Safariplies Limited v County Government of Bungoma & 3 others (Environment & Land Case E001 of 2024) [2024] KEELC 3275 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3275 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENT & LAND CASE E001 OF 2024

EC CHERONO, J

APRIL 11, 2024

BETWEEN

SAFARIPLIES LIMITED .... APPLICANT

AND

COUNTY GOVERNMENT OF BUNGOMA .... 1ST RESPONDENT

COUNTY SECRETARY COUNTY GOVENRMNET OF BUNGOMA .... 2ND RESPONDENT

CHIEF EXECUTIVE COMMITTEE DEPARTMENT OF LANDS, URBAN PLANNING, HOUSING AND MUNICIPALITIES .... 3RD RESPONDENT

COUNTY ATTORNEY COUNTY GOVERNMENT OF BUNGOMA .... 4TH RESPONDENT

RULING

1. What is before me for determination is the applicant's Notice of Motion application dated 2nd February,2024 brought under the provisions of Order 40 Rules 1,2, and 3 and Order 51 Rules 1 and 4 of the Civil Procedure Rules, 2010 and Sections 1A, 1B, 3B and 63 (c) & (e) of the *Civil Procedure Act* together will all enabling provisions seeking the following orders;

   a. Spent.

   b. Spent.

   c. An order of temporary injunction do issue restraining the Defendant/Respondents either by themselves, their servants, employees, agents, assignees or anybody claiming under or in their name from entering and/or accessing, trespassing, encroaching or in any way whatsoever interfering with the Plaintiff/applicants quiet occupation, use and possession of parcel of land known as E.bukusu/n.kanduyi/4634 situated in Kanduyi division of Bungoma County

containing by measurement 0.049 hectares or thereabouts (hereinafter "the suit property") pending hearing and determination of this suit.

d. The costs of the application and the suit be borne by the Respondents/Defendants.

e. Any other relief which this honourable court deems fit and just to grant.

2. The application predicated on grounds shown on the face of the application and is supported by the affidavit of a director shareholder of the applicant Chrisostim Nyongesa Wafula sworn on 2nd February,2024.

3. It is the applicant's case that Safariplies Limited (hereinafter 'the company) is the absolute registered owner of all that land known as E.BUKUSU/N.KANDUYI/4634 measuring approximately 0.049 hectares situated in Kanduyi Division of Bungoma County (hereinafter 'the suit property'). It is stated that the company purchased the suit property from one Thomas Owino who was the registered owner after conducing due diligence vide an agreement for sale dated 16th September, 2017.The applicants further state that they confirmed that the suit property was far away from the road and away from any public utility land.

4. It was the applicant's case that upon successful registration of the suit property in its name, it approached Kenya Commercial Bank and secured a loan facility of Kshs. 10,500,000/= to which the suit property was charged on 1st December, 2017.The applicant further states that it acquired all the necessary permits and approvals from the 1st respondent before occasioning improvements on the suit property.

5. The applicant also states that it was taken aback by the gazette notice dated Wednesday 31st January,2024 published on the standard newspaper in which the 1st respondent through the 3rd respondent stated of the county government's intention to remove and/or demolish all developments around Kanduyi area in which the suit property falls in. The appellant accused the respondents for failure to provide any elaborate plans and explanations for the intended demolition of its rightfully acquired property within 7 days of the notice. The applicant contends that unless the orders sought are granted its rights to property will be violated.

6. When this matter was placed before the duty court for directions of the application brought under certificate of urgency on 5th February, 2024, the court issued a temporary injunction against the respondents pending hearing and determination of this application. Directions were equally taken to canvass the application by way of written submissions.

7. Upon being served with the said application, the respondents filed a replying affidavit sworn on 28th February, 2024 grounds of opposition dated 26th February, 2024 and a notice of preliminary objection dated 26th February, 2024. In their replying affidavit, the respondents stated that they are mandated by the law and more so *the Constitution* which establishes County Governments to carry out various duties concerning governance of the County. They made reference to their mandate and duties as specified in Article 174, 176,6, 40, 179(1), 183(1), 184,62, 61 of *the Constitution* of Kenya, 2010, the fourth and fifth schedule of *the Constitution*, 2010, Section 36 and part xi of the County Government Act of Kenya, 2012, Section 12(1) of the *Urban Areas and Cities Act*, Cap 275 Laws of Kenya and Section 56,72(1), 73(2) & (4) *Physical and Land Use Planning Act*, Cap 303 Laws of Kenya amongst other provisions of the law.

