinguish or substitute the Chargor's rights and interests in the suit properties or the contents being detrimental to the Chargee's interest. It was trite law that upon the appointment of the official Receivers and Managers of a Company, the Director's power in respect of management of the company were suspended. Any actions done or omitted to be done, with the intention of disentitling the interest of secured third parties was unlawful and void ab initio.

24. He held that the change of name during the process of Receivership was a nullity, so were the subsequent Agreements entered and purporting to bind a company under Receivership and without written leave being granted by the Receiver.

25. According to the Deponent, the 1st and 2nd Plaintiffs/Applicants connived with the 3rd Defendant/Respondent to deny debtors of 3rd Defendant/Respondent. Further, they did so by concealing funds payable to the debtors/collections by the receiver and illegally channeling the funds of receivership.

26. He further deponed that while the 1st and 2nd Plaintiffs/Applicants while seeking interim temporary injunction orders under the provision of Order 40 of the Civil Procedure Rules, 2010 must establish that they had legal rights to such property. However, from the given facts, the 1st and 2nd Plaintiffs/Applicants in the matter only seem to rely on invalid oral agreements and had3rd Respondent not proved that they had 'a prima facie case" with probability of success which would be rendered nugatory if the orders sought were not granted. There was also no nexus drawn through production of evidence to substantiate allegations that all companies were subsidiaries of the 3rd Defendant /Respondent. Therefore, the deponent argued that such allegations by 1st and 2nd Plaintiffs/Applicants were only meant to misguide Court into ruing in its favor. The offsetting of personal debts by Yagnesh Devani was an illegal exercise as the 3rd Defendant/Respondent was already in receivership with no locus to direct such off setting.

27. The Dependent further averred that there was no evidence tendered by 1st and 2nd Plaintiffs/Applicants to show the colossal amounts paid to the larger group of companies. Alternatively, the rent payable as evidenced in the letter of offers vis a vis said amounts to be off set over the period of over nine years stood exhausted against the alleged amount as stated in Paragraph 12 of their Supporting Affidavit. Hence, thereafter the rent would be payable. He refuted that the 1st and 2nd Plaintiffs/Applicants through the letter dated 8th March 2022 were being asked to vacate the suit premises but instead to pay the rent payable to the new owner - the 1st Defendant/Respondent.

28. He informed Court that the suit properties were lawfully sold to the 1st Defendant/Respondent vide an agreement for sale dated 25th May 2013, terms and conditions stipulated thereof, between

the 3rd Defendant, Kenya Commercial Bank Limited and Eastern and Southern African Trade and Development Bank to VKM Limited devoid of any encumbrances or undisclosed third party interest. That upon subsequent payment of deposits various suits were brought forward regarding assets of the 3rd Defendant/Respondent including the suit properties and other assets of 3rd Defendant/ Respondent were effectively put on abeyance until the determination of the case involving 3rd, 4th and 5th Defendants/Respondents.

29. According to the deponent, all these process culminated in a consent being entered on 10th July 2020 that concluded to agreeing on disposal of various properties of 3rd Defendant/Respondent including the suit properties. He stated that all that property known as the Title number Mombasa/Block XXIII/210 was charged by the 3rd Defendant/Respondent to the Bank of India who were paid up by the Kenya Commercial Bank and the PTA (hereinafter referred to as "The KCB" and "PTA"). That the purchaser of the suit properties assigned it rights and obligations to the 1st Defendant/Respondent vide a deed of assignment dated 8th December 2020 with the full knowledge of the 3rd Defendant/ Respondent, the KCB and the PTA. He stated that the transfer process was done procedurally and there was no fraud or illegality. The KCB, PTA Bank as chargees acted within the powers conferred upon them by the legal charges and as duly appointed Receiver of the 3rd Respondent/ Defendant.

30. It was further deponed that the 1st Plaintiffs/Applicants had not demonstrated any irreparable damage that would be suffered if orders are not granted and that the 1st Defendant/Respondent were not capable of paying damages and adequate compensation. He desposed that the 1st and 2nd Plaintiffs/ Applicants had also not given any undertaking to indicate that there were capable of paying the rent. He held that the 1st Defendant/Respondent would be prejudiced if orders sought were given since the 1st Plaintiffs/Applicants had a duty to pay rent to them. He sought to be paid the rent by the 1st and 2nd Plaintiffs/Applicants from 9th March 2022 going forward. In the long run, the 1st and 2nd Defendants/ Respondents prayed that that Notice of Motion application be dismissed for being incompetent and unmeritorious with costs.

IV. The Replying Affidavit by 2nd Defendant

31. On 24th May, 2022, while opposing the application dated 16th March, 2022 by the 1st and 2nd Plaintiffs/ Applicants herein, the 2nd Defendant/Respondent filed a nineteen (19) Paragraphed Replying Affidavit dated 18th May 2022 deponed by GEORGE W. MATHUI, its Legal Manager together with twelve (12) annextures Marked as "GMM – 1 to 12" annexed thereto. He deponed that the 2nd Defendant/Respondent granted the 1st Defendant/Respondent a principal sum of Kenya Shillings Seventy Million (Kshs. 70,000,000.00) to finance the seventy three per cent (73%) of the purchase price of the suit properties which were to be transferred to 1st Defendant/Respondent though the said parcels of land were erroneously referred to as Land Reference Numbers Mombasa /Block/XIII/206 and 210. According to him, the 2nd Defendant/Respondent went ahead and designated a further facility of Kenya Shillings Sixty Million (Kshs. 60,000,000/=) through a letter of offer dated 10th April, 2021. He stated that through a letter dated 25th June, 2021 the by 1st Defendant/Respondent signified acceptance of the offer and the earlier letters of 6th November, 2020 and 10th April, 2021 were amended to capture the identity of the suit properties as Land Reference numbers Mombasa/Block XXIII/206 and 210. He averred that by the documents filed the suit property Mombasa/Block XXIII/206 was transferred to the 1st Defendant/Respondent by way of an instrument of transfer of charge dated 10th December, 2021. According to him, the legal charge in favor of KCB Limited over the said title was discharged by a Discharge of Charge dated 23rd September, 2021. He informed Court that the caution registered

