Patel (As the Administrator of the Estate of Kanji Naran Patel) v Kiptoo & 8 others (Environment & Land Case E092 of 2024) [2024] KEELC 13487 (KLR) (4 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13487 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E092 OF 2024

JO MBOYA, J

NOVEMBER 4, 2024

BETWEEN

ARVIND KANJI PATEL ..... PLAINTIFF

AS THE ADMINISTRATOR OF THE ESTATE OF KANJI NARAN PATEL

AND

DORCAS JOAN KIPTOO ..... 1ST DEFENDANT

CHIEF LAND REGISTRAR ..... 2ND DEFENDANT

THE DIRECTOR OF SURVEYOR ..... 3RD DEFENDANT

THE ATTORNEY GENERAL ..... 4TH DEFENDANT

SMETH VALLEY LIMITED ..... 5TH DEFENDANT

JAMES KARIUKI ..... 6TH DEFENDANT

COUNTY GOVERNMENT OF NAIROBI ..... 7TH DEFENDANT

INTERNATIONAL ANGEL KINDERGARTEN LIMITED ..... 8TH DEFENDANT

ACYITY CAPITAL LIMITED T/A STEPPING STONES KINDERGARTEN & SCHOOL ..... 9TH DEFENDANT

RULING

Introduction and Background

1. The Plaintiff/Applicant approached the court vide the Notice of Motion Application dated 8th March 2024 and in respect of which the Applicant sought for various reliefs. Subsequently, the Application beforehand was amended vide the Amended Notice of Motion Application dated 21st May 2024 and wherein the Plaintiff sought for a total of seven [7] reliefs.

2. Be that as it may, the Plaintiff/Applicant filed a Second Amended Notice of Motion Application dated 21st May 2024 and in respect of which the Plaintiff/Applicant has sought for a total of sixteen [16] reliefs/ remedies. For good measure, the operative Application which underpins the current ruling is the Amended Notice of Motion Application dated 21st May 2024, but which has highlighted sixteen [16] reliefs on the face thereof.

3. For ease of appreciation, the reliefs sought at the foot of the relevant Amended Notice of Motion Application are as hereunder;

   a. That this matter be certified as urgent and be heard Ex parte in the first instance;

   b. That pending the hearing and determination of this Application, an interlocutory order do issue restraining the 1st, 5th, 6th, and 7th Defendants/Respondents their employees, servants and/or agents and any other person through whom they may act from encroaching, trespassing, evicting, seizing, possessing, entering and remaining on, erecting fences, erecting structures, transferring, selling, leasing and/or in any way other manner dealing with the Plaintiffs property known as L.R. Nos. 2255/1 and 2255/2 situated in Karen in any way detrimental to the interests of the Plaintiff. and any other person through whom they may act from encroaching, trespassing, evicting, seizing, possessing, entering and remaining on, erecting fences, erecting structures, transferring, selling, leasing and/or in any way other manner dealing with the Plaintiffs property known as L.R Nos. 2255/1 and 2255/2 situated in Karen in any way detrimental to the interests of the Plaintiff.

      3A. That in the interim pending the outcome of the Amended Notice of Motion, the Orders issued by the Honourable Court on 8th March 2024 and as extended on 6th May 2024 be continued and be applied against the 1st, 5th, 6th and 7th Defendants pending the hearing and determination of this Application and Main Suit.

   c. That pending the hearing and determination of this Application, an interlocutory order do issue restraining the 1st, 5th, 6th, and 7th Defendants/Respondents, their employees, servants and/or agents and any other person through whom they may act from demolishing the Plaintiff's Structures, building and offices in the Plaintiff's property known as L.R. Nos. 2255/1 and 2255/2 situated in Karen in any way detrimental to the interests of the Plaintiff.

   d. That pending the hearing and determination of the Main Suit, an interlocutory order do issue restraining the 1st, 5th, 6th, and 7th Defendants/Respondents, their employees, servants and/or agents and any other person through whom they may act from demolishing the Plaintiff's Structures, building and offices in the Plaintiff's property known as L.R. Nos. 2255/1 and 2255/2 situated in Karen in any way detrimental to the interests of the Plaintiff.

