



Timau Agro Industries Limited v Bayshore Limited & another (Civil Suit E076 of 2022) [2024] KEELC 6023 (KLR) (16 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6023 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT E076 OF 2022
LL NAIKUNI, J
SEPTEMBER 16, 2024**

BETWEEN

TIMAU AGRO INDUSTRIES LIMITED PLAINTIFF

AND

BAYSHORE LIMITED 1ST DEFENDANT

AFRICAN GAS AND OIL COMPANY LIMITED (AGOL) 2ND DEFENDANT

RULING

I. Introduction

1. This ruling is in respect to two Notice of Motions applications dated 16th May, 2024 filed by the Plaintiff, Timau Agro Industries Limited while the second one dated 30th May, 2024 was instituted by the 1st Defendant, Bayshore Limited and African Gas and Oil Company Limited (AGOL) for the hearing and determination by this Honourable Court.
2. Upon service of the application upon the Defendant, they tendered their response via filing grounds of opposition dated 18th June, 2024. The 2nd Defendant informed the court through its counsel that it would not be participating in the Plaintiff's present application. On its part, the Plaintiff filed a Replying Affidavit sworn on 19th June, 2024 to the Notice of Motion application dated 30th May, 2024.
3. For good order, the Honourable Court will be rendering a simultaneous Ruling while dealing with the two applications separately on their own merit.

II. The Notice of Motion application dated 16th May, 2024

4. The Plaintiff brought the said application against the Defendants herein, under the dint of the provision of Sections 1A,1B, and 3A of the [Civil Procedure Act](#) Cap 21 of the Laws of Kenya, Order



1 Rule 1 & 3, Order 8 Rule 3, 4 and 5 of the Civil Procedure Rules, 2010. The Plaintiff/Applicant sought for the following orders: -

- a. Spent.
 - b. That this Honourable Court be pleased to join Abdulswamad Abeid Said T/a A.a. Said & Co. Advocates, The Chief Land Registrar And The Land Registrar, Mombasa as the 3rd, 4th and 5th Defendants in this suit.
 - c. That upon granting Order (2) above, this Honourable Court be pleased to grant the Plaintiff leave to further amend its Amended Originating Summons dated 1st November, 2023.
 - d. That the costs of this Application be provided for.
5. The application by the Plaintiff herein was premised on the grounds, testimonial facts and averments made out under the 9 Paragraphed Supporting Affidavit of Lawrence Muriithi Mbabu, an advocate of the High Court of Kenya and the managing director of the Plaintiff Company sworn and dated 16th May, 2024 averred that:
- a. Through the Replying Affidavit sworn on 4th April, 2024 and documents filed by the 2nd Defendant/Respondent herein on 5th April, 2024, the Plaintiff had established that Advocate Messrs. Abdulswamad Abeid Said T/a A.a. Said & Co. Advocates was a critical party in this suit as he represented the Defendant in the sale between the Plaintiff and the 1st Defendant wherein he fraudulently transferred the suit property to the 1st Defendant contrary to the terms of the Agreement for sale executed as between the parties. The said Advocate subsequently represented the 1st Defendant in the fraudulent transfer of the suit property to the 2nd Defendant herein well knowing that the 1st Defendant never held a good title to the suit property.
 - b. Further to the foregoing, Advocate Messrs. Abdulswamad Abeid Said T/a A.a. Said & Co. Advocates drew the transfer document dated 14th March, 2018 that purported to transfer the suit property from the 1st Defendant to the 2nd Defendant well knowing that the said transfer was fraudulent and that the 1st Defendant did not hold a valid legal interest in the property in question hence could not confer any good title to the 2nd Defendant.
 - c. The Chief Land Registrar and the Land Registrar, Mombasa effected registration of the transfers from the Plaintiff to the 1st Defendant and subsequently from the 1st Defendant to the 2nd Defendant without first ensuring that the said transfers met the requisite statutory requirements that precede such transfers and by ensuring that the requisite stamp duty is assessed and fully paid.
 - d. The facts pleaded by way of the proposed amendments were necessary to enable this Honourable Court to wholesomely and conclusively determine the issues in dispute between the parties. (Annexed hereto and marked as "LMM-1" was the Draft Further Amended Originating Summons)
 - e. The proposed amendments were intended to disclose as fully as possible all the relevant facts and matters pertaining thereto.
 - f. It was therefore necessary for Advocate Messrs. Abdulswamad Abeid Said T/A A.A.Said & Co. Advocates, the Chief Land Registrar and the Land Registrar, Mombasa to be joined in these proceedings so that all the issues pertaining to the fraudulent transfer of the suit property from



the Plaintiff to the 1st Defendant and subsequently to the 2nd Defendant can be determined in this particular suit to avert the possibility of multiplicity of suits.

- g. The intended further amendments were also necessary to allow the Plaintiff plead all the matters and issues in controversy and to bring all the necessary parties on board for proper, just and final determination of this suit before this Honourable Court.
- h. Despite the 2nd Defendant having filed its response to the Amended Originating Summons on 5th April, 2024, the 2nd Defendant elected not to effect service of the same upon the Plaintiff's Advocates on record. The Plaintiff's Advocate just came across the said response in the e-filing system and promptly filed the present Application.
- i. This suit was scheduled for hearing of the main suit on 23rd May, 2024. It was therefore in the interest of justice that the instant Application be heard and determined forthwith.
- j. This Application was made in goodfaith and without inordinate delay and no prejudice will be occasioned to the Defendants if the proposed amendments are allowed as the Defendants will have corresponding leave to file the respective responses to the Further Amended Originating Summons.
- k. It was in the interest of justice that the proposed amendments be allowed for this Honourable Court to proceed with all the relevant parties and determine the real issues in dispute once and for all.

III. Response by the 1st Defendant to the Notice of Motion application dated 16th May, 2024

- 6. The 1st Defendant, opposed the Notice of Motion application dated 16th May, 2024 through a 7th Paragraphed Grounds of Opposition dated 18th June, 2024 where he deposed that: -
 - i. The application by the Plaintiff/Applicant was a gutter - game tactic shrouded in mischief and bound to wasting precious judicial time and further subjecting this Honourable Court in tendering its resources to a rather scandalous and vexatious proceedings with no substance to this suit.
 - ii. The motion by the Plaintiff/Applicant attempted to enjoin parties to this suit that are not contractually privy to the obligations attached to the 8th June 2017 Agreement for Sale and that no such redress and or relief from this Honourable Court will substantively prevail in enforcing the terms of the said agreement against the parties.
 - iii. The Plaintiff/Applicant's had not established any sufficiency in its motion to succeed by proving a cause of action on alleged fraudulent, illegal, irregular and such breach whatsoever relating to either the representation of Advocate Abdulswamad Abeid Said t/a A.A. Said & Company Advocates to the 1st Defendant/Respondent in acquiring a good unimpeachable title; its representation in preparing transfer instruments and the Chief Land Registrar and the Land Registrar Mombasa in discharging their duties.
 - iv. The 1st Defendant/Respondent is highly prejudiced by this application as the same is res judicata as it ought to have been raised before determination of the application dated 14th November, 2022 hence the present application is an attempt at litigating in instalments, expending this Honourable Court in fishing escapades to the grave detriment of the Defendant.



- v. The Plaintiff was undeserving of this Honourable Court exercising its discretion in its favour for reasons that the Plaintiff/Applicant exhibited substantial delay in filing its application which application was prompted by the 2nd Defendant/Respondent's Replying Affidavit dated 4th April, 2024. The 2nd Defendant/Respondents delayed with an excess of 40 days and filed its application dated 16th May, 2024 a week to the hearing of the main suit.
- vi. The 1st Defendant/Respondent was prejudiced by the Plaintiff's inordinate tardiness having filed its ad-libbed application in bad faith and with a considerable amount of delay.
- vii. It was in the interest of justice that the Plaintiff's application dated 16th May, 2024 be dismissed for the reasons and grounds above.

IV. The Notice of Motion application dated 30th May, 2024

7. As indicated above, the 1st Defendant/Applicant herein moved this Honorable Court for the hearing and determination of their Notice of Motion application dated 30th May, 2024. It was brought under a Certificate of urgency and the dint of the provisions of Article 40 of *the Constitution* of Kenya 2010, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap. 21, Order 40 Rule 2 (1) and (2) of the Civil Procedure Rules, 2010 & all enabling provisions of the law. The 1st Defendant/Applicant sought for the following orders: -
 - a. Spent.
 - b. That this Honorable court be pleased to grant an interim order directing the Plaintiff/Applicant to deposit with this Honorable Court the sum of Kshs. Kenya Shillings Eighty-Five Million, Eighty-Seven Thousand, One Hundred and Eighty-Seven Shillings and Fifty Cents (Kshs. 85,087,187.50) within 21 days of the issuance of this order, being in excess of the contractual 30% of the deposit paid by the 1st Defendant/Applicant to the Plaintiff/Respondent towards the purchase price as per the terms/conditions of the Sale Agreement dated 8th June, 2017 and securing of vacant possession, pending the hearing and determination of this suit.
 - c. That this Honorable Court be pleased to issue its orders prompting a site visitation for the purpose of verifying the status of the suit property given that the Plaintiff/Respondent has failed, is negligent and/or reckless as to granting the Defendants vacant possession as the suit property is vastly occupied by squatters and their number has since increased exponentially.
 - d. That this Honorable Court be please to issue its orders and directions for this Application to be heard inter-party on the 20th of June, 2024 together with Plaintiff/Applicant's Application dated 16th May, 2024 for expediency sake and for addressing the issues raised within this application.
 - e. That the costs of this application be provided for.
8. The application by the 1st Defendant herein was premised on the grounds, testimonial facts and averments made out under the 14th Paragraphed Supporting Affidavit of Jospheh Mwella, the 1st Defendant/Respondent's Chief Legal Advisor sworn and dated 30th May, 2024. He averred that:
 - a. He was aware of the underlying dispute between the Plaintiff and the 1st Defendant/Applicant herein in so far as the context of the dispute revolves around the performance of the 8th June, 2017 agreement. Annexed in the affidavit and marked as "JM - 2" was a copy of the Sale & Purchase Agreement dated 8th June, 2017.