against the said title was removed following an application of the Triton Gas Station Limited in an application dated 16th November, 2021.

32. He reiterated that with regards to all that parcel of land known as Land Reference numbers Mombasa/Block/XXIII/210 the caution registered was removed from an application dated 16th November, 2021 of the Cautioner, the 4th Defendant/Applicant. Following that, the charge on the said title in favour of the Bank of India was discharged vide an instrument dated 27th October, 2020. Thus, the said suit property was duly transferred to the 1st Defendant/Respondent for valuable consideration on 10th December, 2021 and an official charge was created on behalf of the 2nd Defendant/Respondent in legitimate manner and are confirmed by way of official charge dated 21st December, 2021. In light of the foregoing, the 1st and 2nd Plaintiffs/Applicants had no registered or registerable interest over the suit property and thus were not entitled to any relief they sought. He held that they were not entitled to an equitable relief at the interlocutory stage.

V. The Replying Affidavit by the 3rd Defendant/Respondent

33. On 18th May, 2022 while opposing the 1st and 2nd Plaintiffs/Applicants' application dated 16th March 2022 , the 3rd Defendant/Respondent filed a nineteen (19) Paragraphed Replying Affidavit dated 18th May 2022, sworn by BRIAN D'SOUZA, the Official Receiver of the 3rd Defendant/Respondent together with five (5) annextures Marked as "BS – 1 to 5" annexed thereto. He averred that the 3rd Defendant/Respondent was placed under receivership on 19th December 2008. The Deponent argued that by 12th August 2008, the 3rd Defendant never had any legal capacity to lease suit premise to anyone including the 4th Defendant/Respondent without the consent of KCB and the Eastern and Southern Africa Trade and Development Bank. Indeed, he averred that no such consent was given for the purported lease dated 12th August 2008. Notwithstanding this, the 1st and 2nd Plaintiffs/Applicants ought to have been aware that the suit properties were registered under the 3rd Defendant/Respondent. He held that despite this, the 1st Plaintiffs/Applicants never bothered to seek its consent to take part in the purported sub lease. He stated that by a simple official search which could have disclosed the suit properties were registered under the name of the 3rd Defendant/Respondent and no lease could have been registered in the name of anyone else. The deponent stated that the Consent of the charge was also never sought nor obtained for the purported sub leases and that the 1st and 2nd Plaintiffs/Applicants ought to have known that they were purporting to accept sub - leases over the suit property that were charged. His contention was that as 8th October 2021, from the official searches of the suit property showed the registered interest on the suit property and leases purporting to have been registered by 1st and 2nd Plaintiffs/Applicants were non - existent. He argued that none of the leases or subleases that 1st and 2nd Plaintiff/Applicants created were with notice or approval. He averred that he was not aware of allegations contained under the contents of Paragraphs 9 to 19 of the Supporting Affidavit sworn in support of instant application. He pointed out that the suit properties were sold publicly in the year June 2009 and the only legal challenge to the sale were by the 4th Defendants and Triton gas stations Limited who ultimately had their legal challenges rejected by the Court or withdrawn. It was after the challenges raised by the 4th Defendant and Triton Gas were resolved that sale to the 1st Defendant was completed.

34. In conclusion, he urged the Court to find that the application was incompetent taking that the 3rd Defendant was in receivership. Besides, he averred that there was an Interim Liquidator appointed by the 3rd Defendant and for this reason, the proceedings against 3rd Defendant could not be commenced without leave of Court.

VI. The Supplementary Affidavit by the 1st & 2nd Plaintiff/ Applicants

35. On 4th July, 2022, the 1st and 2nd Plaintiffs/Applicants filed a fourteen (14) Paragraphed Supplementary Affidavit dated 1st July 2022 deponed by its Director MANOJ J. SHAH. He deposed that the Notice of Preliminary objection dated 17th May 2022 was improper, misguided as the provision of Section 560 of the *Insolvency Act* provided for the Administration which was statutory. It was neither similar nor related to receivership which in this instant case was contractual. For these reasons, the requirements under the Section 560 of the *insolvency Act*, No. 18 of 2015 did not arise as alleged by 1st Defendant/ Respondent herein.

36. He reiterated the averments already made to the effect that the Lease Agreement duly executed between the 1st and 2nd Plaintiffs and the 5th Defendant was and remained valid. He stressed that the subject transfer of the suit property to the 1st Defendant/Respondent was done irregularly and fraudulently. Following this, the Plaintiffs/Applicants were challenging the title deed held by the 1st Defendant/ Respondent.

37. As a result of the various agreements entered between them and the Defendants they had incurred colossal amount in terms of making heavy and substantial investments on the land and therefore they stood to suffer irreparable damage should the orders sought not be granted.

