



REPUBLIC OF KENYA



**Ahmed & 20 others v Karama & 10 others (Environment and Land Case  
Civil Suit E014 of 2023) [2024] KEELC 5242 (KLR) (2 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5242 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND CASE CIVIL SUIT E014 OF 2023**

**LL NAIKUNI, J**

**JULY 2, 2024**

**BETWEEN**

**ABDALLA AHMED ..... 1<sup>ST</sup> PLAINTIFF**  
**KENNEDY MWAFUSI ..... 2<sup>ND</sup> PLAINTIFF**  
**JANE SIKEMBI ..... 3<sup>RD</sup> PLAINTIFF**  
**SAHALE SALIM ..... 4<sup>TH</sup> PLAINTIFF**  
**FARAJ BALALA ..... 5<sup>TH</sup> PLAINTIFF**  
**LEILA SULEIMAN ..... 6<sup>TH</sup> PLAINTIFF**  
**JEMIMA NAJAMA ASATI ..... 7<sup>TH</sup> PLAINTIFF**  
**BENSON MAKOTI MWANYALO ..... 8<sup>TH</sup> PLAINTIFF**  
**ABDULHAKIM ABDALLA NASSIR AWADH ..... 9<sup>TH</sup> PLAINTIFF**  
**MOHAMED SALIM SAAD ..... 10<sup>TH</sup> PLAINTIFF**  
**KHADIJA SALIM ABDALLA ..... 11<sup>TH</sup> PLAINTIFF**  
**ZAHARA SWALEH LLAD ..... 12<sup>TH</sup> PLAINTIFF**  
**ANDREW KIPROTICH MWAKISAGHU ..... 13<sup>TH</sup> PLAINTIFF**  
**KASSAM EBRAHIM SALIM ..... 14<sup>TH</sup> PLAINTIFF**  
**JUMA BWANAMKUU ..... 15<sup>TH</sup> PLAINTIFF**  
**GRACE MWINGA ..... 16<sup>TH</sup> PLAINTIFF**  
**KHALID ALI MOHMED ..... 17<sup>TH</sup> PLAINTIFF**  
**18. BENEDICT NANGELA MWAKIMA ..... 18<sup>TH</sup> PLAINTIFF**  
**JENI TABU SIKEMBO ..... 19<sup>TH</sup> PLAINTIFF**



ABDULKADER MOHAMED AWADH SALIM ..... 20<sup>TH</sup> PLAINTIFF  
FAITH KATHINI MAKAU ..... 21<sup>ST</sup> PLAINTIFF

AND

NASIB YAHYA KARAMA ..... 1<sup>ST</sup> DEFENDANT  
KARIM YAHYA KARAMA ..... 2<sup>ND</sup> DEFENDANT  
HABSHI YAHYA KARAMA ..... 3<sup>RD</sup> DEFENDANT  
FAIZA HASSAN KARAMA ..... 4<sup>TH</sup> DEFENDANT  
MASAD HASSAN KARAMA ..... 5<sup>TH</sup> DEFENDANT  
AMAL HASSAN KARAMA ..... 6<sup>TH</sup> DEFENDANT  
KHAIFA HASSAN KARAMA ..... 7<sup>TH</sup> DEFENDANT  
SAIDA HASSAN KARAMA ..... 8<sup>TH</sup> DEFENDANT  
KARAMA HASSAN KARAMA ..... 9<sup>TH</sup> DEFENDANT  
SULEIMAN HASSAN KARAMA ..... 10<sup>TH</sup> DEFENDANT  
SUHALA HASSAN KARAMA ..... 11<sup>TH</sup> DEFENDANT

