



REPUBLIC OF KENYA



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**Saggaf v Edarus & 2 others (Civil Suit E006 of 2023)
[2024] KEELC 6978 (KLR) (15 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6978 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT E006 OF 2023
LL NAIKUNI, J
OCTOBER 15, 2024**

BETWEEN

MOHAMMED MAULA SAGGAF PLAINTIFF

AND

SALMA ABUBAKAR EDARUS 1ST DEFENDANT

ABUBAKAR MALIK SAGGAF ALAWY 2ND DEFENDANT

GHAZI MALIK FEISAL SAGGAF ALAWY 3RD DEFENDANT

RULING

I. Introduction

1. This ruling is in respect of the Notice of Motion application dated 11th August, 2023 instituted by Mohammed Maula Saggaf, the Plaintiff/Applicant. Further, it is also on the Notice of Preliminary objection dated 25th September, 2023 raised by Salma Abubakar Edarus, Abubakar Malik Saggaf Alawy and Ghazi Malik Feisal Saggaf Alawy, the Defendants herein.
2. Upon service of the Notice of Motion application upon the Defendants/Respondents, they responded through the said preliminary objection.

II. The Plaintiff/Applicant's case

3. The Plaintiff/Applicant filed the Notice of Motion application brought under the dint of the provision of Order 40 Rules 1, 2 and Rule 4(1) and Order 51(1) of the [Civil Procedure Rules](#) 2010 and Sections 1A,1B, 3A of the [Civil Procedure Act](#), Cap. 21.
4. The Plaintiff/Applicant sought for the following orders:
 - a. Spent.



- b. Spent.
 - c. That pending the hearing of this suit, this Honourable Court be pleased to restrain the 1st, 2nd and 3rd Defendants either by themselves, their servants, agents and or otherwise from disposing, selling, transferring, charging, leasing or in any other manner disposing land in Plot Title Number Mombasa Block XXVI/5.
 - d. That the cost of this application be provided for
5. The application is supported by the grounds, testimony and the averments made under the 33 Paragraphed supporting affidavit of Mohammed Maula Saggaf, the Plaintiff herein together with eleven (11) annexures marked as “MMS – 1 to 11” annexed thereto. He averred that:-
- a. He knew the Defendants herein and they were indeed members of his extended family. In this case, he confirmed that:-
 - i. The husband of the 1st Defendant was called Malik Feisal Saggaf Alawy's (who was now deceased) and was his brother. For that reason, the 1st Defendant was his sister in law.
 - ii. The 1st Defendant was the biological mother of the 2nd and 3rd Defendants. In this case the two Defendants were his nephews.
 - b. Prior to the year 2003, the Defendants and the Applicant together with Swafiya Abdulrahman Saggaf and Shariff A. Saggaf Alawy (the parents) were living together in a rented house at near Blue Room Restaurant within Mombasa Island. By then, the 2nd and 3rd Defendants were minors. As at that time the deceased was still alive and later moved to the United States of America to work. His family followed him but after a short while he brought them back to Kenya and continued staying together as a family.
 - c. The deceased died on 21st October 2003 in the United States of America. After his death, the family continued staying together. However after a while, the government of United States of America brought us a compensation to the estate of the deceased, a cheque in USD. Upon clearance, the amount was approximately a sum of Kenya Shillings Seven Million Nine Hundered and Twenty Thousand (Kshs. 7,920,000/-). This amount was received by the 1st Defendant.
 - d. According to the applicant the sum of Kenya Shillings Seven Million Nine Hundered and Twenty Thousand (Kshs. 7,920,000/=) constituted the entire estate of the deceased where as a Muslim the applicant is not qualified to inherit. To him, the beneficiaries of the estate of the deceased are the widow, children and the parents (“the beneficiaries of the estate of the deceased”).
 - e. He recalled they had several meetings as a family to discuss about how the estate of his deceased brother was to be administered. Finally, they agreed that they were to use the money to purchase a house so that going forward we are not to spend on rentals.
 - f. They embarked on searching a suitable house to purchase. Finally, they settled on a property Four (4) Bedroomed, 2 storey house on Plot title number Mombasa Block XXVI/5 situate within Mombasa Island long General Mathenge Road, Kizingo (hereinafter referred to as ‘Suit Property’). Apart from the house, there was an undeveloped portion at the back of the house.
 - g. He recalled that they engaged the seller and after negotiations we agreed at a price of a sum of Kenya Shillings Ten Million Six Hundred Thousand (Kshs.10,600,000.00/=).