- b. As a consequence of executing the Sale and Purchase of Land Reference number 3713/IV/MN (Miritini, Mombasa County) (herein referend to as “The Suit property”) the Plaintiff/ Respondent was paid a total sum of Kenya Shillings One Hundred and Fifty-Four Million, Five Hundred and Eighty-Seven Thousand, Seven Hundred and Sixty Eight and Fifty Cents (Kshs.154,587,768.50) towards the purchase price of Kenya Shillings Two Hundred and Thirty-One Million, One Hundred and Sixty-Six Thousand, Six Hundred and Five (Kshs. 231,668,605.00). Annexed in the affidavit and marked as “JM -3” was itemized documents evidencing the series of payments made to the Plaintiff/Respondent.)
- c. This payment was well above the contractual 30%required for an initial deposit for the Sale and Purchase Agreemets in the disposition of land having received amounts for the sale and securing vacant possession.
- d. The Plaintiff/Respondent had since failed to comply with the provisions of Clauses 4,3,6.2 and 6.3 by identify the portion of the parcel and granting vacant possession to the 1st Defendant/ Applicant given that the parcel is vastly occupied by squatters and their numbers continue to increase exponentially. Annexed in the affidavit and marked as “JM - 4” (a-d) were images evidencing the status on the suit property.)
- e. The 1st Defendant/ Applicant had resulted to selling all its interest in the suit property to the 2nd Defendant/Respondents being third party purchasers without notice of any defect in order to recover from its loss of user and the anticipated investment projections from realization of the property.
- f. The context of the dispute was squarely between the Plaintiff/Respondent and the 1st Defendant/Applicant on the performance of the terms of the Sale and Purchase Agreement dated 8th June, 2017 and that the 2nd Defendant/Respondent was not in any way privy to the issues between the two respective.
- g. Within the reading of Sections 27 (1) of the Land Registration Act 2012, the suit property was rightly held and transferred without valuable consideration from the Plaintiff/Respondent to the 1st Defendant/Applicant.
- h. Within the reading of the provision of Section 43 (2) of the Land Act 2012,the 1st Defendant/ Applicant is rightly within its rights to transfer its interest in Land Reference number 3713/ IV/MN (Miritini, Mombasa County)(herein referred to as “the suit property”) entirely to the 2nd Defendant/Applicant with or without valuable consideration.
- i. From the reading of Section 39 (a) and (b) of the Land Act 2012 availed to the Plaintiff/ Respondent as a form of remedy for any breach in the agreement dated 8th June, 2017 an action for repossession of the suit property.
- j. The Plaintiff’s interests in LandReference number 3713/IV/MN (Miritini, Mombasa County) (herein referend to as the suit property) was remedied in ELC CASE NO. 303 of 2013 and MISC. Civil Application No. 465 of 2021 wherein orders for eviction of the squatters and possession of the suit property was issued for the Plaintiff to execute. (Annexed in the affidavit and marked as “JM - 5” (a & b) were copies of the orders granted to the Plaintiff Respondent for securing possession).
- k. In the interest of justice, it was only fair that for the pendency of this suit that the Plaintiff/ Applicant makes deposit of the sum of Kshs. Kenya Shillings Eighty-Five Million, Eighty Seven Thousand, One Hundred and Eighty Seven Shillings and Fifty Cents (Kshs. 85,087,187.50)



for purposes of securing vacant possession of the suit property pending the hearing and determination of this suit.

V. The Supplementary Affidavit of 1st Defendant

9. With the leave of Court the 1st Defendant through Joseph Mwella, the Chief Legal Officer filed a 22 Paragraphed Supplementary affidavit sworn on 21st June, 2024 where the deponent averred that:-
- a. On 8th June, 2017 the Plaintiff/Applicant and 1st Defendant/Respondent herein entered into an Agreement for the sale and purchase of Land Reference Number 3713/VI/MN (Miritini, Mombasa County) for a consideration of Kenya Shillings Two Hundred and Thirty-one Million, Six Hundred and Sixty - Eight Thousand, Six Hundred and Five (Kshs 231,668,605.00/-). Attached in the affidavit and Marked as “JM -1” was a copy of the sale agreement dated 8th June, 2017.
 - b. The parties negotiated and agreed through the sale and purchase agreement to remit 30% of the consideration sum being Kenya Shillings Sixty-Nine Million, five Hundred Thousand and Five Hundred and Eighty-One (Kshs.69,500,581.00).
 - c. Upon execution of the same, the 1st Defendant /Respondent proceeded in good faith to make disbursement of the agreed deposit and remitted directly and/or indirectly the sum of Kenya Shillings One Hundred and Fifty-Four Million, Five Hundred and Eighty-Seven Thousand, Seven Hundred and Sixty-Eight and Fifty Cents (Kshs. 154,587,768.50) towards the Vendor's advocates which sums were indeed more than the contractual deposit sum agreed upon as an initial payment in completion. Attached in the affidavit and Marked as “JM – 2” were the series of payments made.
 - d. The Plaintiff/Applicant and the 1st Defendant/Respondent further executed the transfer instruments including a transfer dated 6th November, 2017 being a transfer duly executed by the authorized legal representatives of the parties thereto and the same was effected for registration with the land registrar.
 - e. Through the transfer instrument dated 6th November, 2017, the 1st Defendant/ Respondent acquired and held a good unimpeachable title having effected a transfer of all the interest held by the Plaintiff/Applicant in Land Reference number 3713/VI/MN (Miritini, Mombasa County) from the Plaintiff/Applicant to the 1st Defendant/Respondent. (Attached in the affidavit and Marked as “JM – 3” was a copy of the Transfer instrument dated 6th November, 2017).
 - f. Upon effecting the registration of the same, the advocate for the 1st Defendant/Respondent conducted its due diligence by conducting a post registration search with the Land Registrar Mombasa to ensure that the transfer was effected and that the new registration reflects. Attached in the affidavit and Marked as “JM – 4” was a copy of Certificate of Postal search dated 21st November, 2017).
 - g. The Plaintiff/Applicant’s amended notice of Motion and amended originating summons both dated 1st November, 2023 were hinged on the proviso of Sections 25 and 26 of the [Land Registration Act](#) of 2012, which limits the Plaintiff/Applicant's cause of action in challenging the 1st Defendant/Respondent’s proprietary rights and interests in acquiring and passing title in Land Reference Number 3713/VI/MN (Miritini, Mombasa County) to:



- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the Certificate of Title has been acquired illegally, un-procedurally or through a corrupt scheme.
- h. The title acquired by the 1st Defendant/Respondent herein was unimpeachable and free from any fraudulent acts, corrupt schemes and/or any substantive unprocedural technicalities.
- i. The Plaintiff/ Applicant's amended notice of Motion and Amended Originating Summons both dated 1st November, 2023 are further hinged on an alleged breach by the 1st Defendant/ Respondent of Clauses 3.4, 4.3, 4.4 and 6.2 of the Agreement for Sale dated 8th June, 2017 which clauses aligns the parties to the agreement to discharge their duties and obligations on:
- a. the completion on the part of the Purchaser to pay the balance;
 - b. the completion on the part of the Vendor in removal of the squatters as per a valuation report conducted in 2016; and
 - c. completion on the part of the Vendor in maintaining the status of the property and granting vacant possession
- j. The 1st Defendant/Respondent herein never breached Clauses 3.4, 4.3, 4.4 and 6.2 and discharged fully its obligations in their compliance to wit, having acquired a good title through the instrument dated 6th November, 2017 in compliance with Clauses 3.2, 3.3 and subsequently Clause 4 which provide that;
- a. Clause 3.2.....And Provided Further that the Purchaser's Advocates shall not effect the said transfer in favor of the Purchaser or its nominee, and shall hold the title Documents as Stakeholder pending the further payment of 20% (twenty percent) deposit as described in clause 3.3 below.
 - b. Clause 3.3. A further 20% (twenty percent) of the purchase price being Kenya Shillings Forty Six Million, Three Hundred and Thirty Three Thousand, Seven Hundred and Twenty One (K.Shs. 46,333,721/=) shall be paid by the Purchaser to the Purchaser's Advocate Thirty (30) days from the date of signing and execution of this Agreement and be released to the Vendor's Advocate for onward payment to the Vendor upon which the Purchaser's Advocates shall be deemed released from their role as Stakeholder in respect thereof.
- k. With regards to the completion on the part of the Purchaser and in strict compliance with the 8th June, 2017 Agreement for Sale, the 1st Defendant/Respondent was guided by the reading of Clause 3.4 which expressly mandated and deemed the Purchaser's Advocate to have discharged its obligations by paying the balance of the Purchase price being Kenya Shillings One Hundred and Sixty Two Million, One Hundred and Sixty eight Thousand, and Twenty Three and Fifty Cents (Kshs. 162,168,023.50/-) or in the alternative such as shall be apportioned in terms of Clause 4 below.
- l. Further to the reading of Clause 3.4, the 1st Defendant discharged its obligations in terms of apportioning sums from the sums disbursed indirectly to the Plaintiff/Applicant as consideration being the sum of Keny Shillings Seven Million, Five Hundred and Forty-Eight Thousand and Nine Hundred and Eighty (Kshs. 7,548,980). Annexed in the affidavit and marked as "JM - 5" a list of the squatter compensated in compliance with Clause 3.4).