## RULING

### I. Introduction

1. This Honourable Court is tasked with the mandate to make a determination of the Notice of Motion application by Abdalla Ahmed and 20 others, the Plaintiffs/Applicants herein dated 1<sup>st</sup> September, 2023. It was brought under a Certificate of Urgency and the provisions of Order 40 Rules 1, 2, 3 & 10 and Order 51 Rule 1, Order 50 Rule 6 of the Civil Procedure Rules, (as amended 2020) Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap. 21, Sections 16 & 22 of Limitations of Actions Act, Cap. 22, Article 159 of *the Constitution* of Kenya, 2010 and all other Enabling Provisions of the Law and the Inherent Jurisdiction of the Court.
2. Upon service to the Respondents, the application was opposed through filing of a Replying Affidavit sworn by Karama Yahya Karama on 27<sup>th</sup> September, 2023. While the Applicants responded to the said Replying Affidavit through a Supplementary Affidavit dated 27<sup>th</sup> February, 2023.

### II. The Applicants' case

3. The Applicants sought for the following orders:-
  - a. Spent.
  - b. Spent.
  - c. Abandoned by Consensus of all parties.
  - d. That pending the hearing and determination of this suit, an Order of injunction do issue restraining the Defendants/Respondents and their agents, servants and/or employees from unlawfully distressing for rent and/or interfering with the Plaintiffs' quiet and peaceful



possession, occupation and enjoyment of properties known as Plot No. MN Block XII 163 subdivided into MN/BLOCK XII/320-356

- e. That the costs of this application be provided for.
4. The application by the Applicants is premised on the grounds, facts and testimony on the face of the application and further supported by the 17 paragraphed annexed affidavit of ABDALLA AHMED the 1<sup>st</sup> Plaintiff/Applicant herein with five (5) annexures marked as “AM 1 to AM 5”. The 1<sup>st</sup> Applicant averred that:
- a. The Plaintiffs/Applicants are the legal purchasers and occupiers of all that parcel of land known as MN/BLOCK XII 163 which was later subdivided into MN/BLOCK XII/320 - 356 were now facing imminent, violent eviction and demolition by the Defendants/Respondents who are the administrators and beneficiaries of the Estate Yahya Karama Laadi (deceased) and Hassan Karama Al - Beid (deceased). Annexed and marked as “AM 1” a copy of the said various sale agreements.
  - b. The Plaintiffs collectively and individually developed several immovable houses, business premises, social amenities in suit premises and have been living there for over (30) years and developed sentimental attachment to suit premises, having purchased the same from Yahya Karama Laadi (deceased) and Hassan Karama Al - Beid (deceased). He annexed a copy of photographs and mark the same as “AM - 2”.
  - c. Prior to aforesaid purchase, the Plaintiffs/Applicants religiously and timeously continued paying the monthly ground rents to their respective landlords until sometimes on diverse dates between the years 1989 and 1994 following a Presidential directive, the Plaintiffs and their respective Land Lords entered into a legal sale agreements on the suit property and in which they each paid the full consideration of a sum of Kenya Shillings Thirty Thousand (Kshs. 30,000). Annexed in the affidavit and marked “AM – 3” copy of payment receipts.
  - d. Upon execution of the various sale agreements as stated in Paragraph (3) above. The Plaintiff sought for execution of transfer into their respective names by their Land Lord - (vendors) Yahya Karama Laadi and Hassan Karama Al - Beid (Now deceased). Unfortunately the said vendors irregularly and unlawfully declined on the grounds that the consideration paid was a lower price thus breaching the conditions of the sale agreement.
  - e. The Plaintiffs having successful executed the various sale agreements with the Defendants/ Respondents fathers who were the vendors, unfortunately passed on before transferring the suit premises to the individual Plaintiffs/Applicants.
  - f. Then defunct Municipal Council of Mombasa (now County Government) came up with a lay out plan and approvals on subdivision of various parcels of land Including parcel no. MN/ BLOCK XII 163 which was later sub - divided into MN/BLOCK X11/320 - 356 which was occupied by the Plaintiffs.
  - g. Consequently the then District Land Officer Mombasa approved the lay out plans by the defunct Municipal Council of Mombasa vide his letter dated 9<sup>th</sup> January 1989 to the Director of survey for preparation and registration of various deed plans and subsequent issuance of titles. Annexed in the affidavit and marked as “AM – 4” was a copy of approval plan.
  - h. The Defendants/Respondents soon thereafter took out letters of administration of the estate of the two deceased vendors and have since issued illegal eviction threats and notices to the Plaintiffs/Applicants. Furthermore the Defendants/Respondents have instructed mean