- h. The challenged they faced now was that there was a deficit of a sum of Kenya Shillings Two Million Five Hundred Thousand (Kshs.2,500,000.00/=). The family discussed and agreed that upon purchase, the suit property was to be held in trust by the 1st Defendant as a trustee for the benefit of the 2nd and 3rd Defendants, and his parents. The family agreed that if he could pay the deficit of a sum of Kenya Shillings Two Million Five Hundred Thousand (Kshs. 2,500,000/-) then like the beneficiaries of the estate, he would be entitled to a share of the proposed homestead. He agreed on condition that the estate was to own the house and he was to own the vacant portion of the suit property.
- i. He recalled that they equally agreed that soon after the purchase the suit property was to be subdivided to give the vacant portion of the suit property and transferred it into his name. This agreement was oral and nothing was written down. He arranged and raised the deficit and paid the agreed amount of a sum of Kenya Shillings Two Million Five Hundred Thousand (Kshs. 2,500,000/-) and the process of acquisition of the suit property commenced by the signing of the agreement of sale on 6th September 2004.
- j. It was within his knowledge that on 15th December, 2004 the suit property was transferred and registered in the name of the 1st Defendant. He annexed in the affidavit a copy of the title deed confirming this and mark the same as annexure “MMS - 3”.
- k. He remembered that after the registration of transfer the family took possession. He confirmed to the court this is where the family has been residing at to date.
- l. As they went through the process of purchase and transfer, he understood that the 1st Defendant held the property in trust for his parents, himself, the 2nd and 3rd Defendants. In this equally understood his share was restricted to the vacant portion of the suit property but he was to live with the other family members until his share was registered in his name.
- m. He recalled that after a short while, the process of subdivision commenced. Since he trusted the 1st Defendant, he left the process of subdivision to her only receiving updates from time to time. After the processes of subdivision was completed, he waited for the 1st Defendant to give him a title to his portion. He annexed in the affidavit copies of correspondence with government offices on the proposed subdivision including approvals and mark them as annexure as “MMS - 4”. He also annexed in the affidavit a copy of the approved subdivision of the two portions of the suit property and mark the same as annexure “MMS - 5”. The portion marked “A” was to go to 2nd and 3rd Defendants and his parents with their shares in accordance with the Muslim law on succession. The portion marked “B” was the un-developed area of the suit property which was to be transferred to him as his share for the sum of Kenya Shillings Two Million Five Hundred Thousand (Kshs. 2,500,000.00/=) he contributed.
- n. He was surprised when sometimes in the month of June 2023, he was notified by a property agent that the suit property was on sale to the public. This disturbed him because this was their family home. The prospect of being thrown out in the cold dawned on him. At this juncture, he confronted the 1st Defendant to know what was happening and she agreed that the information was true as the property was being sold by the registered proprietors, the 2nd and 3rd Defendants.
- o. He then proceeded to check at the land registry to confirm the status of the title but the green card was not available. For that reason, he could not do a search. He annexed in the affidavit a copy of the application for search and mark the same as annexure “MMS - 6”.



- p. He instructed his advocates who wrote a letter to the 2nd and 3rd Defendants on 6th June 2023. He annexed in the affidavit a copy of this letter and mark it as annexure “MMS - 7”. This letter was responded to on 30th June 2023 by the advocates for 2nd and 3rd Defendants in which letter it confirmed that the said defendants were the registered owners and denied my interests thereof. He annexed in the affidavit a copy of that letter and mark the same as annexure “MMS - 8”.
- q. He disclosed that his mother who was also the mother of the deceased known as Swafiya Abdulrahman Saggaf alias Sofia Sagafu Kiboga. On 14th July 2015, she swore an affidavit for record purposes confirming what he had sworn herein relation to how the suit property was acquired. He annexed in the affidavit a copy of the affidavit and mark the same as annexure “MMS - 9”. His mother had also donated to him her power of Attorney. He annexed in the affidavit a copy of the same and mark it as annexure “MMS - 10”.
- r. It was also within his knowledge that prior to his death, in 2015 his late father and who was also the father of the deceased swore an affidavit in which he also confirmed what he had stated in this affidavit in relation to how the suit property was acquired. He annexed in the affidavit a copy of the affidavit and mark it as annexure “MMS -11”.
- s. He felt aggrieved by the activities of the Defendants which border on breach of fiduciary duty by the 1st Defendant and fraud by the defendants jointly and severally. In that regard, he urged the court in the main suit to grant him the following prayers:-
- a. A declaration that there existed a constructive trust or an implied trust between the 1st Defendant and the Plaintiff over the suit property where the 1st Defendant held the undeveloped portion of Plot Title Number Mombasa Block XXVI/5 as a trustee of the plaintiff, and the developed portion/house of Plot Title Number Mombasa Block XXVI/5 as a trustee of the plaintiff's father, Abdulrahman Saggaf Alawy, the plaintiff's mother, Swafiya Abdulrahman Saggaf alias Sofia Sagafu Kiboga, the 2nd and 3rd Defendants.
 - b. A declaration that the 1st Defendant breached her fiduciary duties as a trustee by transferring the suit property to the 2nd and 3rd Defendants without regard to the unregistered interests of the Plaintiff and those of the Plaintiff's parents in the suit property.
 - c. A declaration that the 2nd and 3rd Defendants did not acquire a good title over Plot Title Number Mombasa Block XXVI/5 and that the transfer of the suit property was null and void.
 - d. Alternatively,
 - i. A declaration that the suit property, Plot Title Number Mombasa Block XXVI/5 is a trust property where the Plaintiff owns the undeveloped portion while the 1st Defendant, the parents of the plaintiff or their estates, the 2nd and 3rd Defendants are joint beneficiaries in accordance with Muslim succession law.
 - ii. A declaration that the 2nd and the 3rd Defendants are joint trustees of the suit property, Plot Title Number Mombasa Block XXVI/5 where the plaintiff owns the undeveloped portion while the 1st Defendant, the parents of the plaintiff or their estates, the 2nd and 3rd Defendants are joint beneficiaries of



the house/developed portion of the suit property in accordance with Muslim succession law.

- iii. A Mandatory order do issue compelling the 2nd and 3rd Defendants to determine the value of the undeveloped portion of Plot Title Number Mombasa Block XXVI/5, the suit property, independent of the building/ the developed portion and the value of the building/the developed portion/building standing on Plot Title Number Mombasa Block XXVI/5 independent of the value of the undeveloped portion of the suit property.
 - iv. A further mandatory injunction compelling the 2nd and 3rd Defendants to jointly with the plaintiff sale the suit property, Plot Title Number Mombasa Block XXVI/5 and surrender the equivalent value of the undeveloped portion of the suit property to the Plaintiff and distribute the equivalent value of the building among the beneficiaries of the estate of the deceased.
 - v. The costs of the suit.
 - vi. Any other relief the court may find expedient.
- t. He needed to satisfy three (3) things for the court to grant him the prayers sought in the notice of motion namely:
- a. The existence of a prima facie case with a probability of success.
 - b. That damages are not adequate compensation to him,
 - c. That the balance of convenience tilts in his favour
- u. In relation to the first requirement, he confirmed that he paid the sum of Kenya Shillings Two Million Five Hundred Thousand (Kshs. 2,500,000.00/=) as explained in this affidavit. His legitimate expectation was that he was to get portion “B” as shown in annexure “MMS – 5”. Upon getting this portion. He wished to develop his residence thereon. He challenged the Defendants to prove how they raised the balance of a sum of Kenya Shillings Two Million Five Hundred Thousand (Kshs. 2,500,000.00/=). Indeed, at the hearing of this matter he would produce audio recordings in which the 1st Defendant expressly admitted that he paid this amount as he had explained.
- v. He had discharged the burden placed on me at interlocutory stage at establishing a prima facie case with a probability of success. He had explained above, portion “B” was to be his residence, the property prices within Kizingo area have shot up considerably. Secondly, being denied the opportunity to build a residential home at a place he had resided with his family for close to 20 years was oppressive. He confirmed that his family and he had a special attachment to the suit property. In his own view no money could compensate this.
- w. In relation to the balance of convenience, he urged the court to consider the greed factor in the Defendants. He moved in at a time when the 2nd and 3rd Defendants were minors and helped the family to acquire a prime property. Now the 2nd and 3rd Defendants were adults currently residing in the United States of America. If they sold the suit property, the court would have no way of getting them back to Kenya and even the sale proceeds will be remitted to the Bank Accounts of the said defendants in America. On the contrary, he was in Kenya and the 1st Defendant was also residing on the suit property. For that reason, the court should sustain the current status quo pending the hearing and determination of the suit.