- m. In the 1st Defendant/Respondent complied with the terms Clause 4.5 of the 8th June, 2017 Agreement for sale which prescribed that; ...completion on the part of the Purchaser means paying the balance of the Purchase Price in terms of Clause 3.3 hereinabove, which in turn required the 1st Defendant/Respondent to make a further payment of 20% (twenty percent) of the purchase price being Kenya Shillings Forty Six Million, Three Hundred and Thirty Three Thousand, Seven Hundred and Twenty One (K.Shs.46,333,721/-) and sum was duly paid.
- n. The Plaintiff/Applicant was in breach of Clause 3.6 of the 8th June, 2017 Agreement for sale which prescribed that: Physical possession of the property will be given to the Purchaser by the Vendor on the receipt by the Vendor/Vendor's Advocate of the 20% deposit amount to enable the purchaser construct a boundary perimeter fence on the property at the Purchaser's expense once the squatters' compensation issue has been dealt with.
- o. The balance of the consideration amount from the 8th June, 2017 Agreement for Sale was Kenya Shillings Seventy Seven Million, Eighty Thousand and Eight Hundred and Thirty Six and Fifty Cents (Kshs.77,080, 836.50).
- p. Within the reading of Sections 27 (1) of the [Land Registration Act](#) 2012, the suit property was rightly held and transferred with/out valuable consideration from the Plaintiff/Applicant to the 1st Defendant/Respondent and that the 1st Defendant/Respondent acquired a good title on the same.
- q. Within the reading of Section 43 (2) of the [Land Act](#) 2012, the 1st Defendant/Respondent is rightly within its rights to transfer its interest in Land Reference number 3713/IV/MN (Miritini, Mombasa County) (herein referred to as the suit property) entirely to the 2nd Defendant/Respondent with or without valuable consideration.
- r. From the reading of Section 39 (a) and (b) of the [Land Act](#) 2012 availed to the Plaintiff/Applicant as a form of remedy for any alleged breach in the agreement dated 8th June, 2017 an action for repossession of the suit property.
- s. Having paid the balance of the consideration with regards to Clause 3.3 of the agreement, the Plaintiff/Applicant was well placed in a position to comply with Clause 4.3 by granting vacant possession to the 1st Defendant/Respondent having been granted orders for forceful eviction of the squatters in ELC CASE NO. 303 of 2013 and MISC. Civil Application [No.465 of 2021](#) and taking possession of the suit property in compliance with Clause 6.(Annexed in the affidavit and marked as "JM - 6" (a & b) were copies of the orders granted to the Plaintiff/Applicant for securing possession.).
- t. Underlying dispute was squarely between the Plaintiff/Applicant and the 1st Defendant/Respondent herein in so far as the context of the dispute revolves around the performance of the 8th June, 2017 agreement.

VI. Submissions

10. On 20th June, 2023 while all the parties were present in Court, they were directed to have the Notices of Motion applications dated 16th May, 2024 and 30th May, 2024 be disposed of by way of written submissions and all the parties complied. Pursuant to that on 30th July, 2024 all the parties obliged and a ruling date was reserved on 16th September, 2024 by Court accordingly.



A. The Written Submissions by the Plaintiff on the Notice of Motion application dated 16th May, 2024

11. The Plaintiff through the Law firm of Messrs. Grace Ndinda Regina Advocate filed their submissions dated 24th June, 2024. M/s. Ndinda Advocate for the Plaintiff commenced the submissions by stating that the Plaintiff herein filed a Notice of Motion Application dated 16th May, 2024 seeking the above stated orders.
12. The Learned Counsel submitted that Application was only opposed by the 1st Defendant vide the grounds of opposition dated 18th June, 2024. On 20th June, 2024, the 2nd Defendant's Counsel on record -informed Court that the - 2nd Defendant will not participate in the Plaintiff's present Application.
13. On the brief facts the Learned Counsel submitted that the Plaintiff/Applicant was the original registered owner of all that property known as L.R. No. 3713/VI/MN measuring 11.03 Hectares located at Miritini, Mombasa County. The Plaintiff and the 1st Defendant entered into an Agreement for the sale dated 8th June, 2017 wherein, the Plaintiff agreed to sell and the Defendant agreed to purchase the suit property at a consideration of Kshs. 231,668,605/-
14. The 1st Defendant herein effected a transfer of the suit property in its favour before first paying the agreed purchase price to the Plaintiff as per the provisions of Clauses 3.1, 3.2, 3.3 and 3.4 of the Agreement for sale dated 8th June, 2017 and without the consent and knowledge of the Plaintiff. Consequently, the Plaintiff commenced this suit originally against the 1st Defendant seeking for an order of specific performance against the 1st Defendant to compel the 1st Defendant to pay the balance of the purchase price. The Plaintiff also sought for an alternative order of nullification of the sale transaction between itself and the 1st Defendant on account of the 1st Defendant's non-performance of the Agreement for Sale dated 8th June, 2017.
15. While this suit was ongoing as between the Plaintiff and the 1st Defendant, the Plaintiff realized that African Gas and Oil Company Limited (AGOL) had occupied the suit property. This prompted the Plaintiff to conduct an Official Search, which search revealed that indeed, the 1st Defendant had since transferred the suit property to AGOL without the 1st Defendant first honouring its contractual obligations to the Plaintiff as the original owner of the suit property. This revelation prompted the Plaintiff to move this Honourable Court vide the Application dated 14th November, 2022 seeking for leave to join AGOL to these proceedings as the 2nd Defendant and also for leave to amend the Originating Summons dated 8th July, 2022 accordingly. The said Application was subsequently allowed through the Ruling that was delivered by this Honourable Court on 1st November, 2023. Immediately thereafter, the Plaintiff filed the Amended Originating Summons dated 1st November, 2023 with AGOL as the 2nd Defendant herein.
16. The Learned Counsel asserted that despite having been served with the amended pleadings and directions on trial having been issued with strict timelines within which responses to the Amended Originating Summons were to be filed and a hearing date having been preserved on 22nd February, 2024 for 23rd May, 2024, the 1st and 2nd Defendants herein refused and/or failed to comply with the trial directions. The 2nd Defendant filed a Replying Affidavit to the Amended Originating Summons sworn on 4th April, 2024 and filed on 5th April, 2024 while the 1st Defendant filed a response titled 'Supplementary Affidavit' sworn by Joseph Mwella on 21st June, 2024 and filed on 3rd July, 2024 as its response to the Amended Originating Summons dated 1st November, 2023.



17. The Learned Counsel averred that the Plaintiff/Applicant only came across the 2nd Defendant's said Replying Affidavit in the e-filing on 15th May, 2024 as the same was never served upon the Plaintiff's Advocate on record. Upon reading the 2nd Defendant's Replying Affidavit, which Affidavit was filed a few days to the date preserved for hearing of the main suit, it became apparent to the Plaintiff that other than the 1st and 2nd Defendants herein, there are other parties who were actively involved in the fraudulent transactions conducted by the 1st and 2nd Defendants in their quest to defraud the Plaintiff/Applicant of the suit property. Upon making this realization, the Plaintiff promptly moved this Honourable Court through the Application dated 16th May, 2024.
18. The other critical parties to this suit were Abdulswamad Abeid Said T/A A.A. Said & Co. Advocates as the said Advocate represented the 1st Defendant in the sale between the Plaintiff and the 1st Defendant wherein he fraudulently transferred the suit property to the 1st Defendant contrary to the terms of the Agreement for sale executed as between the parties on 8th June, 2017 and well knowing that the 1st Defendant had not paid the Plaintiff the agreed consideration for the suit property. The said Advocate subsequently represented the 1st Defendant in the fraudulent transfer of the suit property to the 2nd Defendant herein well knowing that the 1st Defendant did not hold a good and viable title to the suit property.
19. The other critical parties to this suit are the Chief Land Registrar and the Land Registrar, Mombasa as they effected registration of the transfers of the suit property to the 1st-and-2nd. Defendants herein when the requisite stamp duty had not been paid. Hence, their presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in this suit.
20. The Learned Counsel relied on the following issues for determination stemming from the Plaintiff's Application dated 16th May, 2024;
 - a. Whether Abdulswamad Abeid Said T/a A.a. Said & Co. Advocates, The Chief Land Registrar And The Land Registrar, Mombasa should be joined in this suit as the 3rd, 4th and 5th Defendants;
 - b. Whether upon granting prayer (i) above, the Plaintiff/Applicant should be granted leave to amend its Amended Originating Summons dated 1st November, 2023 further;
 - c. Whether the Plaintiff's/Applicant's Notice of Motion Application dated 16th May, 2024 was filed without undue delay; and
 - d. Whether the Defendants will suffer any prejudice if the Application was allowed.
21. According to the Learned Counsel on the issue of whether Abdulswamad Abeid Said T/A A.A. Said & Co. Advocates, the Chief Land Registrar and the Land Registrar, Mombasa should be joined in this suit as the 3rd, 4th and 5th Defendants, the Plaintiff's instant Application for joinder is premised on the provisions of Order 1 Rule 3 of the Civil Procedure Rules, 2010 which provide as follows:

“ All persons may be joined as Defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”
22. The Learned Counsel stated that as submitted earlier in this discourse at paragraphs 10 and 11 above, Abdulswamad Abeid Said T/A A.A. Said & Co. Advocates was a necessary party to these proceedings as the said Advocate represented the 1st Defendant in the sale of the suit property between the Plaintiff and



the 1st Defendant wherein he fraudulently transferred the suit property to the 1st Defendant contrary to the terms of the Agreement for sale executed as between the parties on 8th June, 2017 and well knowing that the 1st Defendant had not paid the Plaintiff the agreed consideration for the suit property. The said Advocate subsequently represented the 1st Defendant in the fraudulent transfer of the suit property to the 2nd Defendant herein well knowing that the 1st Defendant did not hold a good and viable title to the suit property.