   e. That pending the hearing and determination of this Application, an interlocutory order do issue requiring the 1st, 5th, 6th, and 7th Defendants/Respondents, their employees, servants and/or agents forthwith to remove such structures and fence they have erected on the Plaintiff's Property known as L.R. Nos. 2255/1 and 2255/2 situated in Karen.

   f. That pending the hearing and determination of the main suit, an interlocutory order do issue requiring the 1st, 5th, 6th, and 7th Defendants/Respondents, their employees, servants and/or agents forthwith to remove such structures, and fence that they have erected on the Plaintiffs Property known as L.R. Nos. 2255/1 and 2255/2 situated in Karen. and 2255/2 situated in Karen in any way detrimental to the interests of the Plaintiffs.

g. That pending the hearing and determination of this Application, a permanent injunction do issue restraining the 1st, 5th, 6th, and 7th Defendants/Respondents, their employees, servants and/or agents and any other person through whom they may act from encroaching, trespassing, encroaching, trespassing, evicting, seizing, possessing, erecting fences, erecting structures, transferring, selling, leasing and/or in any way other manner dealing with the Plaintiff's property known as L.R. Nos. 2255/1 and 2255/2 situated in Karen in any way detrimental to the interests of the Plaintiffs.

h. That pending the hearing and determination of this Application and main suit, a Permanent Injunction do issue requiring the 1st, 5th, 6th, and 7th Defendants/Respondents, their employees, servants and/or agents forthwith to remove such structures, perimeter fence and foundations that it has erected on the Plaintiff's Property known as L.R. Nos. 2255/1 and 2255/2 situated in Karen.

i. That pending the hearing and determination of this Application and main suit, the 2nd Defendant/Respondent be restrained from issuing certificate of title to the 1st, 5th, 6th, and 7th Defendants/Respondents and any other person in respect to Property known as L.R. Nos. 2255/1 and 2255/2 situated in Karen in any way detrimental to the interest of the Plaintiff.

k. That pending the hearing and determination of this Application and main suit, the Director of survey 3rd Defendant/Respondent herein and its employees, servants and/or agents be restrained from issuing deed plans and any subsequent subdivided deed plans that arise from the property known as L.R. Nos. 2255/1 and 2255/2 situated in Karen in any way detrimental to the interest of the Plaintiff.

l. That pending the hearing and determination of this Application and Main Suit the 1st, 2nd, 3rd and 3rd, 5th, 6th, and 7th Defendants/Respondents, their employees, servants and/or agents herein be restrained from doing anything with the with the Plaintiffs property known as L.R. Nos. 2255/1 and 2255/2 situated in Karen in any way detrimental to the interests of the Plaintiff.

m. That the OCPD Nairobi Area Sub-County Police Commandant Karen/Langata and OCS Karen Plain Police Station to assist in the enforcement of the Court Orders.

n. That this Honourable Court be pleased to Order a consolidation of this Suit with the following suits: (i) ELC Case No. 193 of 2024: Smeth Valley Limited vs Arvind Kanji Patel (sued as the administrator of Estate of Kanji Naran Patel), (ii) ELC Case No. E. 130 of 2024: International Angel Kindergarten Limited & Another vs Arvind Kanji Patel & 3 Others and (iii) ELC Case No. E170 of 2024: Nairobi City County vs Arvind Kanji Patel (Sued as the Administrator of the Estate of Kanji Naran Patel) and ELC Case No. E 92 of 2024: Arvind Kanji Naran Patel as the Administrator of the Estate of Kanji Naran Patel vs Dorcas Joan Kiptoo and 7 Others operate as the Lead File.

o. That the costs of this Application be awarded to the Applicant.

4. The Amended Notice of Motion Application dated the 21st May 2024 is anchored on various/ numerous grounds which have been enumerated at the foot thereof. Furthermore, the Application beforehand is supported by the Affidavit of Arvind Kanji Patel sworn on even date, namely, the 21st May 2024 and a Supplementary Affidavit sworn on 7th August 2024. Suffice it to point out that the Supporting Affidavit and the Supplementary Affidavit contains various annexures.

5. Upon being served with the subject Application, the 1st Defendant/Respondent filed Grounds of Opposition dated 14th June 2024 and wherein the 1st Defendant/Respondent contended inter alia that same [1st Defendant/Respondent] has been mis-joined into the suit. Furthermore, the 1st Defendant/ Respondent also filed a Replying Affidavit sworn on 21st May 2024 and which Replying Affidavit is stated to be responding to the Application dated 15th March 2024.