- x. He was the legal representative to the estate of the deceased in that capacity he had filed of before that Kadhi's court KC Succession Cause No. E192 of 2023 Mombasa. He annexed in the affidavit copies of the pleadings and mark them as annexure "MMS - 12". This case was urging the Kadhi's court to determine the shares of the defendants herein and the estate of his late father in accordance with the Muslim law on succession which was the preserve of that court. To sale the suit property before the hearing and determination of this case will amount to gross injustice to the estate of his late father. This was an additional reason for granting orders of injunction as prayed in the application.
- y. The main suit would take a while to be heard and determined. The suit property was not being wasted. For purposes of substantive justice, the court should preserve the suit property. He was apprehensive that unless this court intervened the defendants were keen on selling the suit property at the earliest. The application was urgent.

III. The Defendants' case

6. The 1st, 2nd and 3rd Defendants raised and argued an objection through a 2 Paragraphed Notice of Preliminary objection dated 25th September, 2023 against the Plaintiff's case on the following grounds:-
 - a. The suit was time barred having been brought outside the statutory limitation of 12 years in view of the provision of Section 7 of the Limitation of Actions Act, Cap. 22 Laws of Kenya.
 - b. The Plaintiff's suit was incompetent, bad in law, barred in law, an abuse of the Court process and should be struck out with costs to the Defendants.

IV. Submissions

7. On 15th May, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 11th August, 2023 and the Notice of Preliminary objection dated 25th September, 2023 be disposed of by way of written submissions and all the parties complied. Pursuant to that a ruling date was reserved on 18th July, 2024 by Court. However, dur to unavoidable circumstances, it was eventually delivered on 15th October, 2024 accordingly.

A. The Written Submissions by the Plaintiff/Applicant

8. The Plaintiff/Applicant through the Law firm of Messrs. Muniyithya, Mutugi, Umara & Muzna filed their written submissions dated 31st October, 2023. Mr. Muniyithya Advocate commenced the submissions by stating that the same were the brief submissions of the applicant in support of the application dated 11th August 2023. The application is brought under the Provisions of Rule 40 (1, 2 and 4) of the Civil Procedure Rules 2010 and other enabling provisions of the law. The applicant sought orders for injunction pending the hearing and determination of the suit.
9. The applicant had raised 15 grounds in support of the application and a 33 paragraphed Supporting Affidavit. The Supporting Affidavit has exhibited a total of 8 annexures. Briefly, the parties were family members where the plaintiff was a brother in-law to the 1st Defendant. He was also a paternal uncle to the 2nd and 3rd Defendants. On the other hand, the 2nd and 3rd Defendants are biological sons of the 1st Defendant. Finally, the subject property had been the family house for the parties for more than 20 years. Currently, the Plaintiff and the 1st defendant together with other family members were residing on the suit property.



10. In the supporting affidavit sworn by the plaintiff, he had shown how sometimes in year 2003 the estate of the father of the 2nd and 3rd Defendants was paid a compensation of a sum of Kenya Shillings Seven Million Nine Hundred and Twenty Thousand (Kshs. 7,920,000.00/=). At that time, the family agreed to purchase a property using this compensation so as to avoid the expensive life of payment of rent. However, the property they identified would cost more than what the estate had. The Plaintiff volunteered upon request by family members to pay a further sum of Kenya Shillings Two Million Five Hundred Thousand (Kshs. 2, 500,000.00/=) to make a total of a sum of Kenya Shillings Ten Million Six Hundred Thousand (Kshs.10, 600,000.00/=) being the price of the suit property.
11. There was an oral agreement entered into in good faith prior to the purchase of the suit property. According to the Plaintiff, after successful acquisition of the property, the Plaintiff was to be entitled to the portion of the property which was not developed while the estate was to keep the portion of the suit property which was developed. The transaction took place but pursuant to a further oral agreement the property was registered in the name of the 1st Defendant as a Trustee of the Family but with special right to the Plaintiff to ultimately own the vacant plot through a sub - division.
12. According to the Learned Counsel the Plaintiff had placed evidence to show that the sub - division commenced and the sub - division plan was indeed approved by the County Government of Mombasa and what remained was the processing of the two Title Deeds. According to the Plaintiff the process of obtaining the resultant Title Deeds was left to the 1st Defendant, all in trust. It came as a surprise when in the year 2023 the Plaintiff came to know that the Defendants had unilaterally changed the oral agreement and instead of sub - dividing the land as earlier agreed, proceeded to issue a new title deed in the joint names of the 2nd and 3rd Defendants. This was where the Plaintiff read malice and moved the court through the current suit. For the orders to be granted the Plaintiff must prove the existence of conditions set in law for grant of an interim injunction as set out in the case of "*Giella v Cassman Brown* (1973) EA 358". The principles are set out in paragraph 12 that:-
 - a) The existence of a prima facie case with a probability of success,
 - b) That damages are not adequate compensation to the applicant,
 - c) That the balance of convenience tilts in his favor.
13. Starting with the first requirement, they submitted that the applicant had demonstrated the existence of a prima facie case with a probability of success. This could be elaborated briefly as follows:-
 - a. In the supporting affidavit, the applicant had set out the history showing how the suit property was acquired. As at this moment, no replying affidavit has been filed by any of the defendants to controvert what is set out in the Supporting Affidavit. Of special interest, was how the applicant has explained the source of money. In his evidence, a sum of Kenya Shillings Seven Million Two Hundred Thousand (Kshs. 7,920,000.00/=) came from the estate. The balance of a sum of Kenya Shillings Two Million Five Hundred Thousand (Kshs. 2, 500,000/-) came from the Plaintiff personally. No contradiction has been raised by any of the Defendants and prima facie this court only assumes this to be the true position of the matter.
 - b. Secondly, the purchase price of the property is shown to have been a sum of Kenya Shillings Ten Million Six Hundred Thousand (Kshs.10,600,000/-). This was the aggregate of what the estate had and what the applicant contributed.
 - c. In the Plaintiff, the suit was based on existence of an implied/constructive trust. Under the provision of Section 3 (3) of the Law of Contracts Act one never had to produce documents