VII. Submissions.

38. On 19th May, 2022 while in the presence of all the parties, the Court directed that both the Notice of Preliminary objection dated 17th May, 2022 and the Notice of Motion application dated 16th March, 2022 be canvassed simultaneously by way of written submissions. Pursuant to that all the parties fully complied and the subsequently the Court reserved a date for delivery of the Ruling on notice accordingly.

A. The Written Submission by the Plaintiffs/Applicants

39. On 8th July, 2022, the Learned Counsel for the 1st & 2nd Plaintiffs/Applicants, the Law firm of Messrs. S. Ruwa & Company Advocates filed their written submission in support of the Notice of Motion application dated 16th March, 2022. Mr. Mbogo Advocate holding brief for Mr. Chipanda submitted that the Preliminary Objection raised by 1st Defendant/Respondent raised factual issues and not pure points of law that which would require interrogation of pleadings through a full trial. To buttress his point, the Counsel placed reliance onto the cases of:- "*Boniface Wachira Kariuki – Versus - Nyeri County Government* [2018] eKLR, "*Quick Enterprises Limited – Versus - Kenya Railway Corporation*, Kisumu No.22 of 1999; "*Kandara Residence Association & Another – Versus - Annans Holding Limited & 4 others Director of Survey & 3 Others (Interested Parties)* [2020] eKL*R; John Njuguna Kimunya – Versus - Teresiah Wachuka Kimunya & Another* [2016]; *Oraro – Versus - Mbaja* (2005) 1KLR.

40. He submitted that the Court had jurisdiction to handle the matter herein as the questions raised were with regard to the legality of the title held by the 1st Defendant/ Respondent with respect to the suit properties being Plot Nos. MSA/BLOCK XXIII/ 206 and plot No. MSA/ BLOCK XXIII/210. His contention was that the issues of rent and tenancy were within the scope of the jurisdiction of the Court as envisaged under the provision of Article 162 (2) of *the Constitution* of Kenya 2010 and Section 13 (2) and 13 (7) of the *Environment and Land Court Act*, 2011. On this aspect, the Counsel relied on the cases of:- "*Samuel Macharia – Versus - Kenya Commercial Bank & 2 Others* (2012) eKLR, "*Owners of*

Motor Vessel Lilian Versus Caltex Oil (Kenya) Limited (1989) KLR; and "*In the Matter of the interim Independent Electoral Commission* (2011) eKLR.

41. On the issues of whether the suit was defective for want of compliance of the provision of Section 560 of the *Insolvency Act*, the Counsel submitted that the concept of receivership was not in any manner similar to administration as stipulated in the *Insolvency Act* and provisions of Section 560 of the *Insolvency Act* was not applicable to companies. He argued that as per the provision of Sections 520, 521 and 522 of the said Act, administration was a statutory process aimed at ensuring a company grew rather than being liquidated and dissolved. He stressed that the provision of Section 560 of the *Insolvency Act* never applied apply to companies under receivership and for these reasons, while the application was competent, the objection was unmerited. On this point, he cited the case of:- "*Kimeto & Associates Advocates – Versus - KCB Bank Kenya Limited & 2 Others* (Insolvency Cause E004 of 2019) [2021] KEHC 242 (KLR) (Commercial and Tax) (19 November 2021)

42. The Counsel submitted that the 1st and 2nd Plaintiffs/Applicants had established having "a prima facie case", over the suit properties and the case. He argued that it was clear that the 1st and 2nd Plaintiffs/ Applicants entered the suit property legally through the execution of the lease agreement. Additionally, he held that the case herein challenged the legality of the title held by 1st Defendant/Respondent. His contention was that it was trite law that allegations of fraud were strictly to be proved in a full trial. To support this argument, he relied on the case of:- "*Nguni Gichune Njoroge – Versus – Co - operative Bank Limited & Another* [2015] eKLR.

43. As regards whether the 1st and 2nd Plaintiffs/ Applicants would suffer irreparable damage which could not be compensated, the Counsel submitted that it was not in every case that damages would be adequate remedy. Furthermore, none of the Defendants herein had undertaken being capable of compensating the 1st and 2nd Plaintiffs/Applicants. To back up his argument, he cited the cases of: "Banis Africas Ventures Limited, *Said Ahmed – Versus - Manasseh Denga & Another* [2019] eKLR *Joseph Siro Mosioma – Versus - Housing Finance Company of Kenya & 3 Others* 2008] eKLR; *Joice Baiddawa Opar – Versus - Kenya Commercial Bank Limited & Another* (2019) EKLR.

44. On the issues on whose favor did the balance of convenience tilt, the Counsel submitted that the 1st and 2nd Plaintiffs/Applicants stood a greater disadvantage should the prayers sought from application not be allowed. It followed that if injunctive orders were not granted the 1st and 2nd Plaintiffs/Applicants would be forcefully ejected from the business premises. He placed reliance onto the cases of:- "*Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai* (2018) Eklr, *Kenya Electricity Transmission Company Limited V Kibotu Limited [2019] and Robert Mugo Wa Karanja – Versus - Ecobank (Kenya) Limited & Another* [2019] Eklr. Whist this was the case, the Defendants would suffer no damage in waiting for the final outcome of main suit.