8. The respondents confirmed that indeed on 31st January, 2024 they issued a notice through the standard newspaper giving guidelines on physical planning and land use within Bungoma county. They contend that the said notice did not take away any land legally acquired. They further stated that once an

enforcement notice has been served according to the law, any aggrieved party ought to appeal to the relevant County Physical and land use Planning liaison committee within 14 days of such service and the committee shall determine the appeal within 30 days after which an appeal shall lie in court for determination.

9. It was further contended that the county government of Bungoma acquired all that land known as E.BUKUSU/N.KANDUYI/882 measuring approximately 11.8 hectares from its predecessors which was set aside for public utility and in particular a football stadium and a title deed issued on 22nd May, 1973 under the Register Map Sheet No.22 and an easement registered reserving the land for general public use and as such the land was not available for allocation to individuals. They further stated that sometime in 3rd JULY, 1997 E.BUKUSU/N.KANDUYI/882 was purportedly sub-divided into two portions i.e. E.BUKUSU/N.KANDUYI/2725 measuring 10.7ha and E.BUKUSU/N.KANDUYI/2726 measuring 0.11ha while a portion of 0.90ha was unaccounted for. Further, on 7th July, 1997 E.BUKUSU/N.KANDUYI/2726 was transferred to Alexander Kitungu Kimwele for a consideration of 50,000/= and a certificate of title issued. However, on 8th January 1999 a restriction for no further dealings until the question of ownership is determined was registered.

10. As for E.BUKUSU/N.KANDUYI/2725 the easement was retained however the same was purportedly sub-divided into 27 portions being E.BUKUSU/N.KANDUYI/4623-4649 wherein the suit property is one of the resultant portions. The respondents therefore argued that the subdivision of the original E.BUKUSU/N.KANDUYI/882 was illegal and irregular since the said land had been reserved for public utility i.e. Kanduyi Stadium and that with the easement registered therein all parties were notified of such reservation and therefore the land was not available for re-allocation. They further argued that the sanctity of tile was not intended to be a vehicle for unjust enrichment at the expense of the public and the applicants title was therefore not absolute and indefeasible for having been obtained illegally and through fraudulent dealings. They argued that the applicants had not proved a prima facie case with the likelihood of success and the same cannot be protected under Article 40 of *the Constitution*, 2010 and 26(1) of the *Land Registration Act*,2012. The respondents urged the court to revoke and cancel the applicants title for having been irregularly and fraudulently obtained.

11. In their grounds of opposition the respondents stated that this court lacks the jurisdiction to determine the dispute in issue which they contend is a purview of the County Physical and land use Planning liaison committee under Section 72(3) of the *Physical and Land Use Planning Act*, Cap 303 Laws of Kenya in so far as it intends to challenge the general public enforcement notice issued on 31st January, 2024.The respondents also argued that this matter was sub-judice since there exists ELCEPPET E002 OF 2024 between the same parties and over the same subject matter. It is on these very grounds that the notice of preliminary objection was premised on.

12. As I mentioned elsewhere in this ruling, direction were taken to canvass the application by way of written submissions.

13. The applicants filed their submissions dated 11th March, 2024 where they submitted on five issues. On the first issue whether the Defendants/Respondents' Preliminary Objection has a probability of success it was submitted that the preliminary objection lacks merit but a ploy for forum shopping and curved in a way to delay the Applicant from getting justice since the Honourable Court has original jurisdiction to entertain and determine the current dispute which is purely a land matter and the Plaintiff/Applicant is seeking enforcement and protection of its rights to own and use property as enshrined under Article 40 of *the Constitution* 2010. It was argued that Section 72(3) of the *Physical and Land Use Planning act* does not in any manner arrogates itself the jurisdiction neither does it in any way invites and/or abrogates the original jurisdiction of the Environment and Land Court.