to prove the existence of such a trust. In this case, it was the evidence of the Applicant that the family had agreed orally that the 1st Defendant was to hold the suit property as a trustee.

- d. The third item to consider was the process of sub - division of the suit property. In the annexures “MMS - 4” were documents relating to the subdivision of the suit property. The sub - division was separating the building from the empty undeveloped portion of the property. According to the evidence of the Plaintiff after sub - division, the Plaintiff was to be given the portion without the building and the portion with building was to go to the 2nd and 3rd Defendants.
- e. This evidence tallies with the documents exhibited by the plaintiff as exhibit “MMS - 4”. Once again, the Defendants have not disputed this explanation and more so why the property was being sub - divided as annexed in “MMS – 4” if the sub - division was not to implement the rights of the Plaintiff. They invited the court to note that prima facie, the Plaintiff had demonstrated the existence of a suit to prove the existence of an implied or a constructive trust. The elements of such a trust can be noted. They relied on the case of:- “*Charles K. Kandie v Mary Kimoi Sang* [2017] eKLR” where the Court while quoting with affirmation the case of “*Twalib Hatayan & Anor v Said Saggat Ahmed Al-Heidy & Others* [2015] eKLR” stated:

“...In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see *Black's Law Dictionary*) (*Supra*). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see *Halsbury's Laws of England* supra at para 453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment.....

A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee (see *Black's Law Dictionary*) (supra). This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See *Snell's Equity* 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see *Snell's Equity* at p.177) (supra). (Emphasis added).”

14. The Learned Counsel submitted that the second principle was that of damages not being adequate compensation to the Plaintiff. In his supporting affidavit, the Plaintiff had demonstrated that the original purpose was to purchase a home for the family members. This could be found in paragraphs 4



to 17. Further, the Plaintiff had demonstrated in paragraph 28 that they had lived in this property for the last 20 years. For that reason, the Plaintiff had a lot of attachment to the said property. Finally, the Plaintiff had demonstrated that getting a replacement property of this nature was almost impossible due the scarcity of land. They submitted that these are the conditions to show that damages may not be a good remedy to the applicant. They relied on the following authorities:-

15. The Court of Appeal in case of:- "*Nguruman Limited v Bonde Nielsen & 2 Others* (2014) eKLR" held that:-

"On the second factor, the Applicant must establish that he might otherwise suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the Applicant to demonstrate prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the Applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot adequately be compensated by an award of damages. An injury is irreparable where there is no stand by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation of whatever amount, will never be adequate remedy."

16. Further, in the case of "*Joseph Siro Mosioma v Housing Finance Company of Kenya Limited & 3 Others* [2008] eKLR", where it was held that as follows by Warsame J (as he was then):

"damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substituted for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction."

17. Finally, there was the issue of balance of convenience. They invited the court to look at annexure "MMS - 5" which was agreement of sale. At page 1 of that agreement, the name of their client was written but later cancelled. Secondly, the fact that the applicant had been in physical occupation of the suit property and that the 2nd and 3rd Defendants reside in the United States of America gave the court a good reason to maintain the current status quo. The effect of this status quo will mean that the Plaintiff would continue occupying the suit property pending the hearing and determination of the suit. Further, in paragraph 30 the Plaintiff had disclosed the existence of a succession cause - KC Succ Cause No.E192 of 2023. Just like to the other facts, the Defendants have not contradicted this statement. If the court was to maintain the current status quo it would also mean that the suit property will not be sold to a third party pending the hearing and determination of this suit. He submitted that the court had the duty to do justice to both sides by keeping the suit property intact and without change of ownership. This is the balance of convenience the applicant is seeking the court to make a finding that it tilts in favour of the applicant. They relied on the case of "*Pius Kipchirchir Kogo vs Frank Kimeli Tenai* (2018) eKLR" the concept of balance of convenience was defined as:-

"The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiff's' to show



that the inconvenience caused to them be greater than that which may be caused to the defendant's inconvenience be equal, it is the plaintiff who suffer.”