6. On the other hand, the 5th Defendant/Respondent filed a Replying Affidavit sworn on 16th September 2024 and in respect of which the 5th Defendant/Respondent has denied the averments contained at the foot of the Supporting Affidavit by the Plaintiff/Applicant. Furthermore, the 5th Defendant/ Respondent has averred that the suit properties which have been adverted to by the Plaintiff/Applicant are non-existent. In this regard, the 5th Defendant/Respondent has thus invited the court to find and hold that the orders sought by the Plaintiff/Applicant are in vain.

7. The second Application is the one filed by the 5th Defendant and which Application is dated 16th September 2024. For good measure, the Application dated the 16th September 2024, seeks for the following reliefs;

    i. This Application be certified urgent and heard on a priority basis.

    ii. Pending the hearing and determination of this Application inter-partes, any further proceedings herein including the hearing and determination of the Plaintiff's Amended Notice of Motion Application dated 21st day of May, 2024 be stayed and or suspended.

    iii. Pending the hearing and determination of the Application herein, an order of temporary injunction be and is hereby issued restraining the Plaintiff, the 8th and 9th Defendants or any other party subject of these proceedings whether by themselves or their agents and/or servants from trespassing, entering upon, remaining upon, occupying, developing, dumping, encroaching, charging, dealing or otherwise interfering with the 5th Defendant's possession, occupation, and title over the parcels of land known as Land Reference Numbers 2255/3, 2255/4, 2255/5, 2255/6, 2255/7, 2255/8, 2255/9, 2255/10, 2255/11, 2255/12, 2255/13, 2255/14 and 2255/15 measuring 66.5 acres situated in Karen, Nairobi City County.

    iv. The order issued herein vide the ruling delivered on 16th July 2024 striking out the 5th Defendant's suit in Nairobi ELC Case No. E193 of 2024; Smeth Valley United Versus Arvind Kanji Patel, The Chief Land Registrar, And the Director of Survey on account of allegedly being an abuse of the Court process and in violation of Section 6 of the *Civil Procedure Act* be and is hereby reviewed, varied and set aside in entirety.

    v. Pending the hearing and determination of the suit herein, an order of temporary injunction be and is hereby issued restraining the Plaintiff, the 8th and 9th Defendants or any other party subject of these proceedings whether by themselves or their agents and/or servants from trespassing, entering upon, remaining upon, occupying, developing, dumping, encroaching, charging, disposing of, transferring, leasing, dealing or otherwise interfering with the parcels of land known as Land Reference Numbers 2255/3, 2255/4, 2255/5, 2255/6, 2255/7, 2255/8, 2255/9, 2255/10, 2255/11, 2255/12, 2255/13, 2255/14, and 2255/15 measuring 66.5 acres situated in Karen, Nairobi City County, which order shall be enforced by the Office Commanding Police Division (OCPD) Lang'ata and officer commanding station(OCS) Karen Plains Police Station or any other nearest police station.

    vi. The costs be provided for.

8. The subject Application is anchored on numerous grounds which have been highlighted in the body thereof. In addition, the Application has been supported by the Affidavit of Paul Maiyo sworn on even date, namely 16th September 2024. Furthermore, the deponent herein has attached various annexures [Documents] at the foot of the Supporting Affidavit.

9. Upon being served with the Application by the 5th Defendant, the Plaintiff herein filed a Replying Affidavit sworn by Arvind Kanji Patel on 23rd September 2024. For coherence, the Replying Affidavit avers that the suit properties namely L.R No's 2255/1 and 2255/2, have never been sold and/or transferred to any third party. Besides, the deponent of the Replying Affidavit has also averred that the suit properties have also not been sub-divided.

10. On the other hand, 1st Defendant/Respondent does not appear to have filed any response to the Application by and on behalf of the 5th Defendant.

11. The third Application in respect of the instant matter is the Chamber Summons dated 6th May 2024 and which has been filed by the 1st Defendant. The Application beforehand seeks the following reliefs;

    a. This Honourable Court be pleased to strike out Dorcas Joan Kiptoo, the 1st Respondent/ Applicant from the Plaintiff/Respondent's suit herein; and

    b. Costs be in the cause.