23. Additionally, the Chief Land Registrar and the Land Registrar, Mombasa were also necessary parties to this suit as the duo effected registration of the transfers of the suit property to the 1st and 2nd Defendants herein when the requisite stamp duty had not been paid. Hence, their presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in this suit.
24. In view of the foregoing, the Learned Counsel contended that the Plaintiff/Applicant had inextricable cause of action against the present Defendants and the intended 3rd, 4th and 5th Defendants, which cause of action was predicated on the same suit property and the same transaction. Therefore, it was only prudent in the interest of saving on judicial time and resources that the prayer for joinder of the intended 3rd, 4th and 5th Defendants be allowed and the Plaintiff be granted leave to further amend the Originating Summons to allow all the matters and issues in controversy to be pleaded in this particular suit and to bring all the necessary parties on board to enable this Honourable Court effectively and completely adjudicate upon and settle all questions involved in the suit and to avert the possibility of multiplicity of suits on the same cause of action over the same suit property.
25. In so submitting, they relied on the Court of Appeal decision in the case of “Pravin Bowry – Versus - John Ward and Another [2015] eKLR” in which the Court of Appeal considered the principles to be considered in an application for joinder of parties to a suit and referred to the Court of Appeal decision in “Civicon Limited – Versus - Kivuwatt Limited and 2 Others [2015] eKLR” in which the court observed as follows:

“.....Again the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order 1 rule 10(2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial....”

26. Also, in “Pravin - Bowry (Supra)”, the Court of Appeal relied in the decision in “Meme – Versus - Republic [2004] KLR 637” where it was held that joinder of parties will be permissible:

“.....(i) Where the presence of the party will result in the complete settlement of all the questions involved in the proceedings; (ii) Where the joinder will provide protection for



the rights of a party who would otherwise be adversely affected in law: and (iii) Where the joinder will prevent a likely course of proliferated litigation...”

27. In view of the foregoing, they humbly submitted that the intended joinder was necessary and therefore beseech the Honourable Court to exercise the Court’s discretion in favour of the Plaintiff/Applicant and grant the prayer for joinder of Abdulswamad Abeid Said T/A A.A. Said & Co. advocates, the Chief Land Registrar and the Land Registrar, Mombasa should be joined in this suit as the 3rd, 4th and 5th Defendants.
28. On whether upon granting prayer (i) above, the Plaintiff/Applicant should be granted leave to amend its Amended Originating Summons dated 1st November, 2023 further the Learned Counsel submitted that Order 8 Rule 5 (1) of the Civil Procedure Rules, 2010 gives the court a wide discretion as far as amendment of pleadings is concerned. This section provides that:
- “For the purpose of determining the real question in controversy between the parties or correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such a manner as it directs as to costs or otherwise as are just.”
29. The Court’s discretion to allow amendment of pleadings may be exercised at any stage of the proceedings. That is to say, before or at the trial, after the trial, after judgment or on appeal. This position had been restated in various cases including in the case of “Bosire Ongero – Versus - Royal Media Services 2015 KLR”. The hearing of this suit was yet to commence. The Court record is clear that the whereas the 2nd Defendant has since filed a Replying Affidavit sworn on 4th April, 2024 to the Amended Originating Summons, the 1st Defendant is yet to file a Response as what it has filed so far is a Supplementary Affidavit sworn on 21st June, 2024 which it purports to be its response to the Amended Originating Summons. A Supplementary Affidavit cannot be construed as a response to the Amended Originating Summons. The circumstances of the case have also changed substantially considering the discovery of the fraud committed by the intended Defendants as against the Plaintiff/Applicant herein in the fraudulent transfer of the suit property to the present Defendants herein.
30. In view of the foregoing, they urged the Honourable Court to make a finding that this Application was meritorious and allow the same as prayed. In so submitting, they relied on the case of “Institute for Social Accountability & Another – Versus - Parliament of Kenya and 3 Others (2014) KLR” where a three Judge bench comprised of Hon. Justice Lenaola, Hon. Lady Justice Mumbi and Hon. Justice Majanja J (As they then were) authoritatively held as follows:-
- “.....The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed but rather, on the basis of the state of facts which the parties really and finally intend to rely on. The power to amend makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action and proceedings...”
31. On whether the Plaintiff’s/Applicant’s Notice of Motion Application dated 16th May, 2024 was filed without undue delay, the Learned Counsel submitted that as stated at paragraphs 8 and 9 above, the fraud committed by the intended 3rd, 4th and 5th Defendants was discovered on 15th May, 2024 once the Plaintiff came across the 2nd Defendant’s Replying Affidavit sworn by Joseph Mwela on 4th April, 2024 in the e-filing system. Indeed, on 20th June, 2024, the 2nd Defendant’s Advocate admitted to not having served the said Replying Affidavit upon the Plaintiff and its Advocate on record and apologized



for the same. Further to the foregoing, a claim based on fraud ought to be filed within 3 years from the date of discovery of the fraud. This legal position was enunciated in the case of “Edco Africa Limited & Dr. Mwaniki Dinguri Nick – Versus - Boniface Ndege Kirigia & 2 Others (2023) eKLR”. Therefore, they humbly submitted that the Application was filed immediately upon discovery of the fraud and without undue delay.

32. On whether the Defendants would suffer any prejudice if the application was allowed, the Learned Counsel opined that none of the Defendants herein stands to suffer any prejudice if the Plaintiff's Application dated 16th May, 2024 is allowed as prayed because:-
- a. Up and until the time of filing these submissions, the 1st Defendant had not filed any response to the Amended Originating Summons dated 1st November, 2023. The Court record is clear that the 1st Defendant only filed a pleading titled ‘Supplementary Affidavit’ sworn by Joseph Mwella on 21st June, 2024 and filed on 3rd July, 2024 purporting the same to be its response to the Amended Originating Summons. General purpose of a Supplementary Affidavit is to allow the Plaintiff/Applicant respond to the legal issues arising from the Replying Affidavit or in the alternative to buttress and/or clarify the averments in the Supporting Affidavit. Hence a Supplementary Affidavit cannot serve as a response to the Originating Summons as the 1st Defendant purports to.
 - b. Prior to filing the aforesaid Supplementary Affidavit, the 1st Defendant had filed a strange document titled ‘Amended Replying Affidavit’ sworn by Joseph Mwela on 22nd February, 2024 in response to the Amended Originating Summons. However, when this matter came up for mention to confirm compliance on 22nd February, 2024, the 1st Defendant's Advocate sought for leave to have the said document expunged from the Court's record and for leave to file a proper response only to file a Supplementary Affidavit. The 1st Defendant continues to file strange documents despite the same being prepared by an Advocate and sworn by the 1st Defendant's Legal Officer. Hence, no prejudice can be occasioned to a party who has not filed a defence and/or response in a suit.
 - c. On 20th June, 2024, the 2nd Defendant's Advocates on record informed this Honourable Court that the 2nd Defendant had only come on record in this suit recently and does not wish to participate in the instant Application. It was noteworthy that the 2nd Defendant is a very critical party to this suit and that the 2nd Defendant's Replying Affidavit sworn on 4th April, 2024 in response to the Amended Originating Summons revealed the fraudulent schemes committed by both the present and the intended Defendants as against the Plaintiff/Applicant leading to the filing of the Plaintiff's Application under consideration.
 - d. Once the Plaintiff's Application for joinder and leave to amend the Amended Originating Summons further is allowed, the present Defendants will equally be granted corresponding leave to file their respective responses as of right.
33. In view of the foregoing, it was apparent that none of the Defendants stands to suffer any prejudice if the Plaintiff is allowed to amend its Originating Summons further. Therefore, they urged the Honourable Court to exercise its jurisdiction in favour of the Plaintiff/Applicant and allow the Application as sought.
34. In conclusion, the Learned Counsel submitted that it was apparent from their foregoing submissions that the proposed further amendments to the Amended Originating Summons dated 1st November, 2024 were necessary to enable this Honorable Court determine all the issues in controversy with



finality. Therefore, they urged the Honourable Court to make a finding that the Plaintiffs Notice of Motion Application dated 16th May, 2024 was meritorious and consequently allow the same as prayed.