45. On whether the 1st and 2nd Plaintiffs/Applicants were entitled to the prayers sought, the Counsel argued that 1st and 2nd Plaintiffs/Applicants had established principles for granting of interlocutory injunctions orders as was laid down in the case of ""Giella – Versus - Cassman Brown & Company Limited (1973) E A 358". The Counsel further submitted that where facts of the case were disputed, the Honorable Courts should strive to maintain the status quo pending the final determination an issue which was provided for in the cases of:- "*Loise Wambui Thuo T/A Export Solve Agencies – Versus - George Atenya 7 others* [2020] eKLR and *Joash Ochieng Ougo & Another – Versus - Virginia Edith Wambui Otieno* [1987] eKLR.

46. In conclusion he urged the Court to allow the application as prayed by the Plaintiffs/Applicants herein.

B. The Written Submissions by the 1st Defendant/Respondent.

47. On 8th July, 202, the Learned Counsel for the 1st Defendant/Respondent, the Law firm of Messrs. Taibjee & Bhalla Advocates filed their written submission dated 6th July, 2022 on both the Preliminary objection and opposition of the application by the 1st and 2nd Plaintiffs/Applicants herein. Mr. Clapton Advocate submitted on whether the circumstances warranting the grant of an injunctive orders without the security for rent was sustainable. He submitted that the application was unmerited as a lease required a consent to be given before any sub – lease or subsequent registration was entered into. He argued that without receipt of that consent, it rendered the sub - lease a nullity against the holders of the first lease. He place reliance on the case of:- "*New Calabash Limited – Versus - Joseph Odero* [2018] eKLR

48. He submitted that the 1st and 2nd Plaintiffs/Applicants had no "prima facie case" on the basis that they had no legal right having failed to obtain consent from neither the Bank nor the Receiver before entering purported lease and therefore they could not be salvaged by the doctrine of bona fide tenancy. He cited the case of:- "*MRAO Limited – Versus - First American Bank of Kenya Limited* (2003) EKLR.

49. The Counsel submitted that the 1st and 2nd Plaintiffs/Applicants never stood to suffer any damage since the claim that they paid money was unknown to them. Further, they were not the registered proprietor to the suit properties. In any case, at the time of the registration, the suit properties had been already charged and therefore it would not be possible to have entered into any lease. Subsequently, an initial illegal action could not be legalized by the Court.

50. He submitted that the annexures annexed thereof by the 1st and 2nd Plaintiffs/Applicants had no nexus to the alleged suit properties. They neither had the support of the Certificate of electronic evidence nor had they been audited to be substantiated. They also had not been properly marked save for the one marked as "MS – 6" and therefore they ought to be expunged from the record as evidence in this case.

51. His contention was that in the event that the Court upheld the validity of the actions of the 1st and 2nd Plaintiffs/Applicants purporting to be sub – leased the suit properties without the consents it would be found out the sums allegedly invested had been spent and they were in arrears long before the 1st Defendant/Respondent became the legal and bona fide registered proprietor to the suit properties. Consequently, taking that the 1st Defendant/Respondent was the registered proprietor to the suit properties, there was reasons to be apprehensive that it would suffer irreparable consequences if rent was not deposited into the 1st Defendant/Respondent Advocates' Chambers or at worst Court which meant that 1st Defendant/Respondent risked suffering irreparable harm. The 1st Defendant/Respondent also sought the rent from 1st January 2022 when it became registered owner and not the date of the allegedly/ purported lease commencement date. The 1st Defendant/Respondent ought to be issued with a bank guarantee from 1st Plaintiffs/Applicants for rental arrears estimated for the leases provided by 1st Plaintiffs/Applicants was a sum of Kenya Shillings Seven Twenty Eight Thousand Eight Thirty Hundred (Kshs. 728, 830.00/=). On this aspect, he cited the case of:- "*Pius Kipchirchir Kogo - Versus -Frank Kimeli Tenai* (2018) eKLR". He averred that the 1st Defendant/Respondent stood to suffer great loss and damage, if the said injunctive order was granted. He held that it would mean of them not receiving rent for of the duration the matter was pending in Court until the matter was heard and finally determined. His argument was that nothing would prevent the 1st and 2nd Plaintiffs/Applicants from pursuing the individual should they be successful in this suit. To support this assertion, the Counsel cited the cases of:- "*Robert Mugo Wa Karanja – Versus - Ecobank (Kenya) Limited & ano [2019] eklr; Kenleb Cons Limited – Versus - New Gatitu Service Station Limited another*

(1990) eKLR, *Esther Ndegi Niiru & Another – Versus - Leonard Gatei* (2014) eKLR; *Ochoa Kamili Holding Limited – Versus - Guardian Ban Limited* (2018) eKLR.

C. The Written Submission for 2nd Defendant/Respondent

52. On 12th July, 2022, the Counsels for the 2nd Defendant/Respondent the Law firm of Mutua Waweru & Company Advocates filed their written Submissions dated 11th July, 2022. Mr. Mutua Advocate submitted that 1st and 2nd Plaintiffs/Applicants alleged interest in suit properties were not registered. Therefore, he argued that the 1st and 2nd Plaintiffs/Applicants were not accorded any legal protection under the provision of Section 26 (1) of the *Land Registration Act*, No. 3 of 2012. He stressed that there was no material on record produced by the 1st Plaintiffs/Applicants which demonstrated they had any "prima facie" case as the legal charge was already in favor of the 1st and 2nd Defendants/Respondents. He urged Court not to grant the 1st and 2nd Plaintiffs/Applicants any injunctive Orders as they never had any interest on the suit land. To buttress its point, he relied on the case of:- "*Sere Technologies Limited & another – Versus - Forward Cars Limited & 6 others* {2022] KLR.