12. The Chamber Summons Application is anchored on various grounds that have been highlighted at the foot thereof. Furthermore, the Application is supported by the Affidavit of one Dorcas Joan Kiptoo [the 1st Defendant] and which Affidavit is sworn on 6th May 2024.

13. Upon being served with the Chamber Summons Application, the Plaintiff herein filed a Replying Affidavit sworn on 7th August 2024 and wherein the Plaintiff has contended that the 1st Defendant is the registered proprietor/owner of motor vehicle registration number KBH 195W, which was used during the offensive invasion on to the suit property on 2nd March 2024.

14. The rest of the parties including the 5th Defendant do not appear to have filed any response to the Application beforehand.

15. The subject matter came up for directions before the court on 19th September 2024 whereupon the parties intimated to the court that there were three [3] sets of applications which were pending hearing and determination. Furthermore, the parties covenanted to have the three [3] sets of applications, canvassed and disposed of simultaneously.

16. Arising from the foregoing, the court proceeded to and issued directions pertaining to the disposal of the three [3] sets of applications. In particular, the court directed that the three[3] sets of applications were to be canvassed and disposed of simultaneously. In addition, the court also directed that the applications be canvassed by way of written submissions to be filed and exchanged by the parties within circumscribed timelines.

17. Suffice it to point out that the advocates for the parties duly complied and filed their respective submissions. The Plaintiff filed three [3] sets of written submissions, namely, the submissions dated 11th October 2024 relating to the Application dated 21st May 2024 and the submissions dated 11th October 2024 relating to the Application dated 16th September 2024 and submissions dated 7th August 2024 and which relates to the Chamber Summons Application dated 6th May 2024.

18. The 1st Defendant filed two [2] sets of written submissions dated 7th October 2024 relating to the Application dated 21st May 2024; and the written submissions dated 14th June 2024 relating to the Application dated 6th May 2024.

19. The 5th Defendant on her part filed written submissions dated the 30th September 2024 and in respect of which the 5th Defendant has addressed the two sets of Applications, namely, the Application dated 21st May 2024 and the one dated 16th September 2024.

20. For coherence, the various sets of written submissions which have been adverted to in the preceding paragraphs form part of the record of the court. In this regard, the court has taken cognizance of same and shall endeavour to utilize the respective submissions in determining the critical issues in dispute.

Parties' Submissions:

a. Plaintiff's Submissions:

21. The Plaintiff has filed three [3] sets of written submissions. The written submissions are dated 11th October 2024 and same relate to the Application dated 21st May 2024 and 16th September 2024. The other written submissions filed by the Plaintiff is the one dated 7th August 2024.

22. Suffice it to point out that the Plaintiff herein has raised and canvassed a plethora of issues. Nevertheless, the pertinent issues that have been ventilated by the Plaintiff can be clustered into six [6] thematic issues.

23. Firstly, learned counsel for the Plaintiff has submitted that the suit property, namely, L.R No. 2255/1 and L.R 2255/2 belonged to and were registered in the name of Kanji Naran Patel now deceased. Furthermore, it has been contended that upon the death of Kanji Naran Patel, the Plaintiff herein and one Jayanti Kanji Patel [now deceased] applied for grant of letters of administration and same were thereafter constituted as the legal administrators of the estate of the deceased. To this end, the Plaintiff has exhibited a copy of the certificate of confirmation of grant issued by the court on 14th February 1997.

24. Additionally, learned counsel for the Plaintiff has submitted that by virtue of the fact that the suit properties belonged to and were registered in the name of the deceased, same [suit properties] constitutes part of the estate of the deceased which is being administered by the Plaintiff herein.

25. Arising from the foregoing, learned counsel for the Plaintiff has therefore submitted that by virtue of being legal administrator of the estate of the deceased, the suit properties lawfully fall under the administration of the Plaintiff. In this regard, it has been posited that the Plaintiff herein therefore has rights and interests over and in respect of the suit properties.

26. In this respect, learned counsel for the Plaintiff has invited the court to take cognizance of the import and tenor of Sections 24 and 25 of the *Land Registration Act*, 2012, which underpins the rights of a registered owner of a landed property.