B. The Written Submissions of the Plaintiff on the Notice of Motion application dated 30th May, 2024

35. The Plaintiff through the Law firm of Messrs. Grace Ndinda Regina Advocate filed their submissions dated 16th August, 2024. M/s. Ndinda Advocate for the Plaintiff commenced the submissions by stating the 1st Defendant herein filed a Notice of Motion Application dated 30th May, 2024 (hereinafter “the Application”) seeking for the following 2 substantive orders
- a. That this Honourable Court be pleased to issue an interim order directing the Plaintiff to deposit into Court a sum of Kenya Shillings Eight Five Million Eighty Seven Thousand One Hundred and Eighty Seven Hundred and Fifty cents (Kshs. 85,087,187.50/=) being the amount allegedly paid by the 1st Defendant to the Plaintiff in excess of the contractual 30% deposit as per the terms of the Agreement for Sale dated 8th June, 2017, within 21 days of making the order, to secure vacant possession of the suit property pending the hearing and determination of the suit.
 - b. That this Honourable Court be pleased to issue orders prompting a site visit of the suit property.
36. The Plaintiff filed a Replying Affidavit sworn by Lawrence Muriithi Mbabu on 19th June, 2024 (hereinafter “the Replying Affidavit”) in opposition to the Application. The Plaintiff relied on the averments made under oath in the said Replying Affidavit and further submitted as below without repeating what is stated in its said Affidavit.
37. On the issues for determination, the Learned Counsel relied on the following issues:-
- a. Whether the Application for an injunctive order directing the Plaintiff to deposit a sum of Kshs. 85,087,187.50 into Court, being the amount allegedly paid by the 1st Defendant to the Plaintiff in excess of the contractual 30% deposit as per the terms of the Agreement for Sale dated 8th June, 2017, has merit
 - b. Whether a site visit of the suit property is necessary at the interlocutory stage of these proceedings; and
 - c. Who should bear the costs of the Application?
38. The Learned Counsel relied on the following legal analysis on the issue on whether the Application for an injunctive interlocutory order directing the Plaintiff to deposit a sum of a sum of Kenya Shillings Eight Five Million Eighty Seven Thousand One Hundred and Eighty Seven Hundred and Fifty cents (Kshs. 85,087,187.50/=) into Court, being the amount allegedly paid by the 1st Defendant to the Plaintiff in excess of the contractual 30% deposit as per the terms of the Agreement for Sale dated 8th June, 2017, has merit submitting that the 1st Defendant’s Application though premised under the provisions of Order 40 Rule 2(1) and (2) of the Civil Procedure Rules, 2010, the Application does not meet the threshold for grant of any injunctive order.
39. The principles of injunctions was enunciated in the case of “Giella – Versus - Cassman Brown (1973) EA 358” and as were reiterated in the case of “Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014) eKLR” are that;

“...in an interlocutory injunction application, the applicant has to satisfy the triple requirements to; (a) establishes his case only at a prima facie level, (b) demonstrates



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

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 states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially...”

40. From the material presented before this Honourable Court by the 1st Defendant/Applicant in support of its Application including the written submissions dated 26th July, 2024, the 1st Defendant/Applicant has not even in the remotest sense made any attempts to demonstrate how its present Application met the threshold for grant of any injunctive interlocutory injunction. The 3 pillars set out in the aforementioned guiding authorities must be demonstrated by an Applicant conjunctively for an injunctive order to issue. Hence the Defendant's present Application was due for dismissal.
41. The Learned Counsel contended that at paragraph (a) of the grounds set out in support of the Application, the 1st Defendant alleges that it has so far paid the Plaintiff a total sum of Kenya Shillings One Fifty Four Million Five Eighty Seven Thousand Seven Sixty Eight Hundred and Fifty Cents (Kshs. 154,587,768.50/=) out of the total purchase price of a sum of Kenya Shillings Two Thirty One Million Six Sixty Eight Thousand Six and Five Hundred (Kshs. 231,668,605.00/=). Therefore, it alleged to have paid a sum of a sum of Kenya Shillings Eight Five Million Eighty Seven Thousand One Hundred and Eighty Seven Hundred and Fifty cents (Kshs. 85,087,187.50/=) in excess of the agreed 30% deposit of the purchase price as per the terms of the Agreement for Sale dated 8th June, 2017. In its efforts to prove this allegation, the 1st Defendant had annexed documents to the Supporting Affidavit sworn in support of the Application and marked as annexure as “IM - 3.” However, a simple calculation of the transactions captured in the aforesaid evidence shows that the 1st Defendant has allegedly paid the Plaintiff a total sum of Kenya Shillings Sixty Million Nine Ninety Eight Thousand Three Sixty Hundred (Kshs. 60,998,360.00/=) only, which is less than 30% of the purchase price, which amount is also contested by the Plaintiff. They humbly invited the Honourable Court to look at Paragraphs 3.1(a) to (j) of the Plaintiff's Replying Affidavit for a clear chronology of the transactions in question.
42. The 1st Defendant/ Applicant had clearly stated that at Paragraph 13 of the Supporting Affidavit sworn in support of the Application on 29th May, 2024 that the deposit into Court of a sum of Kenya Shillings Eight Five Million Eighty Seven Thousand One Hundred and Eighty Seven Hundred and Fifty cents (Kshs. 85,087,187.50/=) was meant to secure vacant possession of the suit property pending the hearing and determination of this suit. Also, at Paragraphs 8 and 13 of its written submissions, the 1st Defendant/Applicant had stated that the said deposit is meant to ensure compliance with Clause 6 of the Agreement for Sale dated 8th June, 2017 and to restrain the occupation of squatters.
43. Further the Learned Counsel submitted that the obvious question that then comes into ones mind upon reading the aforesaid averments and submissions made on behalf of the 1st Defendant/Applicant was “how is the money deposited in Court going to ensure that the 1st Defendant/Applicant got vacant possession of the suit property and also restrain the occupation of the squatters on the suit property despite the 1st Defendant/Applicant expressly admitting at paragraph 7 of its Supporting Affidavit to having fraudulently sold the suit property to the 2nd Defendant? It was therefore crystal clear that the 1st Defendant's present Application is hopeless and only made to unnecessarily engage the mind of this Honourable Court.
44. The fact that the 1st Defendant/Applicant registered a transfer of the suit property to itself without first paying the agreed consideration to the Plaintiff was not in dispute hence that transfer was itself



irregular,unlawful and against the express terms of the Agreement for Sale dated 8th June, 2017. As such, the 1st Defendant/Applicant did not derive any valid title from the said transfer capable of passing any proprietary interest to any other party. Secondly, the 1st Defendant/Applicant having admitted at paragraph 7 of its Supporting Affidavit to having fraudulently sold and transferred the suit property to the 2nd Defendant's in order to recover from its loss of user of the suit property, the 1st Defendant had no legal or beneficial interest over the suit property. As such,the 1st Defendant/Applicant has no prima facie case and the orders sought in the Application do not hold.

45. In so submitting, the Learned Counsel relied on the case of “Mrao Ltd – Versus - First American Bank of Kenya Limited (2003) eKLR”, where the Court of Appeal gave a determination on what constitutes a prima facie case as follows:-

“.....in civil cases, it 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 bythe opposite party as to call for an explanation or rebuttal from the latter.”

46. Further to the foregoing, the provisions of Clause 6 of the Agreement for Sale dated 8th June, 2017 which the 1st Defendant/Applicant alleges to seek to enforce through the injunctive interlocutory order categorically provides that if the Plaintiff (Vendor) is unable to grant vacant possession of the suit property on the Completion date, the Purchaser ought to deduct the costs of removing squatters (initially assessed at a sum Kenya Shillings Fifteen Million (Kshs. 15,000,000.00) in terms of Clause 4.4 of the Agreement for Sale dated 8th June, 2017) and pay the entire balance of the purchase price to the Plaintiff (Vendor). It stated as follows:

Clause 6: Possession and Movables

Clause 6.1:The sale includes no movables

Clause 6.2: The property is sold with vacant possession and vacant possession shall be granted on completion. The Vendor shall maintain the status of the property pending completion save that the Vendor through the Purchaser's Advocates office shall be responsible for the removal of all the squatters currently residing on the property at the vendor's own costs pending completion. If the Vendor shall not have removed all the squatters on the property by completion date,the Purchaser shall deduct the costs for such removal in terms of Clause 4.4above and immediately pay the balance of the purchase price in terms of clause 3.4.

47. The Learned Counsel averred that it was not in dispute that the 1st Defendant/Applicant irregularly sold and transferred the suit property to the 2nd Defendant herein way back in the year 2018 with the 1st Defendant herein as the Vendor and the 2nd Defendant as the Purchaser. The 2nd Defendant annexed an undated Agreement for Sale to the 2nd Defendant's Replying Affidavit sworn on 4th April, 2024 in response to the Amended Originating Summons in this matter as annexure as “WM – 2 (a)”, wherein, Clause 4.3 of their said Agreement states as follows:

“The Vendor shall be legally responsible for removing the squatters who are currently occupying a portion of the property.provided however,that the Vendor shall through the Vendor's Advocates office undertake to pay the Squatters'compensation Costs for the removal of the Squatters and the costs attendant thereto shall be deducted from the 10% Deposit amount of the Purchase Price to be paid to the Vendor.”