53. In conclusion, the Counsel submitted that the 1st and 2nd Plaintiffs/Applicants had already quantified their loss and they had a remedy in the form of compensation. His contention was that they could not maintain the position that they stood to suffer irreparable harm if relief was not granted. He cited the case of:- "*Kenya Commercial Finance Co. Limited – Versus - Afraha Education Society* [2001} 1 E.A 87; and *Nguruman Limited – Versus - Jan Bonde Nielsen & 2 Others* [2014] Eklr.

VIII. Analysis & Determination

54. I have keenly heard all the parties and assessed the filed pleadings – the affidavits in support of the Notice of Motion application dated 16th March, 2022 by the 1st and 2nd Plaintiffs/Applicants, the responses, the written submissions, the cited authorities, the Preliminary objection dated 17th May, 2022 by the 1st Defendant/Respondent the relevant provisions of *the Constitution* of Kenya, 2010 and statures.

55. In order to arrive at an informed, fair and just decision, this Honorable Court has condensed the subject matter into the following salient four (4) issues for its determination. These are:-

    a. Whether the objection raised through a Notice of Preliminary Objection dated 17th May, 2022 by the 1st Defendant/Respondent herein meets the threshold of objections based on Law and precedents.

    b. Whether the Notice of Motion application dated 16th March, 2022 by the 1st and 2nd Plaintiffs/Applicants has merit and if it meets the threshold of being granted interim injunctive orders as sought?

    c. Whether the parties are entitled to the relief sought

    d. Who bears the cost of the application?

ISSUE No. a). Whether the objection raised through a Notice of Preliminary Objection dated 17th May, 2022 by the 1st Defendant/Respondent herein meets the threshold of objections based on Law and precedents.

56. The 1st Defendant/Respondent herein filed a Notice of Preliminary objection and this Court felt it important that the objection be tackled as a matter of first priority. According to the Black Law Dictionary a Preliminary Objection is defined as being:

> " In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary......."

The above legal preposition has been made graphically clear in the now famous case of *Mukisa Biscuits Manufacturing Co. Limited – Versus- West End Distributors Limited*. [1969] E.A. 696. Where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure points of law. The Learned Judge then held that:-

> " The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop"

57. The Court wishes to cite the case of "*Attorney General & Another –Versus- Andrew Mwaura Githinji & another* [2016] eKLR:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-

    i. A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.

    ii. A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and

    iii. The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

58. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. The Preliminary objection by the 1st Defendant/Respondent are on the following grounds:-

    a. That the application dated 16th March 2022 was ill misconceived in law for failure of 1st and 2nd Plaintiffs/Applicants to seek leave of Court to commence and continue proceedings against the 3rd Defendant/Respondent contrary to the provision of Section 560 of the *Insolvency Act*, No 18 of 2015; and

    b. Hence the Court lacked jurisdiction to hear the matter. Thus, the proper Court was the Commercial Court.

59. Certainly, the issues raised by the 1st Defendant/Respondent herein are serious and pure issues of law which this court is duty bound to critically venture to be heard and determined prior to them being set down the case for full trial on its own merit. The issues are not fanciful nor remote. For these reasons, therefore, I find that the objection raised by the 1st Defendant/Respondent were properly filed hereof. It constitutes matters akin to be determined at the preliminary level before embarking on the hearing of the case on its own merit in conformity to the case of Mukisa Biscuits Manufacturing Co. Limited (Supra). Therefore, I shall proceed to consider the two (2) issues of objection and make a determination accordingly.

60. The first issue from the objection by the 1st Defendant/Respondent relates to the jurisdiction of this Court. The Court is guided by the decision of the famous case of "Owners of the Motor Vessel "Lillian S" - Versus - Caltex Oil (K) Limited (1989) eKLR" where Justice Nyarangi had this to say:

> " Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence, A Court of law downs its tools in respect of the matter before it holds the opinion that it is without jurisdiction.....".

61. From the very onset, based on the above legal principles, the Court wishes to state that it has jurisdiction to hear and determine the issues filed through the pleadings by the 1st and 2nd Plaintiffs/Applicants herein. In saying so, the Courts holds that the broad jurisdiction of the Environment and Land Court is donated by the provision of Article 162 (2) (b) of *the Constitution* of Kenya, 2010 which provides:-

(1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

(4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.

62. In the discharge of the mandatory obligation placed on it by *the Constitution*, Parliament enacted the *Environment and Land Court Act* and set out in details, the jurisdiction of the Court. The provision of Section 13 of the Act outlines the jurisdiction of the court as follows:

> " The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land. (2) In exercise of its jurisdiction under Article 162 (2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes— (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; (b) relating to compulsory acquisition of land; (c) relating to land administration and management; (d) relating to public, private and community land

and contracts, choses in action or other instruments granting any enforceable interests in land; and (e) any other dispute relating to environment and land".

63. Therefore, I reiterate that from the close perusal of pleadings and evidence on record, I find that the issues raised pertaining to the ownership and legality of the title held by the 1st Defendant/ Respondent with respect to suit properties being plot No MSA/BLOCK XXIII/ 206 and Plot No. MSA/ BLOCK XXIII/210 and issues of tenancy and registered interests on the suit properties. These were issues which were well within the scope of the jurisdiction of the Court and as envisaged under Article 162(2) of *the Constitution* of Kenya 2010, section 13 (2) and 13(7) of the *Environment and Land Court Act*, 2011.