18. The Defendants had filed a Notice of preliminary Objection alleging that the suit was time barred and for that reason it should be struck out for being an abuse of the process of court. They invited the court to look at the contents of Paragraphs 13 and 14 of the Plaint. The Plaintiff had disclosed that after the process of sub - division started he left the same in the hands of the 1st Defendant to complete. At that moment there was no dispute. In annexure “MMS – 4”, the Plaintiff had shown that the process of sub - division was taking place at around the years 2011 to 2012 or thereabouts. How long it was to take for the Title Deeds to be released was not yet known.
19. The Learned Counsel averred that the sub - division exercise was what was taking place then. The applicant left the process to proceed to completion. In Paragraph 14, the Applicant disclosed that in June 2023, was when he learned that the suit property was being sold to the members of the public. Finally, in paragraph 15 of the Plaint the Plaintiff set out the particulars of breach of judicial duty by the 1st Defendant and particulars of fraud by the 1st, 2nd, and 3rd Defendants thereof. As at this moment, the Defendant had not exhibited a document to show when the suit property was transferred from the 1st Defendant to the 2nd and 3rd Defendants.
20. The Learned Counsel further argued that secondly it had been disclosed when the 2nd and the 3rd Defendants decided to sale the property and finally, it had not been shown by any of the defendants that 12 years before the year 2023 the Plaintiff was aware that the property had been transferred into the names of the 2nd and 3rd Defendants. By ordinary calculations 12 years before June, 2023, would take it to the year 2011.
21. Assuming by that time starting to run on 10th May, 2012 when the Director of Surveys confirmed that the registry Index Map had been amended and created two parcels numbers 1152 and 1153, then 12 years from that date would take them to 10th May, 2024. They submitted that the notice of Preliminary Objection was misplaced, had no basis of law and was for dismissal. They relied on the case of “*Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969]EA 696” which was quoted with Affirmation in the case of “*Martha Akinyi Migwambo v Susan Ongoro Ogenda* [2022] eKLR”, the Court stated:-

“....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

At page701 paragraph B-C Sir Charles Newbold, P. added the following: A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion....”
22. In conclusion, the Learned Counsel submitted that the upshot of the above was that there is merit in granting the prayers sought in the application an under consideration as prayed in prayer (c) and (d)thereof.



B. The Written submissions of the Defendants to the Preliminary Objection

23. The Defendants through the Law firm of Messrs. A.A. Mazrui & Co. Advocates for the 3rd Defendant filed their written submissions dated 26th February, 2024. Mr. Salim Advocate submitted that before the Court were written submissions in respect of the Defendants' Notice of Preliminary objection dated 25th September, 2023. The Counsel further stated that the suit herein was commenced by way of Plaint dated 11th August, 2023. In the Plaint, the Plaintiff claimed breach of fiduciary duty on the part of the 1st Defendant and fraud on the part of all the Defendants. It was the Plaintiff's allegation that he contributed towards the purchase of all that parcel of land known as Mombasa Block XXVI/5 and it was agreed that a portion of the same would be transferred to him. He further alleged the existence of a constructive trust on the part of other parties that have not been included in this suit. The Plaintiff therefore claimed for a declaration from this Honourable Court on the existence of a constructive trust and that the 1st Defendant breached her fiduciary duty by transferring the property to the 2nd and 3rd Defendants among other prayers.
24. According to the Counsel, the Defendants had raised a preliminary objection on the following points:
- a. The suit is time barred having been brought outside the statutory limitation of 12 years in view of section 7 of the *Limitation of Actions Act* Cap 22, Laws of Kenya.
 - b. The Plaintiff's suit is incompetent, bad in law, barred in law, an abuse of the Court process and should be struck out with costs to the Defendants.
25. The Learned Counsel submitted that it had been adduced in evidence by the Plaintiff that the title in respect to the above parcel was issued on the 15th December 2005 in the names of the 1st Defendant who was holding the same in trust for the 2nd and 3rd Defendant. Further to the above, the transfer forms in respect of the said purchase clearly show the Plaintiff's name that has been cancelled and subsequent registration of the title made in the names as they appear in the title document before this Honourable Court. It was the Learned Counsel's submission that this is when the cause of action arose on the part of the Plaintiff who has taken more than the statutory required period of 12 years to bring this suit in court. It was therefore the Learned Counsel's submission that the same ought to have been dismissed with costs.
26. The only issue for determination that the Learned Counsel relied on was whether the suit herein is time barred, where the Learned Counsel further submitted that the Defendants' Preliminary objection raises as point of law. The Learned Counsel relied on the case of "*Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (Supra)*". Where the court, in defining a Preliminary Objection stated thus;
- “So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”
27. The Learned Counsel relied on the provisions of Section 7 of the *Limitation of Actions Act*, Cap. 22 of the Laws of Kenya stated as follows with regards to claims in respect to land;
- “An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”



28. To buttress on this point, the Counsel referred Court to the Court of Appeal case of “*Mukuru Munge v Florence Shingi Mwawana & 2 Others* [2016] eKLR” held that:

“The purpose of the law on limitation of actions is to avoid stale claims, based on the sensible and rationale appreciation that over time memories fade and evidence is lost. The law of limitation therefore seeks to compel claimants not to sleep on their rights and to bring their claims to court promptly. Secondly, the law on limitation of actions ensures that claims are instituted within reasonable time after the cause of action has arisen, so as to secure fair trial when all the evidence is available and to ensure that justice is not delayed. In our minds, those are important constitutional values and principles, which are underpinned by legislation on limitation of actions.”

29. The Learned Counsel submitted that as stated in the introduction, the title to the subject parcel was issued in the year 2005 specifically on 15th December 2005, the names appearing on the title were those of the 1st, 2nd, and 3rd Defendants and not any other person that the Plaintiff had mentioned. Furthermore, even transfer documents in respect of the said transaction show the Plaintiff’s name having been cancelled with no explanation being given for the same. It followed then that this was when the Plaintiff’s cause of action arose, and he ought to have prosecuted it within the timelines as set by the law. The Plaintiff had however waited for over 19 years before bringing his claim to this Honourable Court.

30. The Learned Counsel relied on the case of “*Nyaberi v Nyaberi & 4others* (Environment and Land Case 26 of 2018) [2022]KEELC 2328 (KLR)”, where the Learned Judge held as follows:-

“The Plaintiff is however not off the hook more so when the law as provided for under Section 7 of the *Limitation of Actions Act* comes knocking. The said provision of the law provides as follows; An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

The Plaintiff, in his amended Complaint has sought to be declared as the sole owner and allottee of LR Nos Kericho/ Kipchorian /Lelu Block 4 (Mutaragon)/453 and 7.