48. From the foregoing, the Plaintiff herein was totally exonerated from the obligation of removing any squatters from the suit property.If at all there are any squatters on the suit property, the same are there



because the 1st Defendant/Applicant had not fulfilled its legal responsibility as per Clause 4.3 of the subsequent Agreement for Sale executed between the 1st Defendant and the 2nd Defendant herein.

49. In view of the foregoing, they humbly urged the Honourable Court to make a finding that;the 1st Defendant/Applicant had no legal or beneficial interest in the suit property to warrant the grant of the injunctive interlocutory order as sought since the 1st Defendant/Applicant irregularly registered a transfer of the suit property in its favour without first paying the agreed consideration to the Plaintiff and in violation of the express terms of the Agreement for Sale dated 8th June,2017 and subsequently sold and transferred the suit property to the 2nd Defendant herein at a consideration of a sum Kenya Shillings Five Fourty Million (Kshs. 540,000,000.00/=);and that it is indeed the 1st Defendant/Applicant who has violated the provisions of Clause 6 of the Agreement for Sale dated 8th June, 2017 by failing to pay the balance of the purchase price to the Plaintiff less the costs of removing the squatters as its required under Clause 6.2 of the Agreement for Sale dated 8th June, 2017. Therefore, the Defendant Applicant had no prima facie case.
50. Since the 3 pillars on which rests the foundation of any order of injunction interlocutory or permanent must be proven conjunctively,upon establishing that the 1st Defendant/Applicant had no prima facie case,there is no need to belabor submitting on the other 2 pillars.
51. On whether a site visit of the suit property is necessary at the interlocutory stage of these proceedings, the Learned Counsel submitted that the Plaintiff was in support of a site visit of the suit property being conducted but at the right time which is at the hearing of the main suit as the same will give this Honourable Court a clear picture of the sort of injustice that has been perpetrated by the Defendants herein in cahoots with the law firm of Messrs. A.A. Said and Company Advocates, which law firm, the Plaintiff had since sought for leave to join these proceedings as the 3rd Defendant
52. In conclusion, the Learned Counsel submitted that in view of the foregoing they humbly urged this Honourable Court to make a finding that the 1st Defendant's/Applicant's Notice of Motion Application dated 30th May, 2024 is incompetent and unmeritorious. Consequently, they urged the Honourable Court to dismiss the said Application with costs to the Plaintiff.

C. The Written Submissions of the 1st Defendant

53. The 1st Defendant through the firm of Messrs. Ogendo Mwidau LLP Advocates filed their written submissions dated 26th July, 2024. Mr. Ogendo Advocate commenced their submissions by stating that the submissions were in regards to its application dated 30th May, 2024 and in support of its grounds of opposition dated 18th June, 2024 in opposition of the Plaintiff/Applicant's Application dated 16th May, 2024.
54. On introduction and brief facts, the Learned counsel submitted that the transactional genesis leading to the 1st Defendant/Applicant's application dated 30th May, 2024. The 1st Defendant/Applicant's Notice of Motion filed under certificate of urgency seeking interim orders from this Honorable Court compelling the Plaintiff/Respondent to deposit with court a sum of Kenya Shillings Eighty-Five Million, Eighty-Seven Thousand, One Hundred and Eighty-Seven Shillings and Fifty Cents (Kshs. 85,087,187.50) within 21 days of issuance of the orders being excess amounts of the contractual 30% of the deposit paid towards the consideration of the sale and purchase of Land Reference number 3713/IV/MN (Miritini, Mombasa County) (herein referred to as the suit property).
55. Further to the above, the 1st Defendant/Respondent's application seeks orders for this Honourable Court to issue its orders prompting a site visit for the purpose of verifying and acquainting itself and the parties with the situation on the ground given that the Plaintiff herein has failed, is negligent and/



or reckless on evicting the squatters and granting the 1st Defendant/Applicants a vacant possession. The 1st Defendant/Applicant in opposition to the Plaintiff's application raised grounds of opposition citing the same to have been a time-wasting tack-tic by the Plaintiff/Applicant to litigate in piece meal and/or instalments. The 1st Defendant/Respondent also raised the ground that the Plaintiff's application was defective having not established any sufficiency in its grounds to demonstrate a cause of action on any allegation on fraud, illegality and/or irregularity on the part of the proposed parties to be enjoined to warrant the expense of this Honourable Court's time into speculative matters. Finally, the 1st Defendant/Applicant in its grounds of opposition highlighted the likelihood of it being prejudiced as the Plaintiff's application exhibited a substantial delay on its filing having been triggered by the 2nd Defendant/Respondents Affidavit dated 14th April, 2024.

56. As a last-minute consideration, the Plaintiff/Applicant filed its application dated 16th May, 2024 seeking orders from this Honorable Court to enjoin Abdulswamad Abeid Said t/a A.A. Said & Co. Advocates, The Chief Land Registrar and The Land Registrar Mombasa as the 3rd, 4th and 5th Defendants. The parties herein (the Plaintiff and the 1st Defendant) expressed their interest in disposing interest in the Land Reference number 3713/IV/MN (Miritini, Mombasa County) (herein referred to as the suit property) in the 8th June, 2017 Agreement for Sale for an agreed consideration. Specifically, and with respect to the 1st Defendant/Applicant's application dated 30th May, 2024, the Plaintiff is in breach of Clauses 4.3, 6.2 and 6.3 having failed, is negligent and/or reckless as to discharging its legal responsibility to remove squatters from the suit property.
57. In its Further Affidavit dated 16th June, 2024, the Plaintiff/Applicant through the averments by on Lawrence Mbabu, being under oath, advanced the argument that the basis of the application for joinder was on account of the Defendant/Respondent transferring the suit property without first paying the Plaintiff Applicant the outstanding balance of the purchase price and without the knowledge and consent of the Plaintiff/Applicant. It was worth noting that the Plaintiff/Applicant's application is primarily hell-bent on faulting the 1st Defendant/Applicant on discharging its obligations under the provisions of Clauses 3.3, 3.4, 4.1 and 4.4 of the agreements. The 1st Defendant/Applicant on the other hand was keen to address itself on the breach by the Plaintiff on the performance of Clauses 4.3, 6.2 and 6.3. The Honourable Court will however note that the 8th June, 2017 agreements creates a remedy for any defects with the compliance of the general provisions of Clauses 4 of the agreement by offering the 1st Defendant/Applicant discretion to extend time under Clause 8 from time to time with regards to completion on either party. The terms of Clauses 6 are incurable under the remedy envisioned in Clause 8 hence the need for this Honorable Court to issue its orders directing the Plaintiff/Respondent to make deposit of Kenya Shillings Eighty-Five Million, Eighty-Seven Thousand, One Hundred and Eighty-Seven Shillings and Fifty Cents (Kshs.85,087,187.50) or such sums that will ensure compliance with Clause 6 of the agreement.
58. Finally, the 1st Defendant/Respondent was deemed to have acquired a good title in Land Reference number 3713/IV/MN (Miritini, Mombasa County) (herein referred to as the suit property) from the Plaintiff/Respondent herein and transferred a good title to the 2nd Defendant/Respondent herein by virtue of its compliance with Clauses 4.5 of the 8th June, 2018 Agreement for Sale and that the only pending issue legitimately before this Honorable Court was the removal of the squatters in occupation of the suit property and the payment of the balance.
59. The Learned Counsel relied on the following issues for determination:-
 - a. Whether the Plaintiff/Respondent to deposit with court a sum of Kenya Shillings Eighty-Five Million, Eighty-Seven Thousand, One Hundred and Eighty-Seven Shillings and Fifty Cents (Kshs. 85,087,187.50) or such sum as to secure performance of Clause 6.



- b. Whether the Application for the Joinder Abdulswamad Abeid Said t/a A.A. Said & Co. Advocates, The Chief Land Registrar and The Land Registrar Mombasa as the 3rd, 4th and 5th Defendants was merited
- c. Cost of the application;
60. On the issue of whether the Plaintiff/Respondent should deposit with this Honorable Court a sum of Kenya Shillings Eighty-Five Million, Eighty-Seven Thousand, One Hundred and Eighty-Seven Shillings and Fifty Cents (Kshs. 85,087,187.50) or such sum as to secure performance of Clause 6, the Learned Counsel submitted that the 1st Defendant/Respondent's application is hinged on the provisions of Article 40 of *the Constitution* of Kenya 2010, Sections 1A, 1B and 3A of the *Civil Procedure Act*, 21, Order 40 Rule 2 (1) and (2) of the Civil Procedure Rules, 2010.
61. The provisions of Order 40 Rule (1) and (2) of the Civil Procedure rules provide that:
1. In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of or any injury of a like kind arising out of the same contract or relating to the same property or right.
 2. The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.
62. The 1st Defendant/Respondent moved this Honourable Court seeking orders compelling the Plaintiff/Respondent to make such deposits of sums necessary to restrain the occupation of the squatters in compliance with its contractual mandate under Clauses 4.3, 4.4 and Clause 6 of the 18th June, 2017 Agreement for Sale. The Plaintiff/Respondent in its direction of the 1st Respondent/Applicant (on behalf of the Purchaser) to comply with Clause 4.2 of the 18th June, 2017 Agreement for Sale relied on making deductions referred to under Clauses 4.4. Further to this, the reading of Clauses 4.4 makes reference to a valuation report done 2016 making an estimate of a sum of Kenya Shillings Fifteen Million (Kshs. 15,000,000/-) on the cost of removal of the squatters while Clause 4.4.1. makes an obligation upon the Plaintiff/Respondents (herein being the vendors) to cause a re-valuation of the squatters Costs to be undertaken by a Qualified Valuer. With reliance on the above provisions, it is the humble submissions of the 1st Defendant/Applicant that the Plaintiff/Respondent makes deposit of the sums referred in the 30th May, 2024 application for purposes of restraining the situation of the squatters on the ground.
63. On whether the Application for the Joinder Abdulswamad Abeid Said t/a A.A. Said & Co. Advocates, The Chief Land Registrar and The Land Registrar Mombasa as the 3rd, 4th and 5th Defendants was merited, the Learned Counsel submitted that the Plaintiff/Applicant in its Application dated 16th May, 2024 seeking order to enjoin Abdulswamad Abeid Said t/a A.A. Said & Co. Advocates, The Chief Land Registrar and The Land Registrar Mombasa as the 3rd, 4th and 5th Defendants respectively relied on the provisions of Orders 1, rule 1 & 2, Order 8 Rules 3, 4, and 5 of the Civil Procedure Rules.