27. Secondly, learned counsel for the Plaintiff has submitted that despite the fact that the suit properties belong to the estate of the deceased, the 1st, 5th, 6th and 7th Defendants herein have since encroached onto and trespassed upon the suit properties albeit without the permission or consent of the Plaintiff. In addition, it has been contended that the impugned actions by the 1st, 5th, 6th and 7th Defendants herein constitute trespass and hence ought to be averted.

28. Be that as it may, learned counsel for the Plaintiff has submitted that to the extent that the suit properties belong to the estate of the deceased, the offensive action complained of are therefore calculated to deprive the estate of the deceased of their lawful rights to the suit property.

29. To this end, learned counsel for the Plaintiff has therefore submitted that the Plaintiff has established and demonstrated the existence of a prima facie case with probability of success. In support of the submissions that the Plaintiff has established a prima facie case, learned counsel for the Plaintiff has cited and referenced various decisions including Giella v Cassman Brown [1973] EA; Mrao Ltd v First American Bank of Kenya [2003] eKLR and Nguruman Ltd v Jan Bonde Nielsen [2014] eKLR, respectively.

30. Thirdly, learned counsel for the Plaintiff has submitted that the Plaintiff who is the legal administrator of the estate of the deceased shall suffer irreparable loss unless the orders of injunction are granted. In particular, it has been submitted that the grant of orders of injunction will avert the offensive actions by the 1st, 5th, 6th and 7th Defendants, who are keen to enter upon and alienate the suit properties.

31. Additionally, it has been submitted that if the named Defendants are not restrained, then same [named Defendants] shall proceed with the said activities including demolition of the Plaintiffs structures which are sitting on the suit property. Besides, it has also been contended that there is likelihood that the suit property may be alienated and/or disposed of.

32. In particular, it has been submitted that the nature and kind of loss that is bound to arise is one that cannot be compensable in monetary terms. For coherence, learned counsel for the Plaintiff has implored the court to find and hold that the imminent/ apprehended loss is indeed irreparable.

33. To buttress the submissions pertaining to the likelihood of irreparable loss arising, learned counsel for the Plaintiff has cited and referenced inter alia Vipingo Beach Resort Ltd v Attorney General & 3 Others [2015] eKLR, R.J.R Macdonald v Canada [Attorney General] and Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 Others [2016] eKLR, respectively.

34. Fourthly, learned counsel for the Plaintiff has submitted that the Plaintiff herein has placed before the court plausible and cogent evidence to demonstrate that same is the registered proprietor of the suit properties. Furthermore, learned counsel for the Plaintiff has contended that the Plaintiff has demonstrated that the 1st, 5th, 6th and 7th Defendants have violently entered upon and taken possession of the suit property and thereafter erected a perimeter wall on the suit properties.

35. Owing to the fact that the Plaintiff is the legal administrator of the estate of the deceased and therefore entitled to the suit property, it has been contended that the Plaintiff has established and satisfied the requisite ingredients to warrant the grant of an order of mandatory injunction.

36. At any rate, it has been submitted that the grant of an order of mandatory injunction shall go a long way in vindicating the rights of the estate of the deceased in enjoying the statutory privileges arising from and attendant to ownership of the suit properties.

37. In support of the submissions that the Plaintiff has established and met the threshold for the grant of the orders of mandatory injunction, learned counsel for the Plaintiff has cited and referenced inter alia Gusii Mwalimu Investment Company Ltd & 2 others v Mwalimu Hotel Kisii Ltd [1996] eKLR, Kenya Breweries Ltd & Another v Washington O Okeyo [2002] eKLR and Registered Trusttees of Jamie Masjid Ahl-Sunnait-Wal-Jamait Nairobi v Nairobi City County & 2 Others Milimani HCC No. 1229 of 2024, respectively.

38. Fifthly, learned counsel for the Plaintiff has submitted that the 5th Defendant has no proprietary rights to and in respect of the suit properties. In this regard, it has been contended that the 5th Defendant cannot purport to have purchased and/or acquired the suit properties yet the estate of the deceased who owns the suit properties has never sold the suit properties to anyone.