Section 7 of the *Limitation of Actions Act*, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the Plaintiff herein could only seek to recover the suit land from the 1st Defendant, but only if he did so within twelve years after the cause of action had accrued.

There is no doubt that the cause of action occurred on the 3rd September 1991 when the 1st Defendant was registered as proprietor of the suit land. A period of about twenty four (24) years had lapsed from 3rd September 1991 up to the 3rd April 2018 when the suit was filed. The Plaintiff needed to commence his claim within the time prescribed under Section 7 of the *Limitation of Actions Act*. It follows therefore that by the time this suit was filed, the claim had become statute barred.

31. Furthermore the Learned Counsel also referred to the case of “*Thuranira Karauri v Agnes Nchebe* [1997] eKLR” it was held that a suit that was time barred, incompetent and fit for striking out as limitation goes to jurisdiction. It was further held that it is trite law that limitation goes to the jurisdiction of a court. It follows therefore, that whenever the question of jurisdiction arises, it ought to



be resolved at the earliest opportunity because without jurisdiction a court has no authority to decide a matter before it.

32. In conclusion, the Learned Counsel submitted that that the Plaintiff did not exercise reasonable diligence in asserting his rights over the suit property and equity does not aid the indolent. This suit was stale in the eyes of the law and thus incompetent and the Honourable Court should not waste its precious time entertaining it. The Learned Counsel therefore prayed that the suit be struck out with costs.

C. The Written submissions by the Plaintiff on the Notice of Preliminary objection and in response to the Defendants Written submissions dated 26th February, 2024

33. The Plaintiff through the Law firm of Messrs. Munyiithya, Mutugi, Umara & Muzna Co. Advocates filed his written submissions dated 19th March, 2024. Mr, Munyiithya Advocate submitted that the Defendants had filed a Notice of Preliminary Objection dated 25th September 2023 and was premised on the aforesated two grounds.

34. The Learned Counsel opined that indeed the provision of Section 7 of the *Limitation of Actions Act* Cap. 22 of Laws of Kenya provides for the period of limitation of time to claims in respect to land to be (12) twelve years. It was by virtue of Section 26 of the *Limitation of Actions Act* Cap. 22 of the Laws of Kenya which provides for the computation of time in specific circumstances. The Learned Counsel was guided by the decision in the case of “*Ajay Shah – Versus – Deposit Protection Fund Board as Liquidator of Trust Bank Limited (in Liquidation)*” [2016] eKLR” where the Court of Appeal relied on the decision of the Indian Supreme Court in “*Ajay G.Podar-v-official Liquidator of J.S. & W.M. & ORS*, Civil Appeal No.4597 of 2008” where it was held that:-

“there is a clear dichotomy between the concept of the “period of limitation” on one hand and the concept of “computation of that period. The period of limitation is required to be computed in accordance with the provisions of the *Limitation of Actions Act*. The Court noted that the *Limitation of Actions Act* not only prescribes the period of limitation for different types of suits and applications but also provides for computation. If any period of limitation is to be excluded from the prescribed period of limitation the party has to satisfy the appropriate provisions in the Act. The law of limitation is a procedural law. It is addressed at the commencement of a proceeding. The dichotomy as identified by the Indian Supreme Court applies in the Kenya *Limitation of Actions Act*, period of limitation is distinct from computation of that period.”

35. At this point, the critical question was when did the Limitation of time start to run in this matter? Similarly, the Learned Counsel intimated that they planned to answer the question on when time started running. In response to the above, he was guided by the persuasive case in “*Justus Tureti Obara v Peter Koipetai Nengiso* (2014) eKLR” where Okongo J. stated

“.....The proviso to section 26 (a) of the *Limitation of Actions Act*, Cap. 22, Laws of Kenya provides that where an action is based on the fraud of the defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it. As to when the Plaintiff herein discovered the fraud alleged against the defendant is a matter to be ascertained at the trial.”

36. Further, he cited the provision of Section 26 of the *Limitation of Actions Act*, Cap. 22 of Laws of Kenya. The Learned Counsel submitted that it was evident in paragraph 14 of the Plaintiff's Plaint dated



11th August 2023 that the fraudulent actions came to the Plaintiff's attention sometimes in June 2023 however the same was not disputed. Therefore, time started running from June 2023 and not when the registration of the title was made. The Defendants had not filed a Statement of Defence nor a replying Affidavit. At this moment the averments in the Plaintiff were not controverted. Without prejudice to the foregoing, from the facts of this case, the only way to determine when the alleged fraud was discovered is through a trial thus further defeating the purpose of the Preliminary Objection.

37. In setting out the threshold in Preliminary Objection the Court of Appeal in "*Mukisa Biscuit Manufacturing Limited v West End Distributors (Supra)*". According to the Learned Counsel, it was evident that the Defendant's Preliminary Objection failed having established that the Plaintiff pleaded fraud in the Plaintiff thus leading the court to establish when the fraud was discovered. The Kadhi's Court in Succession Cause No. E192 held that the terminal benefits entitled to the deceased formed part of his estate. The family agreed with the Plaintiff that he should pay the deficit of the purchase price of the suit property and the suit property held in trust for the benefit of the beneficiaries and the Plaintiff's parents.
38. In conclusion, the Learned Counsel urged this Honourable Court to be guided by the above cited authorities and hold that the Preliminary Objection was defective, an abuse of court process and should be dismissed with costs.

V. Analysis and Determination

39. The Honourable Court has carefully read and considered the pleadings herein, the comprehensive written submissions and the cited authorities by all the parties herein, the relevant provisions of the Constitution of Kenya, 2010 and the statutes.
40. In order to arrive at an informed, reasonable, fair and Equitable decision, the Honourable Court has framed four (4) salient issues for determination. These are:-
 - a. Whether the Defendant has met the threshold for a Preliminary Objection based on Law and precedents and
 - b. If the answer to (a) above is in the affirmative, whether the Preliminary Objection raised is merited
 - c. If the answer to (b) is in the negative then whether the Notice of Motion application dated 11th August, 2023 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010
 - d. Who will bear the Costs of Notice of Motion application 11th August, 2023 and the Notice of Preliminary objection dated 25th September, 2023.