looking auctioneers who have now proclaimed and attached the Plaintiffs various properties claiming ground rents. Annexed in the affidavit and marked as “AM – 5” was a copy of the various proclamation notices.

- i. Subsequently the Plaintiffs file a complaint against the Defendant with National Land Commission and on the 7<sup>th</sup> February 2019, the National Land Commission made a finding compelling the Defendants who were the lawful administrators and beneficiaries of the Estate the two deceased vendors to transfer the suit property to the Plaintiffs and on the breadth published through a gazette notice regularizing its findings.
- j. The said National Land Commission finding had since been quashed and/or set aside for want of jurisdiction by the Civil Case “High Court Mombasa ELC Petition No. 13 of 2021 Karama Yahya Karama & 13 Others – Versus – the National Land Commission”.
- k. Immediately upon delivery of the aforesaid Judgment the Defendants had since embarked on issuing eviction notices to the Plaintiffs and furthermore instructed auctioneers who had proclaimed and attached the Plaintiffs various properties claiming outstanding ground rents.
- l. Unless the matter was heard on a priority basis and appropriate interim orders granted, the Plaintiffs/Applicants herein stands to suffer irreparable harm and loss

### **III. The Supplementary Affidavit by the Plaintiff**

5. The Plaintiff in response to the Replying affidavit sworn by Karama Yahya Karama on 27<sup>th</sup> September, 2023 filed a 10<sup>th</sup> paragraphed supplementary affidavit sworn by ABDALLA AHMED on 27<sup>th</sup> February, 2024 where he averred that:-
  - a. In response to Paragraphs 3, 4 & 5 of the Respondent's Replying Affidavit, he reiterated and affirmed that they were the legal purchasers and occupiers of all that parcels of land known as MN/BLOCK XII 163 which was later subdivided into MN/BLOCK XII/320-356 by the Defendants/Respondents who are the administrators and beneficiaries of the Estate Yahya Karama Laadi (deceased) and Hassan Karama Al - Beid (deceased). Annexed in the affidavit and marked as “AM - 2A & 2B” were further copies of sale agreements and payment receipts.
  - b. In response to Paragraph 7 of the Respondent's replying affidavit, he stated that the purchasers and their beneficiaries thereof have granted him full authority to represent them and this juncture as demonstrated in Paragraph (1) above and in the fullness of time the evidence of various sale agreements as lawfully executed towards the purchase of the suit properties shall settle this matter.
  - c. Contrary to the Respondent's assertions, he stated that they were not aware of the existence of the probate cause in respect to the two deceased vendors since Respondents discreetly took out letters of administration and having full knowledge that the suit properties were not forming part of the estate having been sold to them but instead issued illegal eviction threats and notices to them.
  - d. There was no a single iota of evidence of tenancy agreements from the Respondent's that we are mere tenants in default as wrongfully misrepresented by the Respondent's, however on the contrary they were purchasers with valid claims and legitimate expectations over the suit properties as demonstrated by the various sale agreements and the intensive developments we have carried out at the suit premises.