64. On the second issue of the objection raised by the 1st Defendant/Respondent, the Court wishes to assess whether the suit was defective for want of compliance of the provision of Section 560 of the *insolvency Act*, No. 18 of 2015. Section 560 (c) of the Act provides "inter alia":-

(1) While a company is under administration— (a) a person may take steps to enforce a security over the company's property only with the consent of the administrator or with the approval of the Court;

(b) a person may take steps to repossess goods in the company's possession under a credit purchase transaction only with the consent of the administrator or with the approval of the Court; if the Court gives approval—subject to such conditions as the Court may impose;

(c) a landlord may exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company only with the consent of the administrator or with the approval of the Court; and

(d) a person may begin or continue legal proceedings (including execution and distress) against the company or the company's property only with the consent of the administrator or with the approval of the Court.

(2) In giving approval for a transaction under subsection (1), the Court may impose a condition on, or a requirement in connection with, the transaction.

65. The Court wishes to apply this provision of the law by citing the case of:- "*Andrew Gikuni Muchai – Versus - Chase Bank Limited & another* the Court held thus:-

> " In my opinion to answer this question, one needs to appreciate what receivership is all about. In my opinion, receivership in legal terms entails an order/directive where all the property and affairs of an institution are placed in the dominion and control of an independent person known as a receiver. Thus, receivership is a preservation process put in place to protect the assets, liabilities and business affairs of a bank with the aim of protecting the interest of its depositors, creditors and members of the public. In this case to preserve the bank's liquidity, assets, and to find the best way to return it into normal business.

66. Further to this, in the case of:- *George Mureithi and others – Versus - Kenatco Taxis Limited* (In Receivership)" the Court held thus: -

> " Leave of court is mandatory as seen in the above provision couched in mandatory terms that no proceedings shall be commenced against the company unless leave of court has been sought and object to such terms as the court may impose."

67. In addition, the case of:- "*Amos Peter Omusotsi - Versus - Bulleys Tanneries* (under receivership) Supra, where Mbogholi J held:-

> " The 1st Defendant is under receivership. No claim can be brought against the company under receivership without leave of court ..... leave having not been sought and granted in this matter, the suit was incompetent ab-initio........" In the case of "*Fredrick Okoth Owino – Versus - T. S. S Grain Millers* (2017) eKLR, and quoted with approval by the Court of Appeal in the object of "*Nakumatt Holdings Limited and Another – Versus - Ideal Locations Limited* (2019) eKLR the Court held that:
>
> > "It is my considered view that the *Insolvency Act* intends (sic) to create a central forum for dealing with all insolvency disputes that may have been filed against the company. It does not matter whether the suits are pending appeal before the senior courts, the only court with the original jurisdiction to grant leave to continue suits against companies under administration, in my opinion, is the High Court."

68. From these authorities cited above, the Honorable Courts have interpreted administration and receivership interchangeably. Whilst, I fully agree with the position taken by the Counsel of the 1st Defendant/Respondent, I totally disagree with the Counsel for the 1st and 2nd Plaintiffs/Applicants assertion that the provisions of Section 560 never applied herein as it entirely made reference to administration. Undoubtedly, the provision of Section 560 of the *Insolvency Act*, No. 18 of 2015 was coached in mandatory terms in as far as the matter of seeking leave of the administrator or the Court and the Court is thus bound by it. Admittedly, the 3rd Defendant is a legal entity incorporated as a company under the Laws of company. The Honorable Court fully concurs with the Counsel for the 1st Defendant/Respondent that It is a company which is under administration. For this reason therefore, the 1st and 2nd Plaintiffs/Applicants ought to have taken steps before instituting this suit against the 3rd Defendant and/or enforcing a security over the company's property only with the consent of the administrator or with the approval of this Court. Unfortunately, this never happened or at least there has been no such empirical evidence placed before the Honorable Court to that effect. Consequently, having critically assessed this particular objection raised by the 1st Defendant/Respondent, I find herewith that the preliminary objection has merit. In the given circumstances, the Honorable Court proceeds to strike out the pleadings and the suits instituted against the 3rd Defendant/Respondent forthwith.

ISSUE No. b). Whether the Notice of Motion application dated 16th March, 2022 by the 1st and 2nd Plaintiffs/Applicants has merit and if it meets the threshold of being granted interim injunctive orders as sought?

69. As provided in submissions by parties herein, the conditions for consideration in granting an injunctive orders are well settled in the celebrated case of "*Giella – Versus - Cassman Brown & Company Limited* (1973) E A 358, where the court provided thus; -"Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant 'might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

70. Additionally, on the same issue, the Court of Appeal in the case of *"Nguruman Limited – Versus - Jan Bonde Nielsen & 2 Others*, CA NO. 77 OF 2012, laid down the three triple requirements required for grant of an order of injunction. The applicant has to: -

   a. establish his case only at a prima facie level,

   b. demonstrate irreparable injury if a temporary injunction is not granted, and ally any doubts as to (b) by showing that the balance of convenience is in his favor.

71. All conditions must be met for injunctive orders sought to be granted. The question that the Court herein asks itself is whether the Applicant herein has established "a prima facie" level case.

72. In the case of "*MRAO Limited – Versus – First American Bank of Kenya Limited* (2003) eKLR, the Court of Appeal elaborated on what "a prima facie case' entailed. They stated thus; - "…. A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right. It is a case 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 as to call for all explanation from the latter……".