14. The applicant further submitted that the language of the impugned notice being the subject of this Honourable Court was not in any way intended to provide room for the parties to air their grievances since the notice period issued was 7 days only. It was therefore their contention that the applicants were left with no choice than to approach the court which has original jurisdiction to entertain, hear and determine the dispute at hand as established under Article 162(2)(b) of *the Constitution* of Kenya 2010 and Section 4 of the Environment and *Land Act* No.19 of 2011 and the jurisdiction of the court is thoroughly highlighted under the provision of Section 13 of the Environment and *Land Act*.

15. On the issue whether this matter is sub-judice, it was argued that the ground as raised identified no point of law. It was submitted that the mere citation of the parties without a brief introduction on the alleged suit litigated over the same subject matter and a narration of the prayers in the suit and orders issued cannot then invite the court to make a determination of the existence of sub-judice in a matter. They therefore argued that the objection ought to be dismissed and that the matter before the Honourable Court has disclosed a reasonable cause of action. Reliance was placed in the case of Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya (2020) eKLR and Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR, Thiba Minn-Hydro Co Ltd vs. Joshat Karu Ndwiga (2013) Eklr. The applicants submitted that the matter in questions is of great public importance and was worth the courts precious time as was held in the case of Independent Electoral & Boundaries Commission vs. Jane Cheperenger & 2 others Civil Application No. 36 of 2014.

16. The applicants further submitted that they have met the requirements of Giella vs Cassman Brown and Co. Ltd. For the requirement of a prima-facie case, the applicant submitted that they are holders of a title whose tenure is a freehold. It was their argument that there have been approvals, licenses and authorizations for the developments on the property and all these procedures were authorized and obtained from the respondents. The applicant argued that the application raises important issues of intended infringement of right and denial of peaceful enjoyment of property as enshrined in *the Constitution* of Kenya 2010 that can only be determined at the main suit stage. It is therefore critical that this Honourable Court issues the injunction to restrain the Defendants/Respondents from interfering with the suit property until the main suit is heard and determined and as such the applicant has established a prima facie case.

17. As for the requirement that failure to grant the orders sought would result to irreparable loss, the applicant, while placing reliance on the case of Paul Gitonga Wanjau vs. Gathuthi Tea Factory Ltd & 2 Others(2016) eKLR submitted that they went through all the required processes to acquire the land and even obtained approvals and licenses from the respondents. It was further their submission that they took up a loan with KCB Bank and in the event the orders sought are not granted, they shall suffer untold losses which cannot be compensated by damages.

18. As to whether they have proved their case on a balance of probabilities, they applicants cited the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR stating that the respondents have not denied that the applicants hold title of the suit property and neither have they denied that they issued licenses and approvals for the various projects on the suit property and as such they argued that the balance of convenience tilts in their favour and they are worthy of the orders sought. The applicants therefore urged the court to find that the preliminary objection lacks merit and sought to have the same dismissed with costs. They equally urged the court to find that their application is meritorious and allow the same with costs.

19. The respondents on the other hand filed their submissions dated 4th March 2024 in further opposition of the application dated 2nd February 2024 and in support of their preliminary objection dated 26th February, 2024. They submitted on five issues.

20. On the first issue, they argued that the Court lacks jurisdiction under the *Physical and Land Use Planning Act*. They submitted that this Court can only exercise jurisdiction donated to it either by *the Constitution* or statute and cannot arrogate itself jurisdiction beyond that which is conferred by *the Constitution* and /or the law. They submitted that the

    applicant's case was based on the notice placed in the standard newspaper dated 31st January, 2024 issued by the County Government of Bungoma through the Chief Executive Committee Member Department of Lands, Urban/Physical Planning, Housing and Municipalities which gave notice of the County Government's intention to remove and/or demolish all developments around Kanduyi area in which the suit property falls in. It was their argument that under Section 72(3) and (4) of the *Physical and Land Use Planning Act*, the first port of call as by law provided is the County Physical and Land Use Planning Liaison Committee and not this Court which has the appellate jurisdiction. Reliance was placed in the cases of Susan Wanjiku Maina v Director, Physical and Land Use Planning Kiambu County Government & another [2022] eKLR and Ngomo Multi-Purpose Co-operative Society Ltd v County Government of Mombasa (2021) eKLR.

21. The respondents urged the court to consider the principle of exhaustion as was done in the abovementioned cases adding that it is trite law that where a procedure is provided for in law, that procedure ought to be followed before invoking the jurisdiction of the Court. They cited the case of Speaker of the National Assembly v James Njenga Karume [1992] eKLR.