64. In addition to the above, Order 1 Rule 10 (2) of the Civil Procedure Rules, provides as follows in regard to joinder of parties:

“The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

65. The Learned Counsel opined that on the case of “Omboko – Versus - Speaker & Chairperson of Busia County Assembly Service Board & 6 others (Petition *E005 of 2020*) [2022] KEELRC 14695 (KLR) (7th July 2022) (Ruling)” wherein the court in its determination relied on the case of “Habiba W Ramadhan & 7 others – Versus - Mary Njeri Gitiba Court ELC Case No 119 of 2014 the court stated as follows: (2017) eKLR; Nairobi High”:

“As already observed by the court, under Order 1 Rule 10(2) the court has discretion to order joinder of any party to a suit at any stage of the proceedings so long as the presence of that party before the court is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions in dispute...”

66. The court further placed its reliance on the position of the case of “Communications Commission of Kenya & 4 others – Versus - Royal Media Services Limited & 7 others [2014] eKLR”:

“the Supreme Court of Kenya held that: ‘(22) (23) In determining whether the applicant should be admitted into these proceedings as an interested party we are guided by this court’s ruling in the Mumo Matemo case where the court (at paragraphs 14 and 18) held:

“[An] interested party is one who has a stake in the proceedings, though he or she is not a party to the cause ab initio. He or she is one who will be affected by the decision of the court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause...” Similarly, in the case of *Meme – Versus - Republic*, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

- i. Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
- ii. Joinder to provide protection for the rights of a party who would otherwise be adversely affected in late; joinder to prevent a likely course of proliferated litigation.

67. The Plaintiff/Applicant in its application dated 16th May, 2024 has not established before this Honorable Court that the joinder and or the presence of the Abdulsamad Abeid Said t/a A.A. Said & Co. Advocates, The Chief Land Registrar and the Land Registrar Mombasa will assist in prosecuting its case and the determination of its cause of action with regards to the 8th June, 2017 Agreement for Sale without which the Defendants are prejudiced by its speculative approach in prosecuting its claim.

68. From the upshot, it was evident that the key elements material in establishing and meeting the required threshold to enjoin the intended parties have not been sufficiently demonstrated by the Plaintiff/Applicant. The 1st Defendant/Respondent was indeed prejudiced by the 16th May, 2024 application



being a sequel to the 14th November, 2024 application seeking to enjoin further parties not privy to the 8th June, 2017 Agreement for Sale.

69. The 1st Defendant/ Respondent was convinced that issues ripe for determination before this Honorable Court is squarely on the payment of the contractual balance and the removal of the squatters currently on the suit property which can be determined without divulging on non-issues.
70. On the costs of the application the Learned counsel submitted that in “Reid, Hewitt & Co – Versus - Joseph, AIR 1918 Cal 717 and Myres – Versus - Defries (1880) 5 Ex D 180”, the House of Lords noted that:-

“The expression ‘costs shall follow the event’ 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.”

71. In award of costs was therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In “Morgan Air Cargo Limited – Versus - Everest Enterprises Limited [2014] eKLR” the court noted that;

“The exercise of discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that ‘Cost follows the event’ was driven by the fact that there could be no ‘one-size-fit-all’ situation on the matter. That is why section 27(1) of the Civil Procedure Act is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

72. On the issue of costs, they submitted that on the strength of their submissions they implore the discretion of this Honorable Court to allow the 1st Defendant/Applicant’s application and dismiss the Plaintiff/Respondent’s application and grant the 1st Defendant/Respondent herein the cost.
73. The Learned Counsel concluded that it was the Plaintiff’s application be dismissed in the interest of justice.

VII. Analysis & Determination.

74. I have carefully read and considered the pleadings herein by the Plaintiff and the Defendant, the comprehensive written submissions, the myriad of cases cited herein by parties, the relevant provisions of the Constitution of Kenya, 2010 and statutes.
75. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are: -
- a. Whether the Application for the Joinder Abdulswamad Abeid Said t/a A.A. Said & Co. Advocates, The Chief Land Registrar and The Land Registrar Mombasa as the 3rd, 4th and 5th Defendants was merited
 - b. Whether the Court should allow the Notice of Motion application dated 16th May, 2024 for amendment of the further amended originating summons dated 1st November, 2023
 - c. Whether the Notice of Motion application dated 30th May, 2024 is merited



- d. Who will bear the Costs of Notice of Motion applications dated 16th May, 2024 and 30th May, 2024.

Issue No. a). Whether the Application for the Joinder Abdulswamad Abeid Said t/a A.A. Said & Co. Advocates, The Chief Land Registrar and The Land Registrar Mombasa as the 3rd, 4th and 5th Defendants was merited?

76. Under this sub-title, the Plaintiff this Honourable Court will examine whether the Plaintiff has made out a case for the joinder of parties in particular – the African Gas and Oil Company Limited as the 2nd Defendant in this suit.

77. As already stated herein, amendment of pleadings are anchored on the provisions of Order 8 Rule 5(1) of the Civil Procedure Rules, 2010 which provides:-

“5(1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to cost or otherwise as are just.”

78. Further Order 8 Rule 3(1) and (5) of the Civil Procedure Rules which provides as follows:-

“1. subject to Order I, Rules 9 and 10, Order 24, Rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such as it may direct, allow any party to amend his pleadings.

5. An amendment may be allowed under sub rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as the cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.....”

79. Ideally, this provision of the law gives the court the mandate to allow amendment of pleadings at any stage of the proceedings on such terms that may be just. The amendment sought in this case is for enjoinderment of a Co - defendant. Parties are at liberty to choose the necessary parties in a suit where they claim certain reliefs arising from a transaction or a wrong committed. A party cannot force a Plaintiff to sue persons that they do not have a claim against as if the case is dismissed then the party must bear the burden of paying costs.

80. That is a reason why before a party files a suit in court, he/she must be sure of the party to have a duel with. You do not start battles on all fronts hoping to settle on one person. You must be sure of the defendant you want to sue.

81. In this case the Applicant states that through the Replying Affidavit sworn on 4th April, 2024 and documents filed by the 2nd Defendant/Respondent herein on 5th April, 2024, the Plaintiff has established that Advocate Abdulswamad Abeid Said T/A A.A. Said & Co. Advocates is a critical party in this suit as he represented the Defendant in the sale between the Plaintiff and the 1st Defendant wherein he fraudulently transferred the suit property to the 1st Defendant contrary to the terms of the Agreement for sale executed as between the parties. The said Advocate subsequently represented the 1st Defendant in the fraudulent transfer of the suit property to the 2nd Defendant herein well knowing that the 1st Defendant did not hold a good title to the suit property.



82. Further to the foregoing, Advocate Abdulswamad Abeid Said T/A A.A. Said & Co. Advocates drew the transfer document dated 14th March, 2018 that purported to transfer the suit property from the 1st Defendant to the 2nd Defendant well knowing that the said transfer was fraudulent and that the 1st Defendant did not hold a valid legal interest in the property in question hence could not confer any good title to the 2nd Defendant. The Chief Land Registrar and the Land Registrar, Mombasa effected registration of the transfers from the Plaintiff to the 1st Defendant and subsequently from the 1st Defendant to the 2nd Defendant without first ensuring that the said transfers met the requisite statutory requirements that precede such transfers and by ensuring that the requisite stamp duty is assessed and fully paid.
83. The test in applications for joinder is firstly, whether an applicant can demonstrate he has an identifiable interest in the subject matter in the litigation though the interest need not be such interest as must succeed at the end of the trial. Secondly, and in the alternative it must be shown that the applicant is a necessary party whose presence is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit. Has the applicant demonstrated he has sufficient interest in the subject matter of the suit or that he is a necessary party whose presence is necessary to enable the court to effectually and completely adjudicate upon all the issues in the suit?
84. The Plaintiff has submitted that while the notice of motion dated 8th November, 2022 was pending hearing before this Honourable Court, the Plaintiff/Applicant conducted a Postal Search on the title to the suit property on 8th November, 2022, which search shows that the present registered owner of the suit property is African Gas and Oil Company Limited (AGOL). The above later discovery necessitated the filing of the Application dated 14th November, 2022 through which the Plaintiff/Applicant seeks for leave to amend its earlier Application of 8th July, 2022 and the Originating Summons filed therewith to incorporate the new developments in this case whereby, the Defendant herein appears to have fraudulently transferred the suit property to a third party without first paying the entire purchase price to the original registered owner, the Plaintiff/Applicant herein, and without the knowledge and consent of the Plaintiff/Applicant.
85. The provision of Order 1 Rule 3 of the Civil Procedure Rules states as follows: -
- “All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”
86. The provision of Order 1 Rule 10 (2) of the Civil Procedure Rules states as follows: -
- “The court may at any stage of the proceedings, either upon, or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon or settle all questions involved in the suit, be added.”
87. It will be seen from the provision of Order 1 Rule 3, that the court may order the joinder of a person as defendant if there is a claim against him arising out of the same act or transaction complained of or if a separate suit were brought against him it will bring common questions of law or fact as in the



existing case. It should however be noted that the joinder of the person as defendant in this instance must be in relation to a claim made against him by the Plaintiff, for if it were not the case, he would not be defendant. Critically speaking, the very presence of a person as Defendant implies that the Plaintiff has a case against him. To this end, I strongly find that it will be necessary to join the proposed parties as the 3rd, 4th and 5th Defendants in this matter. Thus, the application succeeds to that extent thereof.