39. In addition, learned counsel for the Plaintiff has submitted that if the 5th Defendant holds any certificate of title to and in respect of the suit property or any resultant subdivision thereof, then the said certificate[s] of title are illegal, unlawful and void for all intents and purposes.

40. In a nutshell, learned counsel for the Plaintiff has submitted that the 5th Defendant has not established the existence of a prima facie case to warrant the grant of an order of temporary injunction in her favour. For coherence, it has been posited that in the absence of a prima facie case, no order of temporary injunction can issue and/or be granted.

41. To buttress the foregoing submissions, learned counsel for the Plaintiff has cited and referenced various decisions including American Cynamid v Ethicon Ltd [1975] Ac 396; Mrao Ltd v First American Bank of Kenya & 2 Others [2003] eKLR and Moses C Muhia Njoroge & 2 Others v Jane W Lesaloi & 5 Others [2013] eKLR, respectively.

42. Sixthly, learned counsel for the Plaintiff has submitted that the 5th Defendant has neither established nor demonstrated the existence of error and/or mistake apparent on the face of record to warrant review of the orders of the court issued on 16th July 2024 and wherein the court struck out the 5th Defendant's suit and granted liberty for the 5th Defendant to file a counterclaim in respect of the instant matter.

43. In the absence of an error or mistake apparent on the face of record, learned counsel for the Plaintiff has submitted that the limb of the 5th Defendant's submissions seeking for review has therefore been mounted in vacuum.

44. At any rate, learned counsel for the Plaintiff has contended that before a court of law can engage with an application for review on the basis of an error or mistake apparent on the face of record, the court must be satisfied that such an error or mistake does exist. To this end, learned counsel for the Plaintiff has invited the court to take cognizance of inter-alia the case of National Bank of Kenya Ltd v Ndungu Njau [1996] eKLR, Michael Kirara Muraya v County Commissioner, Muranga County & Another [2017] eKLR and the estate of Kiberenge Mukua [deceased] [2021] eKLR, respectively.

45. Finally, learned counsel for the Plaintiff has submitted that the Application by the 1st Defendant and which seeks to strike out the name of the 1st Defendant is misconceived and legally untannable. In particular, it has been contended that the question of whether or not the 1st Defendant has been misjoined in the proceedings is a question of facts which can only be determined and interrogated during a plenary hearing and not otherwise.

46. Further and in any event, it has been submitted that the 1st Defendant is the registered owner of Motor Vehicle Registration No. KBH 195W, which was used during the invasion of the suit property on 22nd March 2024.

47. Arising from the fact that the 1st Defendant is the registered owner of Motor Vehicle KBH 195W and coupled with the facts that the 1st Defendant was sighted on the suit property on the date of the invasion suffices to warrant the joinder of the 1st Defendant.

48. Furthermore, learned counsel for the Plaintiff has submitted that the Plaintiff's claim as pertains to the subject matter touches on and concerns ownership of the suit property and the trespass thereto. In

this regard, it has been contended that insofar as the 1st Defendant is one of the persons who trespassed onto the suit property, the Plaintiff therefore has a reasonable cause of action against the 1st Defendant.

49. To buttress the submissions touching on and concerning the fact that the Plaintiff has a reasonable cause of action as against the 1st Defendant, learned counsel for the Plaintiff has cited various decisions including *Airland Tours & Travel Ltd v National Industrial Ltd Milimani HCC No 1234 of 2002* [UR} and East Africa Portland Cement Ltd v Attorney General & Another [2013] eKLR.

50. Arising from the foregoing submissions, learned counsel for the Plaintiff has invited the court to find and hold that the Plaintiff has established the requisite ingredients to warrant the grant of orders of temporary and mandatory injunction, respectively.

51. Furthermore, learned counsel for the Plaintiff has also invited the court to find and hold that the 1st Defendant has not been mis-joined into the suit. To the contrary, the court has been implored to find and hold that having been sighted on the suit property on the 2nd March 2024, the 1st Defendant is indeed a necessary party.

52. Other than the foregoing, learned counsel for the Plaintiff has also submitted that the 5th Defendant has no known rights and/or interests to the suit property. In this regard, it has been contended that the 5th Defendant cannot therefore partake of or benefit from a temporary injunction.