22. On the second issue, it was argued that this suit is sub-judice ELC Petition E002 of 2024 between Margaret Nasimiyu Wesonga, Joseph Masibo, Godfrey Jacob Mbindi, Simon Wamalwa, Safariplies Limited, Cleophaz Misiko, Salu Wekesa, Juma Waswala, Blasio Barasa Adriano Makokha and Gabriel Nalianya against the Defendants/Respondents herein over the same subject matter to which E.Bukusu/N.Kanduyi/4634 in the Environment & Planning Division of this Court at Bungoma. Counsel quoted Section 6 of the *Civil Procedure Act* while arguing that the concept of sub judice which in latin means "under Judgment" denotes that where an issue is pending in a Court of law for adjudication between the same parties, any other Court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent Court to stay the proceeding and such order can be made at any stage. Reliance was placed in the case of Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR. They therefore asked the court to dismiss this suit with costs.

23. On the third issue, it was submitted that the 2nd, 3rd and 4th defendants are improperly joined to this suit since they are not legal persons and for not being constitutional and statutory legal entities capable of suing and being sued under the law. They argued that without the personal names of the holders of those offices, the purported suit against those offices is a non-starter and still born and an absolute abuse of the Court process. They went on to submit that the 1st, 2nd and 3rd Defendant/Respondents, under section 133 of the *County Governments Act*, 2012 cannot be sued in their personal capacity or otherwise as they are not legal entities capable of being sued for commissions or omissions done in their official duties. Reliance was placed on the case of John Mining Temoi & another v Governor of Bungoma County & 17 others [2014] eKLR and John Rimui Waweru & 3 others v Githunguri Constituency Ranching Co Limited & 5 others [2015] eKLR. They therefore urged that the suit against the 1st, 2nd and 3rd respondents be struck out with costs.

24. On the fourth issue, it was submitted that no prima facie case has been established by the plaintiff/applicant. The respondents contend that the suit property formed part of land set aside for purposes of public utility and that the mode of acquisition of title by the applicants was illegal and marred with fraud. It was their submission that illegally obtained land cannot be protected under Article 40 of *the Constitution*. Reliance was placed on the case of Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment). It was the respondent's contention that the Plaintiff/Applicant has not met the three stage tier sequential conditions stated in the celebrated case of Giella v Cassman Brown and Co Ltd [1973] EA 358 for the grant of the injunction orders sought even if the application was to be considered on merit.

25. The respondents argued that if at all the applicants had carried out their due diligence by looking at the history of the suit property, they would have realized that the same had been alienated for public utility and more particularly a stadium. It was argued that the applicants can therefore not be allowed to benefit from unlawfulness. They quoted the cases of Kamau Mucuha v Ripples Ltd [1993] eKLR , Munyu Maina v Hiram Gathiha Maina Civil Appeal No 239 of 2009 [2013] eKLR, Chemey Investment Limited v Attorney General & 2 others [2018] eKLR and Abu Chiaba Mohamed v Mohamed Bwana Bakari & 2 others [2005] eKLR.

26. On the 2nd requirement for grant of an order of injunction, the respondents submitted that since the value of the suit land and the property therein had been quantified, the same can be compensated by an award of damages. On the last requirement, they argued that the property being one of general public utility, the balance of convenience tilts in favour of the public as represented by the respondents. Finally, they submitted that the Respondents having successfully defended the suit and the application, they are entitled to the costs of the suit and the application.

27. Upon considering the Notice of motion application dated the 2nd February, 2024 including the respective affidavits in support and in opposition thereto, the parties respective submissions and the arguments for and against the notice of preliminary objection dated 26th February, 2024 the following are the issues for determination:

    a. Whether this honourable court is bereft of jurisdiction.

    b. Whether this matter is sub-judice.

    c. Whether the applicant has made a case for the orders sought.

    d. Who shall bear the costs of the application.

28. On whether this court has jurisdiction to hear and determine this Petition and by extension the application, the respondents argued that the applicant erred in filing this matter before this court prior to filing an appeal against the enforcement notice before the Physical and Land Use Planning Liaison Committee (hereinafter 'the committee'). The respondent invoked the doctrine of exhaustion where he argued that the applicant ought to have commenced these proceedings at the committee level before approaching this honourable court as required under Section 72(3) and (4) of the *Physical and Land Use Planning Act*. In rebuttal the applicants argued that the issue at hand was a public interest matter that needed the courts attention and that the notice period issued by the enforcement notice necessitated the need to approach the court as opposed to the committee. Further, the applicant argued that this court has original jurisdiction to hear and determine issues regarding a right to property as protected under *the constitution*.