- e. In response to the allegation of “Mombasa ELC Petition No.13 of 2021 and Civil Suit No. 4022 of 2004” having extinguished their collective and individual right of claim of ownership over the suit properties was clearly farfetched and malicious. Furthermore it was his trite position that the two suits had not dealt with the merit of their individual and collective claims to perfect the various sale agreements.
- f. It could not be disputed that the two vendors Yahya Karama Laadi and Hassan Karama Al - Beid (now deceased) had lawfully authorized and appointed M/s. Ibrahim Musa & Sons Limited to collect the initial ground rent and subsequently balance of purchase price from the Applicants herein. He annexed in the affidavit and marked as “AM - 3A & 3B” copies of the appointment letter and acknowledgement receipts of payments.
- g. Subsequently, the Plaintiffs filed a complaint against the two deceased vendors with then Mombasa District Criminal Investigation officer on the behavior and blackmail by the vendors who later promised to transfer the suit properties to the Plaintiffs. He annexed in the affidavit and marked as “AM - 4A” a copy of the instructing letter to the investigation officer.

#### IV. Submissions

6. On 4<sup>th</sup> March, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 1<sup>st</sup> September, 2023 be disposed of by way of written submissions. However, by the time of penning down this Ruling, the Honourable Court was only able to access the submissions by the Plaintiffs/Applicants and not from the Respondents herein. Pursuant to that, the Honourable Court proceeded to reserved to render the Ruling on its merit on 2<sup>nd</sup> July, 2024 accordingly.

##### A. The Written Submissions by the Plaintiffs/Applicants

7. The Plaintiffs/Applicants through the Law firm of Messrs. Mutisya, Mwanzia & Ondeng Advocates filed their written submissions dated 26<sup>th</sup> February, 2024 on the same day where the Learned Counsel submitted that for hearing and determination was the Plaintiffs/Applicants application dated 1<sup>st</sup> September 2023 seeking the above stated prayers.
8. The application was based on grounds set out in the face of the Motion and the Supporting Affidavit of ABDALLA AHMED sworn on 1<sup>st</sup> September 2023. On the issues of determination, the Learned Counsel relied on the following issues:-
  - a. Whether the Plaintiffs/Applicants should be granted leave to file suit out of time.
  - b. Whether the Plaintiffs/Applicants should be granted the orders sought in the application.
  - c. Who bears cost of the application
9. On whether the Plaintiffs/ Applicants should be granted leave to file out of time. The Learned Counsel submitted that extension of Limitation period for all causes of actions was undertaken under the provision of Sections 27, 28,16 and 22 of the *Limitation of Actions Act* (Cap 22). However such extension was at the discretion of the court because it can only enlarge it where the applicant gives sufficient reasons as to why the case was not filed on time. Ex - Parte application in respect of leave to file a suit out of time was enunciated in the Supreme Court case of “County *Executive of Kisumu – Versus - County Government of Kisumu and 8 Others (2017) eKLR [Civil Application No. 3 of 2016]*” where the following requirements were laid down:-