Issue No. a). Whether the Defendant has met the threshold for a Preliminary Objection in Law and precedents.

41. Under this sub – stratum the Honourable Court shall discuss the viability of the Notice of Preliminary objection dated 25th September, 2023. In the now famous case of:- "*Mukisa Biscuits (supra)*", the Court of Appeal defined a Preliminary Objection as follows:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and if which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of



the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

.....A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

42. In the case of “*Republic v Eldoret Water & Sanitation Company Ltd Ex parte Booker Onyango & 2 Others* (2007) eKLR”, the Court stated that an Objector cannot introduce any factual dispute or controversy and must stick to pure points of law. Therefore, a Preliminary Objection can only be premised on undisputed facts, must raise pure points of law and cannot be raised where facts have to be ascertained or where the Court is asked to exercise judicial discretion. For a Preliminary Objection to be maintained, the pure points of law raised must sprout from the pleadings. In the case of “*Avtar Singh Bhamra & Ano. v Oriental Commercial Bank* HCC No 53 of 2004”, the Court stated as follows;

“A preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

43. The Defendants have stated in its Preliminary Objection that the suit is time barred. It has also stated that the suit is incompetent, bad in law, barred in law, an abuse of the Court process. The question of limitation is a question that go to the jurisdiction of this Court. It is a clear point of law, which if argued as preliminary point may dispose of the suit. In the case of “*Bosire Ongero v Royal Media services* [2015] eKLR”, the Court stated that the question of limitation touches on the jurisdiction of the Court, which means that if a matter is statute barred, the Court would lack jurisdiction to entertain it. I therefore find and hold that the Preliminary Objection raised in the instant case is on a point of law, and the same is validly and properly taken.

ISSUE No. b). If the answer to (a) above is in the affirmative, whether the Preliminary Objection raised is merited

44. Taking that I have already determined that the Preliminary is on a point of law, let me now examine if this suit is time barred. Briefly, the parties were family members where the plaintiff was a brother in-law to the 1st Defendant. He was also a paternal uncle to the 2nd and 3rd defendants. On the other hand, the 2nd and 3rd defendants are biological sons of the 1st defendant. Finally, the subject property had been the family house for the parties for more than 20 years. Currently, the Plaintiff and the 1st Defendant together with other family members were residing on the suit property.
45. In his supporting affidavit, the Plaintiff averred that sometimes in the year 2003 the estate of the father of the 2nd and 3rd Defendants was paid a compensation of a sum of Kenya Shillings Seven Million Nine Hundred and Twenty Thousand (Kshs. 7,920,000.00/=). At that time, the family agreed to purchase a property using this compensation so as to avoid the expensive life of payment of rent. However, the property they identified would cost more than what the estate had. The Plaintiff volunteered upon request by family members to pay a further sum of Kenya Shillings Two Million Five Hundred Thousand (Kshs. 2, 500,000.00/=) to make a total of a sum of Kenya Shillings Ten Million Six Hundred Thousand (Kshs.10, 600,000.00/=) being the price of the suit property. There was an oral agreement entered into in good faith prior to the purchase of the suit property. According to the Plaintiff, after successful acquisition of the property, the plaintiff was to be entitled to the portion of the property which was not developed while the estate was to keep the portion of the suit property which was developed. The transaction took place but pursuant to a further oral agreement the property



was registered in the name of the 1st Defendant as a Trustee of the Family but with special right to the plaintiff to ultimately own the vacant plot through a subdivision.

46. According to the Plaintiff, he had placed evidence to show that the subdivision commenced and the subdivision plan was indeed approved by the County Government of Mombasa and what remained was the processing of the two Title Deeds. According to the Plaintiff the process of obtaining the resultant Title Deeds was left to the 1st Defendant, all in trust. It came as a surprise when in 2023 the plaintiff came to know that the defendants had unilaterally changed the oral agreement and instead of subdividing the land as earlier agreed, proceeded to issue a new title deed in the joint names of the 2nd and 3rd Defendants. This was where the plaintiff read malice and moved the court through the current suit.
47. It is not in dispute that the Plaintiff's claim is based on an oral agreement entered into in the year 2003 and the agreement was in regards to the suit property for which the Plaintiff has sought, among other orders. The issue is whether the dates when the agreement was executed is the date when the causes of action arose. The Defendants argued that it had been adduced in evidence by the Plaintiff that the title in respect to the above parcel was issued on the 15th December 2005 in the names of the 1st Defendant who was holding the same in trust for the 2nd and 3rd Defendant. Further to the above, the transfer forms in respect of the said purchase clearly show the Plaintiff's name that has been cancelled and subsequent registration of the title made in the names as they appear in the title document before this Honourable Court. It was the Learned Counsel's submission that this was when the cause of action arose on the part of the Plaintiff who has taken more than the statutory required period of 12 years to bring this suit in court. It was therefore the Learned Counsel's submission that the same ought to have been dismissed with costs.
48. Additionally, the Defendant argued that in the introduction, the title to the subject parcel was issued in the year 2005 specifically on 15th December 2005, the names appearing on the title are those of the 1st, 2nd, and 3rd Defendants and not any other person that the Plaintiff has mentioned. Furthermore, even transfer documents in respect of the said transaction show the Plaintiff's name having been cancelled with no explanation being given for the same. It follows then that this was when the Plaintiff's cause of action arose, and he ought to have prosecuted it within the timelines as set by the law. The Plaintiff had however waited for over 19 years before bringing his claim to this Honourable Court.
49. The Plaintiff on the other hand maintains that it was evident in paragraph 14 of the Plaintiff's Plaint dated 11th August 2023 that the fraudulent actions came to the Plaintiff's attention sometimes in June 2023 however the same is not disputed. Therefore, time started running from June 2023 and not when the registration of the title was made. The Defendants had not filed a Statement of Defence nor a replying Affidavit. At this moment the averments in the Plaint were not controverted. Without prejudice to the foregoing, from the facts of this case, the only way to determine when the alleged fraud was discovered is through a trial thus further defeating the purpose of the Preliminary Objection.
50. I reiterate that a Preliminary Objection is a pure point of law raised on undisputed facts from pleadings. I have perused the pleadings in the instant case. The provision of Section 26 of the [*Limitation of Actions Act*](#) provides as follows:-