29. Section 72 of the [*Physical and Land Use Planning Act*] states as follows;

72. Enforcement notice

(1) A county executive committee member shall serve the owner, occupier, agent or developer of property or land with an enforcement notice if it comes to the notice of that county executive committee member that—

(a) a developer commences development on any land after the commencement of this Act without the required development permission having been obtained; or

(b) any condition of a development permission granted under this Act has not been complied with.

(2) An enforcement notice shall—

(a) specify the development alleged to have been carried out without development permission or the conditions of the development permission alleged to have been contravened;

(b) specify measures the developer shall take, the date on which the notice shall take effect, the period within which the measures shall be complied; and

(c) require within a specified period the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities.

(3) Where a person on whom an enforcement notice has been served is aggrieved by that notice, that person may appeal to the relevant County Physical and Land Use Planning Liaison Committee within fourteen days of being served with the notice and the committee shall hear and determine the appeal within thirty days of the appeal being filed.

(4) Any party aggrieved with the determination of the county physical and land use planning liaison committee may appeal to the court only on a matter of law and the court shall hear and determine the appeal within thirty days.

30. On matters jurisdiction, it is trite law that a Court cannot act in a matter where it has no jurisdiction for jurisdiction is everything, and a premise upon which a Court or Tribunal derives the power, authority and legitimacy to entertain any matter before it. This proposition is supported by the pronouncements of the Court in the case of Phoenix of E.A. Assurance Co. Limited vs. S. M. Thiga t/a Newspaper Service [2019] eKLR where the Court stated thus:-

> "...'Jurisdiction' denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae."

31. I find that having stated the relevant law relied upon by the Respondents in support of their Preliminary Objection, I have to find out whether the Petition and the application fall within the purview as circumscribed under Section 72 of the *Physical and Land Use Planning Act*.

32. The respondents have argued that the Petition and the application herein are based on what the 3rd respondent caused to be published in the standard newspaper dated Wednesday, 31st January, 2024 titled development control/enforcement. In that notice, the 3rd respondent notified the public of the discovery of alleged illegal developments/occupations and issuance of business/trade permits by the county and national government within Bungoma county municipalities, towns, Markets and other urban areas. The notice invoked the provisions of *the Constitution*,2010 i.e. Chapter 5 Article 62 (2) and the fourth schedule Part 2(8) and the *Physical and Land Use Planning Act* No.13 of 2019, the Environmental Management and Coordination Act1999(Amended 2015), *Urban areas and Cities Act* 2011 and the County Government Act 2012 Section 103.The notice went ahead and issued an advisory to the residents, developers/investors and officers in both County and national government and called for the strict adherence of the issues discussed thereafter.

33. On examination of the applicant's case, it emerges that the suit property was marked for demolition to pave way for the Masinde Muliro Stadium, Kanduyi. The applicant alleges that the suit property belongs to it having legally and procedurally acquired the same. At this juncture, it is imperative to note that the threshold for preliminary objections is now well settled and there would be no reason to reinvent the wheel. Courts have held on numerous decisions that a preliminary objection deals purely with points of law and where facts are not disputed. Where the court has to look outside the case for evidence to establish the facts presented, then this falls outside the purview of a preliminary point where it calls for a full hearing to be conducted to determine the matter.

34. In Mukisa Biscuit Manufacturing Co Ltd v West End Distributors ltd [1969] EA 696, the court stated as follows:-Per Law, JA

> " So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit." This was followed up by the judgment of Sir Charles Newbold, P in the same case:
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> "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 demurrer. 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 had to be ascertained or if what is sought is 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."

35. In the case of Lemitei Ole Koros & another v Attorney General & 3 others [2016] eKLR, Munyao, J stated as follows:

> " Where facts are not contested, the court is able to make a determination of law on the preliminary objection, but where facts are in contest, then automatically, the issue falls out of the ambit of a preliminary objection. It would be improper for a court to make a contested determination of fact within a preliminary objection."