53. In a nutshell, learned counsel for the Plaintiff has contended that the Application dated 21st May 2024 is meritorious whereas the Application dated 6th May 2024; and the one dated 16th September 2024 are devoid of merits.

b. 1st Defendant's Submissions:

54. The 1st Defendant filed two [2] sets of written submissions, namely, the submissions dated 14th June 2024 in respect of the Application dated 6th May 2024 and the submissions dated 7th October 2024. The latter submissions relate to the Application dated 21st May 2024.

55. In respect of the two [2] written submissions, learned counsel for the 1st Defendant has raised and highlighted three [3] salient issues for consideration by the court. Firstly, and as concerns the Application dated 6th May 2024, the 1st Defendant has contended that same [1st Defendant] has no rights to and/or interests over the suit properties.

56. Furthermore, learned counsel for the 1st Defendant has submitted that the instant suit touches on and/or concerns a dispute pertaining to ownership of the suit properties. In this regard, it has been contended that insofar as the 1st Defendant has no claim to and in respect of the suit property, no reliefs can be sought for and/or issued as against the 1st Defendant.

57. Other than the foregoing, it has been submitted that the 1st Defendant is neither an agent of or representative of the 5th Defendant which is a registered company and thus constitute[s] a separate and distinct person in the eyes of the law.

58. To underscore the submissions that the 1st Defendant has been wrongly impleaded, learned counsel has cited and referenced various decisions including Gladys Nduku Nthuki v Letsego Kenya Ltd; Mweni Charlse Maingi [intended Plaintiff] [2022] eKLR and Zephir Holdings Ltd v Mimosa Plantation Ltd, Jeremaih Matagaro & Another [2015] eKLR.

59. Secondly, learned counsel for the 1st Defendant has submitted that the Application dated 21st May 2024 is supported by a deficient and defective Affidavit which contravenes the provisions of Section 5 of the Oaths and Statutory Declaration Act. In this regard, learned counsel for the 1st Defendant

has contended that paragraph 11 of the Supporting Affidavit indicates that the deponent is currently outside the country yet the affidavit has been commissioned at Nairobi. In this regard, it has been submitted that the commissioning of the Affidavit in Nairobi and yet the deponent is[sic] outside the country defeats the mandatory requirements underpinned by the provisions of Section 5 of the Oaths and Statutory Declaration Act.

60. Furthermore, learned counsel has submitted that where an Affidavit does not comply with the mandatory provisions of Section 5 of the Oaths and Statutory Declaration Act, Chapter 15, Laws of Kenya, the Affidavit is rendered invalid and ought to be struck out.

61. In support of the foregoing submissions, learned counsel for the 1st Defendant has cited and referenced various decisions including Francis Mbalanya v Cicilia Wahenya [2017] eKLR; Mary Gathoni & Another v Frida Ariri Otolo & Another [2020] eKLR; Regina Munyiva Ndunge v Kenya Commercial Bank Ltd [2005] eKLR; CMC Motors Group Ltd v Bengeria Arap Korir T/a Marben School & Another [2013] eKLR and Pius Njogu Kathuru v Joseph Kiragu Muthura & 3 Others [2018] eKLR.

62. Thirdly, learned counsel for the 1st Defendant has submitted that the Plaintiff herein has neither established nor demonstrated the requisite conditions to warrant the grant of the orders for temporary injunction at all. In particular, it has been contended that the Plaintiff has not demonstrated that same has a prima facie case with probability of success.

63. On the other hand, learned counsel for the 1st Defendant has also submitted that the Plaintiff herein has also failed to demonstrate that same [Plaintiff] shall be disposed to suffer irreparable loss if the orders of injunction are not granted.

64. On the contrary, learned counsel for the 1st Defendant has submitted that the loss, if any, that the Plaintiff may suffer is capable of being quantified and thereafter compensated by an award of damages. To the extent that the loss, if any, to be suffered is quantifiable and thus compensable, learned counsel for the 1st Defendant has therefore submitted that no irreparable loss has been demonstrated.

65. In support of the submissions that no irreparable loss has been demonstrated/established, learned counsel for the 1st Defendant has cited and referenced various decisions including Pine Court Malindi Ltd & Another v Imperial bank of Kenya [Under Receivership] & 2 Others [2019] eKLR; Marple Brooks Projects Company Ltd & Another v I & M Bank Ltd [2019] eKLR and Vivo Energy Kenya Ltd v Maloba Petrol Station & 3 Others [2015] eKLR, respectively.