- i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
  - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court
  - iii. Whether the court should exercise the discretion to extend time is a consideration to be made on a case by case basis
  - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court
  - v. Whether there will be any prejudice suffered by the Respondents if the extension is granted
  - vi. Whether the application has been brought without undue delay; and
  - vii. Whether in certain cases, like election petitions public interest should be a consideration for extending time.
10. The Learned Counsel submitted that they had a bona fide cause of action and time had lapsed but they were constrained to pursue it within time for reasons that they were pursuing the matter through amicable solutions and the same was buttressed by the grounds captured in the Notice of Motion. Immediately after the execution of the sale agreements they did sought for execution of transfer of ownership into their respective names but the landlords (vendors) who are now deceased irregularly and unlawfully declined to issue the transfer on grounds that the consideration paid was a lower price. After the successfully execution of the various sale agreements with the Defendants/Respondents fathers who were the vendors herein, the Applicants/Plaintiffs immediately stopped paying ground rents because the Sale Agreements clearly stated that the Vendors upon execution of the Agreements. They were only paying the ground rents when they were still tenants but upon purchasing the suit property they were no longer tenants but legal owners of the suit land and hence were not obliged to pay anymore the ground rents claimed by the Defendants.
  11. The Learned Counsel submitted that when the Defendants/Respondents after taking out letters of Administration, failed to issue them with the title deeds as per the subdivision plan done by the District land officer Mombasa, they lodged a complaint at the office of the District Criminal Investigation Officer requesting him to carry out investigations of the reported complaint. Vide a report dated 13<sup>th</sup> January 2007 it was established that the Defendants fathers who were the Vendors had indeed sold the suit property to the Plaintiffs/Applicants and the same was evidenced by the presence of the various executed Sale Agreements hence the Defendants/Respondents could not now claim that the Plaintiffs/ Applicants never purchased the said suit property. The DCIO recommendation was that the Defendants should facilitate the issuance of titles to the bona fide owners and compelled the sellers to cooperate in solving the matter but the Defendants for reasons best known to them never took into account the DCIO recommendation. There after the Plaintiffs/Applicants filed a complaint against the Defendants with the National Land Commission and after a hearing was done the Commission made a decision compelling the Defendants who are the lawful Administrators and beneficiaries of the estate of the deceased vendors to transfer the suit property to the Plaintiffs/ Applicants which decision the Defendants failed to comply to.
  12. The Plaintiffs later filed the civil suit “Mombasa ELC Misc. Application No.87 of 2021 (O.S) Abdulkader Mohamed Awadh Salim & others - Versus - Karama Yahya Karama & 5 Others” in order to enforce the NLC decision against the Defendants and in turn the Defendants/Respondents also filed a “Mombasa ELC Petition No.13 of 2021 Karama Yahya Karama & 13 Others – Versus - The National



Commission” where this Honorable Court consolidated the suits and heard them together on the 28<sup>th</sup> September 2022 where he nullified the NLC decision, dismissed the Plaintiffs O.S and allowed the Defendants/Respondents’ Petitions. After the Judgment was entered in favour of the Defendants they immediately issued Notices and eviction threats to the Plaintiffs/Applicants and started distressing for rents. They even sent Makini Auctioneers who proclaimed and attached the applicants various properties which actions now prompted the Applicants in to filing this suit.

13. From the above analysis, it is clear that the Plaintiffs/Applicants intentions was to resolve the matter amicably hence they first decided to approach all the above stated avenues which compelled the Defendants to transfer the ownership of the suit property to the Applicants as per the various executed sale agreements but still they remained adamant to do so. Therefore, they submitted that the delay was not inordinate because of the reason stated above. Thus, they humbly prayed that the Plaintiffs/Applicants be heard in court and the case be decided on merits as they will be prejudiced if the court lock them out on account of failing to file the matter on time.
14. It was the Learned Counsel’s submission that in any legal contract parties were bound by the contract and were supposed to adhere to it until its completion, failure of which the affected party could take legal action for specific performance and the Defendants’ blatant and unlawful refusal to complete the agreements executed by their fathers is a total disregard of the law and the same should not be allowed to prevail and this will only be achieved if the court allows the applicants to file their suit for it to be heard and decided on merits basis.
15. The Applicants claim was that they purchased the suit property from the Defendants fathers which claim could only be substantiated through evidence of Sale Agreements in the main suit. Therefore for interest of Justice they humbly prayed that this court allow the Applicants be heard in court for them to prove their claim. Thus, it was the Learned Counsel’s submission that the Applicants be granted the leave to file this suit out of time failure of which they would be prejudiced if this court deny them the opportunity to file their suit.
16. On whether the Plaintiffs/Applicants should be granted the orders sought in the application, the Learned Counsel submitted that the guiding principles for the grant of orders of temporary injunction were well settled in the case of “Giella – Versus - Cassman Brown (1973) EA 358” and the same decision was reiterated in the case of “Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014) eKLR”, where the Court held that;

“in an interlocutory injunction application the Applicants has to satisfy the triple requirements to a) establishes his case only at prima facie level, b) demonstrates irreparable injury if a temporary injunction is not granted and c) by showing that the balance of convenience is in his favour. These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states he applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially.”
17. According to the Learned Counsel from the above analysis, it was indeed clear that the Plaintiffs/Applicants purchased the suit property from the Defendants fathers who were the Vendors but they failed to transfer the ownership on ground that the purchase price was low something that the vendors ought to have raised before executing the various sale agreements simply because once parties enter into a contract they were fully bound by it up to its completion and whoever defaults is liable for Specific Performance.