36. Again in the case of Oraro vs Mbaja [2005] KLR 141, the court held as follows;

> " Anything that purports to be a preliminary objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence."

37. In my considered view and understanding, the applicant in its claim is seeking for the protection of what it claims to be a legally and lawfully obtained title and its property as erected in the suit property as opposed to an issue of land use and planning as per the preamble of the *Physical and Land Use Planning Act*, CAP 303 Laws of Kenya which states 'AN ACT of Parliament to make provision for the planning, use, regulation and development of land and for connected purposes.' The framing of the applicant's pleadings, primarily triggered by development control/enforcement notice, predominantly rests on the claim that the applicant is the registered owner of the suit property. This property purportedly faces imminent demolition by the respondents, and the applicant aims to seek legal protection for it.

38. A quick look at the respondents' grounds of opposition and replying affidavit reveals that the mode in which the applicant acquired title of the suit property takes center stage as opposed to matters of planning, use and development of land. It is trite law that the power to determine the legality of title to land is vested in the Environment and Land Court under Article 162 (2) (b) of *The Constitution* of Kenya, 2010 and Section 13 of the *Environment and Land Court Act*, No. 19 of 2011 and on this ambit the preliminary objection fails.

39. The respondent in the preliminary objection equally contends that the applicants claim is sub judice. The law governing the doctrine of sub judice is provided for in Section 6 of the *Civil Procedure Act*, as follows;

    Stay of suit

    No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

40. Therefore, for a party to maintain a plea of sub judice, they must present evidence to show that the suit relates to the same parties or parties litigating under the same title, and the matter in issue is substantially the same as that in an earlier filed suit. It therefore follows that to prove that a suit is sub judice, it will be necessary that pleadings in respect of a previously instituted suit are exhibited, for the court to determine whether the parties and the issues are the same.

41. According to the case of Oraro vs Mbaja(supra), it is clear that where evidence is necessary to prove a preliminary objection, then the same cannot be validly raised as a preliminary objection. Indeed, in the instant suit, while the Respondents argue that both the parties and issues in this suit are in issue in another suit pending before this court, the Applicants have emphasized that the parties and issues in the previous and current suits are different and the cause of action and reliefs sought are different. I subscribe to the view that a plea of sub judice ought not be raised as a preliminary objection, but may be raised by way of a Notice of Motion where pleadings in the two cases are exhibited. I therefore find that the plea of sub judice in so far as the facts thereof are in dispute, is not validly raised as a preliminary objection and the same must fail.

44. Having looked at the definition and what constitutes a preliminary objection considering the issue for determination before this court, I am not satisfied that the preliminary objection dated 26th February, 2024 raises a pure point of law which merits consideration by this court. The issues raised by the applicant/plaintiff are issues which can only be resolved on a merit hearing before the ELC.

42. Now turning to the substantive prayer of the application, the applicant prays for a temporary injunction against the respondents pending determination of the main suit. Basically, the principles upon which a Court may grant a temporary injunction were set out in the case of GIELLA VS. CASSMAN BROWN & ANOTHER (1973) EA 358. These are that:-

(a) An applicant must show a prima facie case with a probability of success.

(b) An injunction will not normally be granted unless the application might otherwise suffer irreparable injury.

(c) When the Court is in doubt, it will decide the application on the balance of convenience.

43. With regard to the first principle, In Mrao Ltd -vs- First American Bank of Kenya Ltd &2 Others (2003) KLR 125, the Court of Appeal fashioned a definition for the term "Prima facie Case" in civil cases in the following words: -

> " 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."

44. In the Nguruman case (supra), the Court of Appeal adopted the above definition in what constitutes a "prima facie case" and proceeded 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.

44. It can be presumed that a party who holds a title deed to a property is prima-facie evidence that he is the owner of such suit property and has a good Title against the world. The title deed in respect of the suit land was allegedly issued on 14th November, 2017 and is annexed to the supporting affidavit and marked exhibit "CNW3". The said title deed is allegedly charged to KCB Bank for a loan facility of 10,500,000/= as evidence in "CNW3". The respondents argued that the title deed was obtained illegally and through fraudulent dealings and that the same had been set aside for public utility and more so the Masinde Muliro Stadium in Kanduyi in the original title number E.BUKUSU/N.KANDUYI/882 and could not be available for alienation or re-allocation to other parties. The respondents in their replying affidavit gave a chronology of how the plaintiff's title to the suit property came about in a procedure they argue was unlawful and marred with irregularities.