Where, in the case of an action for which a period of limitation is prescribed, either—

- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or



- (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

51. From the Plaintiff's pleadings it is clear that he had discovered the fraud in June 2023 as stated in paragraph 14 of his plaint. A cause of action, is a set of facts sufficient to justify a right to sue to obtain money, property, or the enforcement of a right against another party. The term also refers to the legal theory upon which a Plaintiff brings suit. According to the provision of Section 26 of the Limitation of Actions Act the cause of action accrues when the fraud is discovered. In the present scenario therefore I find that the alleged fraud was discovered on the June 2023. These proceedings were filed on the 11th August, 2023 which period was beyond the 3 months from the date the fraud was discovered.

52. The provision of Section 7 of the Limitation of Actions Act provides:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

53. It provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the Defendants having been registered as the legal registered proprietors in the year 2005 as evidence by the title, the Plaintiff herein could only seek to recover it from the Defendants, but only if he was indeed within twelve after the sale of land and subsequent registration. There is no doubt that the period of about 18 years has lapsed from the year 2005 when the Defendants were registered as proprietors of the suit land. By all standards, this is whopping long period to even fathom any consideration. The period of limitation starts running a fresh whenever there are changes in the title as was held in the case of “Kimani Ruchine & Anor v Swift Rutherford & Co. Ltd and Another (1980) KLR 10”.

54. In the case of “Edward Moonge Lengusuranga v James Lanaiyara & Another [2019] eKLR”, it was held as follows:-

“Section 7 of the Limitation of Actions Act, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the first Defendant having bought the suit land in the year 1999 (as per Paragraph 6 of the Plaint) and taken possession of the same, the Plaintiff herein could only seek to recover it from the 1st Defendants, but only if he did so within twelve years after the Sale Agreement.”

55. It follows that the Plaintiff ought to commenced his claim within the time prescribed under the provision of Section 7 of the Limitation of Actions Act. It follows therefore that by the time the Plaintiff filed this suit, the claim was statute barred. In the case of “Bosire Ongero v Royal Media Services [2015] eKLR” the court held that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred the court has no jurisdiction to entertain the same.

56. A suit barred by limitation is a claim barred by law, hence by operation of law, the Court cannot grant the relief sought. In the case of “Iga v Makerere University [1972] EA”, the Court had this to say on the Law of Limitation;

“A Plaint which is barred by limitation is a Plaint barred by law. Reading these Provisions together it seems clear that unless the Applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption, the Court



shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the Court cannot grant the remedy or relief sought.”

57. Notwithstanding the principles of natural Justice, Equity and Conscience and fair hearing under the provision of Articles 25 (c) and 50 (1) and (2) of the Constitution of Kenya, 2010 in the given circumstance of this case, the situation cannot be salvaged. Suffice it to say, I have further considered the foregoing and I find that limitation being a substantive law, the inherent powers of Court and the overriding objectives as enshrined under the provisions of Article 159 (1) & (2) of the Constitution of Kenya, 2010, Sections 1A, 1B, 3, 3A of the Civil Procedure Act, Cap. 21 and Sections 3 and 13 of the Environment & Land Court Act, No. 19 of 2011 cannot be invoked with a view to disregard the provisions of another Act of Parliament. Even if the Limitation of Act was a procedural legislation, Section 3 of the Civil Procedure Act provides:

In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.

58. The locus classicus on jurisdiction is the celebrated case of Owners of the “Motor Vessel “Lillian S” v Caltex Oil (Kenya) Limited [1989] KLR 1” where Justice Nyarangi of the Court of Appeal held as follows:-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

59. Clearly, this Court lacks jurisdiction and the matter is at its end. My hands are tied tightly using a synthetic legal rope. I cannot shake nor move an inch on the matter. The only left remedy is to down my tools and take no further step. For this very fundamental reason, the preliminary objection herein succeeds in its entirety with the result that the Plaintiff’s suit is herein struck out with costs. That being the case, this Honorable Court cannot further examine issue (c) as it has no jurisdiction to do the same and can only make a determination on the costs.

Issue No. c). Who will bear the Costs of Notice of Motion application 11th August, 2023, the Notice of Preliminary objection dated 25th September, 2023 and the suit

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



61. In the present case, the Honourable Court is of the opinion that the Defendants having proved their preliminary objection, they are entitled to have the costs of the preliminary objection, the Notice of Motion application dated 11th August, 2023 and the suit.

VI. Conclusion and disposition

62. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-

- a. That the Notice of Preliminary objection dated September 25, 2023 be and is hereby found to have merit and the same is upheld in its entirety with costs.
- b. That the Notice of Motion dated August 11, 2023 and the suit by way of Plaintiff dated the same day is herein struck out.
- c. That the costs of the Notice of Preliminary objection dated September 25, 2023, the Notice of Motion application and suit both dated August 11, 2023 be awarded to the 1st, 2nd & 3rd Defendants to be borne by the Plaintiff.

It is so ordered accordingly.

RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 15TH DAY OF OCTOBER 2024.

.....

HON. MR. JUSTICE L.L NAIKUNI

ENVIRONMENT AND LAND COURT AT,

MOMBASA

Ruling delivered in the presence of:-

- a. M/s. Firdaus Mbula – the Court Assistant.
- b. Mr. Munyithya Advocate for the Plaintiff.
- c. Mr. Salim Advocates for the Defendants.