18. Hence, the Defendants could not claim that the Applicants never purchased the suit property because evidence of sale agreement showed the contrary. It was their fathers who sold the suit property to the Applicants and they duly appointed Ebrahim Musa & Sons Limited as their authorized Agent who was to receive the payments of sales and the documents of Transfers were to be prepared and completed by the vendors Advocates Messrs. Sachdeva & Company Advocates therefore them being the legal Administrators of the deceased estate were bound by the contract of sale to complete the transfer of ownership to the Applicants.
19. Therefore, they submitted that the Plaintiffs claim was supported by copies of the various executed Sale Agreements hence establishing a prima facie and we do rely on the case of “Mrao Limited – Versus - First American Bank of Kenya Limited (2003) eKLR” where the court stated that:-
- “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 legal right which has apparently been infringed by the opposite party as to call for explanation or rebuttal from the latter.”
20. Onto the second principle the Learned Counsel submitted that irreparable injury would be occasioned to them if an order of temporary injunction is not granted. The Plaintiffs/Applicants herein are at the verge of being rendered destitute if the injunction would not be granted. The Defendants acts of issuing eviction threats and even unlawfully distressing for rent whilst they were very much aware that the Plaintiffs/Applicants were no longer tenants but rightfully legally owner of the suit property is uncalled for. They had even gone to an extent of proclaiming and attaching the Applicants various properties which is a way of humiliating them and were now living in a state of uncertainty and constant fear.
21. It was therefore their submissions that if this court fails to immediately stop the Defendants’ actions the Plaintiffs/ Applicants will suffer irreparable harm that would not sufficiently be compensated through damages and we do rely on the case of “Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (2018) eKLR” where the court stated that
- “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”.
22. On the last principle, the Learned Counsel humbly averred that the balance of convenience tilted in favour of the Plaintiffs/Applicants because they were innocent Purchasers for value. They diligently complied with all the requirements laid down in the Presidential Directive of 1988 with the expectations that immediately the execution of the sale agreements was done, the Vendors would transfer the ownership rights to them but unfortunately that never happened and are now facing eviction threats at a place where they were the lawful owners, a fact that the Defendants clearly knows it because it was supported by proof of sale agreements executed by the vendors who are now deceased.
23. They humbly supported this principle using the case of “Paul Gitonga Wanjau – Versus - Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR” where the court stated that
- “Where any doubt exists as to the Applicants’ right, or if the right is not disputed but its violation is denied the court in determining whether an interlocutory injunction should be granted takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand would suffer if the injunction was



granted and he should ultimately turn out to be right and that which the Applicant on the other hand might sustain if the injunction was refused and he should ultimately turn out to be right. Thus the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

24. Further, in the case of “Robert Mugo Wa Karanja – Versus - Ecobank (Kenya) Limited & Another [2019]eKLR” the court stated that

“when deciding on an injunction application stated it first looks into the circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules which 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 grant a temporary injunction to restrain such acts.”

25. It was their contention that the suit property was at the verge of being wasted because the Defendants are intending to distribute it amongst themselves hence the need for the court to issue the injunction as sought in the application. In over view, they submitted that the Plaintiffs/Applicants had proved their case on a balance of probabilities as required in civil cases and ought to be granted the Orders sought in the application because them being Kenyans whose rights were protected in *the Constitution* ought to enjoy the right to peaceful possession of property as provided for under Article 40.