44. Section 24 of the *Land Registration Act* provides as follows:

Subject to this Act—

(a)the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

44. Section 26(1) of the *Land Registration Act* 2012 provides as follows

> " The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon transfer on transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge except
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> (a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or
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> (b) Where the Certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

44. In the case of WILLY KIPSONGOK MOROGO v ALBERT K. MOROGO (2017) eKLR the Court held as follows: 'the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under the Act.'

45. From the entirety of my analysis, It is my considered view that the applicant, being the holder of a title deed to the suit property is protected under the law and ought to be granted an opportunity to defend its title at the full hearing while at this stage the substratum of the case which is the suit land and the developments therein ought to be preserved.

44. Secondly, the applicant is required to demonstrate that irreparable injury will be occasioned to them if a temporary injunction is not granted. In Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) eKLR the court discussed what is meant by irreparable injury and it stated as follows;

> " Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

44. The applicants attached images of the developments erected over the suit property to the supporting affidavit where they allegedly carry out their business for their livelihood. It was also deposed that they took up a loan facility with KCB Bank for Kshs. 10,500,000/= to make the aforementioned developments which amount has been secured by the title to the suit property and that they continue to service the same. It is my considered view that based on these averments, the applicants have shown sufficient demonstration of irreparable loss which may be visited upon them should the orders sought not be granted.

44. Thirdly, the applicants have to demonstrate that the balance of convenience tilts in their favour. In the case of Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) EKLR, the concept of balance of convenience was defined as follows;

‘The meaning of balance of convenience will favour of the Plaintiff’ is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.

44. In considering this element, the courts are called upon to consider which route bears the lower risk. In determining the issue at hand, I am persuaded that granting the injunctive relief at this stage bears the lower risk as opposed to not granting the same. It is my considered view that this Court cannot, based solely on the affidavit evidence, make a decision as to whether the applicant is legally and lawfully in possession of the suit premises or the status of the same in light of conflicting averments by the parties herein. In this case the issue of title is not clear-cut. The issue is seriously disputed. Since the Respondents are alleging that the applicant acquired title to the suit property illegally, fraudulently and unprocedurally, the dispute can only be resolved in a full hearing where parties would be afforded an opportunity of being heard and their evidence subjected to cross examination.

44. In Robert Mugo Wa Karanja Vs Ecobank (Kenya) Limited & Another [2019) Eklr, the court in deciding on an injunction application stated;

> “ circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts…”

44. From the circumstances of this case, the affidavit evidence tendered by both parties, the annexures thereto, the submissions and the applicable law, I find that the applicants have met the requirements for the grant of temporary injunction orders.

44. On the issue on costs; section 27 of the *Civil Procedure Act* provides that costs shall follow the event. The successful party shall ordinarily have costs unless the court for good reasons decides otherwise.

44. In view of the reasons given hereinabove, I make the following orders;

    a. An order of temporary injunction be and is hereby issued restraining the Defendant/Respondents either by themselves, their servants, employees, agents, assignees or anybody claiming under or in their name from entering and/or accessing, trespassing, encroaching or in any way whatsoever interfering with the Plaintiff/applicants quiet occupation, use and possession of parcel of land known as E.BUKUSU/N.KANDUYI/4634 situated in Kanduyi division of Bungoma County containing by measurement 0.049 hectares or thereabouts (hereinafter “the suit property”) for a period of six (6) months from the date of this Ruling pending hearing and determination of the main Suit.

    b. The costs of the application shall be costs in the cause.

c. This matter shall be heard and determined on priority basis.

d. Since Kenya Commercial Bank has been stated by the Petitioner/Applicant that she secured a loan facility of Kshs. 10,500,000/= from Kenya Commercial Bank using the Title to the suit property, it is imperative that the pleadings be Amended to bring on board Kenya Commercial Bank as an interested party to this Petition.

DATED and SIGNED and DELIVERED at BUNGOMA this 11th day of April, 2024.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. MR. Wesonga & Mr. Wangila for the Respondents
2. Mr. Oriwa for Applicant
3. Bett C/A