73. From the instant case, the 1st and 2nd Plaintiffs/ Respondents has raised issues of legality of the title held by the 1st Defendant/ Respondent with respect to suit properties being plot, Land Reference No. No MSA/BLOCK XXIII/ 206 and plot No. MSA/ BLOCK XXIII/210. It is their contention that the suit properties were sub - leased to them by the 5th Defendant/Respondent who in turn had a lease agreement with 4th Defendant/Respondent herein. The 4th Defendant/Respondent was a sister company to Triton Petroleum station Limited who gave them control of the suit premises in year 2008. The 1st Plaintiff/Applicant has emphatically averred that the transfer of title to the 1st Defendant/ Respondent was done illegally, irregularly and fraudulently. Indeed, they have provided an elaborate particular items to support this allegations. As a rejoinder, the 1st Defendant/Respondent has strongly refuted the allegation. Be that as it may, as the provision of Section 107 of the Evidence Cap. 80 dictates that it is he who alleges must prove, there would be need to these assertion to be demonstrated during a full trial.

74. Furthermore, the 1st and 2nd Plaintiffs/Applicants have furnished a copy of the Lease Agreement duly executed between the 4th Defendant/Respondent and the Triton Petroleum Station dated 12th August 2008; a Letter of Offer to sublease dated 25th February 2011 from the 5th Defendant/Respondent to Brighton Limited; The Sub - Lease was for the Petrol station for the consideration of Kenya Shillings One Hundred and Fifty Thousand (Kshs. 150,000 =/) ;there is another Sub – Lease; Letter of Offer from the 5th Defendant/Respondent to the 1st and 2nd Plaintiffs/Applicants dated 25th February 2011 for the restaurant and shop for the consideration of Kenya Shillings One Hundred Thousand (Kshs. 100,000.00) and statement of accounts attached thereto showing payment of rent for various months.

    From evidence on record, I find that the 1st Plaintiffs/ Applicants have established "a prima facie" case.

75. On the second limb as to whether the 1st and 2nd Plaintiffs/Applicants proved that he would suffer irreparable damage if injunctive order was not granted. The 1st and 2nd Plaintiffs/Applicants contended that despite having spent such a colossal sum of Kenya Shillings Forty Three Million Seventy Five Thousand Six Ninety Seven Hundred (Kshs. 43,075,697=/), but also have had emotionally and mentally invested in the suit premises yet they were at the risk of being evicted by the 1st Defendant/ Respondent. As a rejoinder, the 1st, 2nd and 3rd Defendants in their submissions averred that that the loss and damage likely to be suffered by 1st and 2nd Plaintiffs/Applicants were quantifiable and an equitable remedy which could not be issued for a quantifiable amount. From the evidence adduced

and on record, undoubtedly, the 1st and 2nd Plaintiffs/ Applicants received a Notice of payment of rent dated 9th March 2022 and were to be evicted in 30 days if rent was not paid. As it stands, the 1st and 2nd Plaintiffs/Applicants faced the risk of eviction if the injunctive orders was not granted. For these reasons, therefore, I am fully satisfied that that the second limb has been met by 1st and 2nd Plaintiffs/ Applicants for grant of temporary injunction orders. I proceed to grant it accordingly.

76. On the third limb as to whether the 1st and 2nd Plaintiffs/Applicants have shown that the balance of convenience tilts to their favor. The 1st and 2nd Plaintiffs/Applicants have provided the Honorable Court copies of the Lease agreement duly executed between 4th Defendant/Respondent and the Triton Petroleum Station dated 12th August 2008; a Letter of Offer to sub - lease dated 25th February 2011 from the 5th Defendant/Respondent to the Brighton Limited; The sub - lease was for the Petrol station for the consideration of a sum of Kenya Shillings One Hundred and Fifty Thousand (Kshs. 150,000 =/); the Letter of offer from the 5th Defendant/Respondent to the 1st and 2nd Plaintiffs/Applicants dated 25th February 2011 for the restaurant and the shop for the consideration of a sum of Kenya Shillings One Hundred Thousand (Kshs. 100,000.00) and statement of accounts attached thereto showing payment of rent for various month as evidence.

77. On keen perusal of these documents provided for by the 1st and 2nd Plaintiffs/Applicants herein, the Court is persuaded that the evidence has demonstrated that the balance of convenience tilts towards granting the injunctive orders in favor of the 1st and 2nd Plaintiffs/Applicants herein.

ISSUE No. c). Whether the parties are entitled to the relief sought

78. Under this sub – heading, based on the surrounding facts and inferences of this rather convoluted case there are certain facts that remain constant. Firstly, the issue of the ownership and title of the suit properties which has been challenged and being a main issue of contention between the 1st and 2nd Plaintiffs and the 1st Defendant/Respondent. Arising from it, there will be need to fully appreciate the Leasehold agreement duly executed between the Plaintiffs/Applicants and the 4th and 5th Defendants/Respondents. Leading to having this arrangement, it is claimed that the Plaintiffs/Applicants proceeded to incur and spend a substantial amount in terms of causing elaborate renovation and improvement on the fixtures onto the suit properties. They have argued that these expenses if deducted would mitigate any rental sums being claimed by the 1st Defendant/Respondent.