26. On who bore the costs of the application, the Learned Counsel submitted that the Defendants ought to shoulder the costs because if they had transferred the ownership of the suit property to the Plaintiffs/Applicants immediately after the execution of the sale agreements the application before this court would not have been made.

27. In conclusion, the Learned Counsel submitted that the upshot of the a foregoing was that the orders sought in the application be granted as prayed.

## V. Analysis and Determination

28. I have carefully read and considered the pleadings herein, the written submissions and the myriad of authorities by the Learned Counsels, the relevant provisions by *the Constitution* of Kenya, 2010 and the statutes. In order to arrive at an informed, fair and reasonable decision, the Honorable Court has two (2) framed the following issues for determination.

- a. Whether the Notice of Motion dated 1<sup>st</sup> September, 2023 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.
- b. Who will bear the Costs of Notice of Motion application 1<sup>st</sup> September, 2023.



**ISSUE No. a).Whether the Notice of Motion dated 1<sup>st</sup> September, 2023 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.**

29. The main substratum of the application here is rather straight forward. It is on whether to grant interim injunction orders or not. The application herein is premised under Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst the provisions of the law. Which provides as follows: -

Order 40, Rule 1

Where in any suit it is proved by affidavit or otherwise—

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

30. The principles applicable in an application for an injunction were laid out in the celebrated case of “Giella (Supra)”, where it was stated:-

“First 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 be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

31. The three conditions set out in “Giella (supra)”, need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of:- “Nguruman Limited (Supra)”,

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Limited - Versus - Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between”.



32. In dealing with the first condition of prima facie case, the Honorable Court guided by the definition melted down in *MRAO Limited – Versus - First American Bank of Kenya Ltd & 2 others* (2003) KLR 125,

“So what is a prima facie case, I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself would conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

33. As the Court previously observed in this ruling, the Applicants averred that they are the lawful registered proprietors of the suit property having purchased the property from the Defendants fathers who were the Vendors but they failed to transfer the ownership on ground that the purchase price was low something that the vendors ought to have raised before executing the various sale agreements simply because once parties enter into a contract they are fully bound by it up to its completion and whoever defaults is liable for Specific Performance. The Defendants could not therefore claim that the Applicants did not purchase the suit property because evidence of sale agreement showed the contrary. It is their fathers who sold the suit property to the Applicants and they duly appointed Ebrahim Musa & Sons Ltd as their authorized Agent who was to receive the payments of sales and the documents of Transfers were to be prepared and completed by the vendors Advocates Messrs. Sachdeva & Company Advocates therefore them being the legal Administrators of the deceased estate are bound by the contract of sale to complete the transfer of ownership to the Applicants. A Court exercising is equitable jurisdiction would in the light of the pendency of this suit favour to preserve the status quo and afford parties opportunity to be heard and not to be turned away and denied access to justice.

34. In the case of “*Mbuthia – Versus - Jimba credit Corporation Ltd (Supra)*”, the court held that;

“In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the party’s cases.”

35. Similarly, in the case of “*Edwin Kamau Muniu – Versus - Barclays Bank of Kenya Ltd*” the court held that;

“In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria.”

36. In the present case, the Respondents by their action, have threatened the alienation of the suit property which will be prejudicial to the Applicants being the Legal proprietors of the suit land. Ownership of land and proof of title Regarding this first condition though, the Applicants have demonstrated a prima facie case with a probability of success at the trial as enunciated in the case of “*Giella -Versus - Cassman Brown & Co. Ltd (Supra)*”.

37. The court has further considered the evidence on record against the second principle for the grant of an injunction, that is, whether the Applicants might suffer irreparable injury which cannot be adequately compensated by an award of monetary damages. With regards to the second limb of the Court of Appeal in “*Nguruman Limited (supra)*”, held that,

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an



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

38. On the issue whether the Applicants will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Applicants must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. It is not hidden that the Applicants’ property is at risk. The Learned Counsel for the Applicants submitted that the Plaintiffs’ actions as stated in the Supporting Affidavit of Abdalla Ahmed sworn on 1<sup>st</sup> September, 2023 was an affront to justice. It stole a match against the Applicant and would inevitably render the outcome of the suit, if successful, otiose and academic. A Court had to ensure justice is seen to be done and the Court processes are not abused. The judicial decision of “Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (Supra)” provides an explanation for what is meant by irreparable injury and it states;

“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.”