ISSUE No. b). Whether the Court should allow the Notice of Motion application dated 16th May, 2024 for amendment of the further amended originating summons dated 1st November, 2023?

88. The main substratum of this application is on the amendment of the further amended originating summons dated 1st November, 2023. Under this sub - title the Court shall evaluate the merits of the Notice of Motion application. The general power to amend pleadings draws from the provision of Order 8 Rules 1, 2, 3, 4, 5 and 6 of the Civil Procedure Rules, 2010 and the provision of Section 100 of the *Civil Procedure Act*, Cap. 21. It is trite law that where pleadings have closed the leave of Court is required in line with criteria set out under Order 8 Rule 3 (1), (2), (3), (4) and (5) of the Civil Procedure Rules, 2010.

89. In the case of “Jacinta Wanjiru Mwangwa – Versus - Samwel Theuri & 3 others [2019] eKLR”, my brother Justice Sila Munyao held that:-

“With regard to Order 1 Rule 10 (2), it will be noted that the court has discretion to order the name of a person to be removed from proceedings or to be added to the proceedings, either as Plaintiff or Defendant, or the joinder of a person whose presence the court feels is necessary for the determination of all questions in the suit. Now, the court will only enjoin a person as Defendant if the court feels that the Plaintiff has a claim against such person, and as I have explained above, you cannot be Defendant if there is nothing that the Plaintiff has against you. Before giving the order to enjoin a person as Defendant, the court must thus be satisfied that the Plaintiff has a claim against such person, for you would not wish for a situation where a person is enjoined as Defendant, but there is really nothing that the Plaintiff has against such person. It is the same thing where a person is enjoined as Plaintiff. The court must be satisfied that such person has a claim similar to what the existing Plaintiff has against the existing Defendant.”

90. In the case of “Rubina Ahmed & 3 others – Versus - Guardian Bank Ltd (Sued in its capacity as a successor in Title to First National Finance Bank Limited) [2019] eKLR” the Court of Appeal while dismissing an appeal relied on Halsbury’s Laws of England, 4th Ed. (re-issue), Vol. 36(1) at paragraph 76, which stated the following about amendments of pleadings: -

“.....The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”. [Emphasis added].



91. The court has the power to amend pleadings which power can be exercised at any stage of the proceedings before judgment as per Bullen and Leake & Jacob's Precedents of Pleading, 12th Edition, which provides as follows concerning amendment of pleadings:

“.....power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action...”

92. Similarly, in Halsbury's Laws of England, 4th Ed. (re-issue), Vol. 36(1) at paragraph 76, state the following about amendments of pleadings: -

“.....The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”

93. This Court in the case of “Mayfair Establishments Limited – Versus -Taib (Sued as the Legal Representative of the Estate of Sheikh Ali Taib Bajaber - Deceased) & 3 others (Environment & Land Case 99 of 2022) [2024] KEELC 5601 (KLR) (30 July 2024) (Ruling)” opined that:

“14. Parties to a suit also have a right to amend their pleadings at any stage of the proceedings, albeit that right is not absolute, for it is dependent upon the discretion of the court. However, this discretion should be exercised judiciously.”

94. The Applicant sought for to amend further the amended Originating summons both dated 1st November, 2023 so as to capture the latest discovery on the already enjoined 3rd, 4th and 5th Defendants and bring its claim against it. The 1st Respondent opposed the application by stating that the application by the Plaintiff/Applicant is a gutter-game tactic shrouded in mischief and bound to wasting precious judicial time and further subjecting this Honourable Court in tendering its resources to a rather scandalous and vexatious proceedings with no substance to this suit. The motion by the Plaintiff/Applicant attempts to enjoin parties to this suit that are not contractually privy to the obligations attached to the 8th June 2017 Agreement for Sale and that no such redress and or relief from this Honourable Court will substantively prevail in enforcing the terms of the said agreement against the parties. The Plaintiff/Applicant's had not established any sufficiency in its motion to succeed by proving a cause of action on alleged fraudulent, illegal, irregular and such breach whatsoever relating to either the representation of Advocate Abdulswamad Abeid Said t/a A.A. Said & Company Advocates to the 1st Defendant/Respondent in acquiring a good unimpeachable title; its representation in preparing transfer instruments and the Chief Land Registrar and the Land Registrar Mombasa in discharging their duties.



95. Courts should freely allow amendments but this discretion should be exercised judiciously. Thus, with this background, I find that the prayer for leave to amend the Plaintiff's pleadings is merited and is hereby allowed.

ISSUE No. c). Whether the Notice of Motion application dated 30th May, 2024 is merited?

96. The 1st Defendant in its notice of motion application dated 30th May, 2024 sought for the Plaintiff/Respondent to deposit with court a sum of Kenya Shillings Eighty-Five Million, Eighty-Seven Thousand, One Hundred and Eighty-Seven Shillings and Fifty Cents (KShs. 85,087,187.50) or such sum as to secure performance of Clause 6 and orders prompting a site visitation for the purpose of verifying the status of the suit property given that the Plaintiff/Respondent has failed, is negligent and/or reckless as to granting the Defendants vacant possession as the suit property is vastly occupied by squatters and their number has since increased exponentially. This is a mandatory injunction. In the Court's understanding a mandatory injunction is a court order that requires a party to perform a specific act or series of actions.

97. In the case of:- "Joseph Kaloki t/a Royal Family Assembly – Versus - Nancy Atieno Ouma [2020] eKLR" the court of appeal reaffirms its decision in "Kenya Breweries Limited & another – Versus - Washington O. Okeyo [2002] eKLR" and stated that:

“a mandatory injunction can be granted on an interlocutory application as well as at the hearing but should not normally be granted in the absence of special circumstances but that if a case is clear and which the court thinks it ought to be decided at once, a mandatory injunction will be granted at an interlocutory application.”

98. The Court also reaffirmed its decision in "Shariff Abdi Hassan – Versus - Nadhif Jama Adan [2006] eKLR" where it stated that: -

“The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.”

99. Critically speaking, I am not convinced that special circumstances exist in this matter that may warrant the grant of a mandatory injunction. At the same time, from the surrounding facts and inferences of this matter, it is not befall the category of it being so clear that it ought to be decided at once and on its finality. The orders sought are pre – mature. Certainly, by all means there are huge competing claims raised by both parties and which demand for further interrogation during a full trial. Therefore, having this in mind, I proceed to decline to grant orders of Mandatory injunction nature at this stage. It follows, then the Notice of Motion application dated 30th May, 2024 cannot succeed at all.

Issue No. d). Who will bear the Costs of Notice of Motion application dated 16th May, 2024 and Notice of Motion application dated 30th May, 2024.

100. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court "Jasbir



Rai Singh – Versus Tarchalan Singh (2014) eKLR” and “Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, (2014) eKLR”.

101. In this case, this Honourable Court for found both applications will be in the cause.

VIII. Conclusion & Disposition

102. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience.

103. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, this court arrives at the following decision and makes the following orders:-

- a. That the Notice of Motion application dated 16th May, 2024 be and is hereby found to be meritorious and thus allowed.
- b. That the Notice of Motion application dated 30th May, 2024 be and is hereby found to lack merit and the same is dismissed.
- c. That this Honourable Court joins Abdulswamad Abeid Said t/a A.A. Said & Co. Advocates, The Chief Land Registrar and The Land Registrar Mombasa as the 3rd, 4th and 5th Defendants.
- d. That the Plaintiff is hereby granted fourteen (14) days to have file and served the Further Amended Originating Summons in terms of the attached draft Further Amended Originating summons.
- e. That thereafter the Defendants are granted 7 days corresponding leave to file and serve Amended Response and/or Counter – Claim if need be.
- f. That subsequently, the Plaintiff be granted 3 days to file response to the Defendants’ Response.
- g. That an or expediency sake, the matter be fixed for hearing on 30th October, 2024. There shall be a mention on 9th October, 2024 for conducting of Pre – Trial Conference pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010;
- h. That the costs of the Notice of Motion application dated 16th May, 2024 and Notice of Motion application dated 30th May, 2024 shall be in the cause.

It is so ordered accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 16TH DAY OF SEPTEMBER 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. M/s. Grace Ndinda Advocate for the Plaintiff.
- c. No appearance for the 1st Defendant/Respondent.
- d. Mr. Busieka Advocate holding brief for Mr. Oloo Advocate for the 2nd Defendant.