79. On the other hand, the 1st Defendant/Respondent has claimed having legally acquired the two suit properties and the title registered in their names hence they are owned rent by the 1st and 2nd Plaintiffs/ Applicants who continue running and operating businesses on the suit properties. They demand to be paid the outstanding rent through their advocates Law firm's name or the Court. They have argued that the all the sums that the Plaintiffs claim to us have used or invested has already been exhausted by effluxion of time. Based on these facts, the Honorable Court has been persuaded that in the interest of Justice, Equity and Conscience that there would be great need to preserve the suit properties pending the hearing and final determination of the full trial through granting the injunctive orders in favour of the 1st and 2nd Plaintiffs/Applicants herein.

80. Further, the Court has found the issue of failure by the Plaintiffs/Applicants to obtain the leave of the Administrator or the Court as provided for under the provision of Section 560 of the *Insolvency Act* before suing the 3rd Defendant who are under Receivership as settled. Pursuant to this, the Court is fully convinced that there was a breach of the provisions of the law and hence directed that the suit be struck out against the 3rd Defendant herein on that ground.

ISSUE No. d). Who will bear the Costs of the application.

81. Ideally, it is trite law that issues of Costs are at the discretion of the Honorable Court. The Black Law Dictionary defines "Cost" to mean, "the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other".

82. The proviso under the provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. By events it means the results and outcome of any legal action, proceeding or process in any litigation. In the case of "*Reids Heweet & Company – Versus – Joseph AIR 1918 cal. 717 & Myres – Versus – Defries* (1880) 5 Ex. D. 180, the House of the Lords noted:-

> " The expression "Costs shall follow the events" means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word 'event' should be read distributive and the costs of any particular issue should go to the party who succeeds upon it....."

83. The events in the instant case is that the Notice of Motion application dated 16th March 2022 by the 1st and 2nd Plaintiffs/Applicants herein has been successful to the extent of being granted injunctive and other related orders. Nonetheless, taking that the suit is yet to be heard and finally determined, its just, fair and reasonable that costs of the application to be in the cause.

VI. Conclusion & Disposition

84. Consequently, having conducted such an elaborate analysis of the framed issues herein, on preponderance of probability, the Honorable Court finds that the 1st and 2nd Plaintiffs/Applicants, save for some aspects of the Preliminary objection raised by the 1st Defendant/Respondent herein, has been successful. Specifically, the Honorable Court now proceeds to grant the following orders. These are:-

    a. THAT the unsigned Notice of Preliminary Objection dated 17th May, 2022 by the 1st Defendant/Respondent herein be and is hereby strictly only allowed as far as to the extent that the 1st and 2nd Plaintiffs/Applicants herein never sought nor obtained the leave of Court or Administrator to institute and continue the suit against the 3rd Defendant contrary to the provisions of Section 560 of the *Insolvency Act*, No.8 of 2015. In effect the Court proceeds to strike out the 3rd Defendant herein from this suit.

    b. THAT unless otherwise stated this Honorable Court has original jurisdiction to hear and determine this matter based on the provisions of Article 162 (2) (b) of *the Constitution* of Kenya, 2010; Sections 3 & 13 of Environment & Land Court, Act, No. 19 of 2011, Sections 101 of *Land Registration Act*, No. 3 of 2012 and Section 150 of *Land Act*, No. 6 of 2012.____

    c. THAT pursuant to that, the Plaintiff be and is hereby granted twenty (21) days leave to amend the Plaint by removing the 3rd Defendant from the all the pleadings pertaining from this suit accordingly.

    d. THAT the Notice of Motion application dated 16th March, 2022 by the 1st and 2nd Plaintiffs/Applicants be and are hereby allowed under the following terms:-

        i. Pending hearing and determination of this suit a temporary injunction is granted to the Applicants/Plaintiff restraining the 1st Respondent/ Defendant; 4th Defendant/Respondent and 5th Defendant/Respondent whether by themselves, their agents, employees or otherwise howsoever from interfering with the 1st and 2nd Plaintiffs/

Applicants quiet possession of all that suit properties known as Land Reference Numbers PLOT NO. MSA/BLOCK XXIII/206 and Land Reference PLOT NO MSA/BLOCK XXIII/210.

ii. Pending hearing and determination of this suit, the Plaintiff to continue making deposits of any rent accrued, collected and/ garnered from the suit properties known as Land Reference Numbers MSA/BLOCK XXIII 206 and Land Reference PLOT NO MSA/BLOCK XXVIII/210 with effect from 31ts March, 2021 todate to the Law firm of Messrs. Taibjee & Bihalla Advocates on a monthly basis on condition that they will hold the sums in trust and/or Lien pending the final determination of this suit.

e. THAT for expediency sake, this matter he fixed for full trial and determination within the next One hundred and eighty (180) days from the date of the delivery of this Ruling hereof on 18th May, 2023. There be a mention on 2nd March, 2023 for Pre - trial Conference pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010.

f. THAT the Costs of the application to be in the Cause.

RULING DELIVERED, SIGNED AND DATED AT MOMABSA THIS 9TH OF DECEMBER 2022

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

ENVIRONMENT & LAND COURT AT,

MOMBASA

In the presence of:-

a. M/s. Yumnah, the Court Assistant.

b. Mr. Mbogo Advocate holding brief for Mr. Shibanda Advocate for the Plaintiff/Applicant.

c. M/s. Murimi Advocate holding brief for Mr. Ogunde Advocate for the 1st Defendant.

d. M/s. Murimi Advocate holding brief for Mr. Mutua for 2nd Advocate.

e. Mr. Clapton Advocate for 1st Defendant.

f. No appearance for the 3rd , 4th & 5th Defendants.