39. Quite clearly, the Applicants would not be able to be compensated through damages as it has shown the court that their rights to the suit property as a legal proprietors and that the Respondents ought to be stopped infringing those right in any manner. The Applicants have therefore satisfied the second condition as laid down in “Giella’s case”.

40. Thirdly, the Applicants have to demonstrate that the balance of convenience tilts in their favour. In the case of “Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (Supra)” which defined the concept of balance of convenience as:

“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”.

41. In the case of “Paul Gitonga Wanjau – Versus - Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR”, the court dealing with the issue of balance of convenience expressed itself thus:-

“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should



be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

42. The balance of convenience tilts in the favour of the Petitioner. The decision of “Amir Suleiman – Versus - Amboseli Resort Limited [2004] eKLR” where the learned judge offered further elaboration on what is meant by “balance of convenience” and stated;-

“The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”

43. On a balance of convenience, the Applicants argued that the balance of convenience tilts in favour of the Plaintiffs/ Applicants because they were innocent Purchasers for value. They diligently complied with all the requirements laid down in the Presidential Directive of 1988 with the expectations that immediately the execution of the sale agreements was done, the Vendors would transfer the ownership rights to them but unfortunately that never happened and are now facing eviction threats at a place where they are the lawful owners, a fact that the Defendants clearly knows it because it is supported by proof of sale agreements executed by the vendors who are now deceased.

44. Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the claim of the Applicants.

45. In the case of:- “Robert Mugo wa Karanja – Versus - Ecobank (Kenya) Limited & Another [2019] eKLR” where 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...”

46. I am convinced that if orders of temporary injunction are not granted in this suit, the property in dispute might be in danger of being dealt in the manner set out in the application and apprehended by the Applicants. In view of the foregoing, I find that the Applicants have met the criteria for grant of orders of temporary injunction.

47. Therefore the Honourable Court finds the Application by the Applicants dated 1<sup>st</sup> September, 2023 meritorious and hereby allows it entirely.



**ISSUE No. b). Who will bear the Costs of Notice of motion application dated 1<sup>st</sup> September, 2023**

48. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 Laws of Kenya holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
49. In the present case, taking that this matter is still on going for full trial as is directed herein below, the Honourable Court elects to have the costs in the cause.

**VI. Conclusion & Disposition**

50. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Clearly, the Applicants have a case against the Respondents.
51. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-
- a. That the Notice of Motion application dated 1<sup>st</sup> September, 2023 be and is hereby found to have merit thus allowed entirely.
  - b. That the Honorable Court be and is hereby pleased to issue an injunction restraining the Defendants/Respondents and their agents, servants and/or employees from unlawfully distressing for rent and/or interfering with the Plaintiffs’ quiet and peaceful possession, occupation and enjoyment of properties known as Plot No. MN Block XII 163 subdivided into MN/BLOCK XII/320-356.
  - c. That for expediency sake, this matter be fixed for hearing on 18<sup>th</sup> November, 2024. There be a mention on 26<sup>th</sup> September, 2024 for conducting a Pre – Trial Conference session pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010.
  - d. That the cost of this application will be in the cause.

It is so ordered accordingly.

**RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS .....2<sup>ND</sup> .....DAY OF .....JULY.....2024.**

**HON. MR. JUSTICE L. L. NAIKUNI,  
ENVIRONMENT AND LAND COURT AT  
MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.



b. Mr. Mwanzia Advocate for the Plaintiffs/Applicants.

c. Mr. Munyithya Advocate for the Defendants/Respondents.