66. Finally, learned counsel for the 1st Defendant has submitted that even if the determination of the Application was to be made on the balance of convenience, the Plaintiff herein has not demonstrated the inconvenience that same shall be disposed to suffer.

67. In any event, it has been contended that the court is called upon to weigh the competing interests between the Plaintiff and the adverse parties and thereafter to discern who between the Plaintiff and the adverse parties shall suffer grater injury/harm, if the orders of injunction were granted.

68. Premised on the foregoing submissions, learned counsel for the 1st Defendant has therefore implored the court to find and hold that the Application by the Plaintiff is devoid of merits and thus ought to be dismissed.

c. 2nd, 3rd and 4th Defendants' Submissions:

69. Though the 2nd, 3rd and 4th Defendants had entered appearance, filed a Statement of Defence as well as the List and Bundle of Documents, same however did not file any written submissions.

70. At any rate, when the instant matter came up to confirm the filing of written submission[s] on the 14th October 2024, learned counsel Mr. Allan Kamau [Principal Litigation Counsel] intimated to the court that same shall not be filing any written submissions.

71. In a nutshell, it suffices to point out that the 2nd, 3rd and 4th Defendants did not file any written submissions as pertains to the three [3] sets of Applications that underpin the instant ruling.

d. 5th Defendant's Submissions:

72. The 5th Defendant filed written submissions dated 30th September 2024 and wherein same [5th Defendant] has adopted the grounds contained at the foot of the Application dated 16th September 2024 and reiterated the averments contained in the Supporting Affidavit. Furthermore, the 5th Defendant has also adopted the contents of the Replying Affidavit sworn in opposition to the Application dated 21st May 2024.

73. In addition, learned counsel for the 5th Defendant has thereafter highlighted and canvassed five [5] salient issues for consideration by the court. Firstly, learned counsel for the 5th Defendant has submitted that the Plaintiff herein came to court and procured orders of interim injunction albeit on the basis of misrepresentation, nondisclosure and concealment of material facts. In this respect, learned counsel for the 5th Defendant has posited that insofar as the interim orders were obtained on the basis of non-disclosure, the Plaintiff herein should not be allowed to accrue further advantage/mileage from the said orders.

74. Furthermore, it was submitted that the interim orders were procured and obtained long before the joinder and inclusion of the 5th Defendant into the suit. Nevertheless, learned counsel has averred that despite having been issued prior to the joinder, the said orders have been deployed to defeat the rights and interests of the 5th Defendant in respect of properties that are said to belong to the 5th Defendant.

75. In short, learned counsel for the 5th Defendant has invited the court to find and hold that the impugned orders were procured on the basis of material non-disclosure and concealment of facts. To this end, learned counsel for the 5th Defendant has cited and referenced the decision in the case of Ubora Housing Cooperative Society Ltd v triple Two Properties & 7 Others [2023] KECA 675] [KLR].

76. Secondly, learned counsel for the 5th Defendant has submitted that the Plaintiff herein has neither established nor demonstrated the existence of a prima facie case with a probability of success to warrant the grant of an order of temporary injunction or at all. In particular, it has been submitted that the suit properties, namely, L.R No's 2255/1 and 2255/2, which have been referenced are no longer in existence.

77. According to learned counsel for the 5th Defendant, the suit properties were sold to and in favour of the 5th Defendant by Sirikwa Auto Spares and upon the transfer and registration thereof in the name of the 5th Defendant, the 5th Defendant proceeded to and caused same [Suit properties] to be sub-divided.

78. In the circumstances, learned counsel for the 5th Defendant has submitted that the Plaintiff's claim are therefore in respect of non-existent parcel of lands. In this regard, it has been contended that the Plaintiff's claim is overtaken by events.

79. Thirdly, learned counsel for the 5th Defendant has submitted that the 5th Defendant herein bought and acquired the suit properties from a third party. Subsequently, it has been contended that the 5th Defendant caused the two [2] properties to be sub-divided culminating into the creation of L.R No's 2255/3 up to 2255/15.

80. On the other hand, learned counsel for the 5th Defendant has posited that upon the completion of the process of sub-division, the resultant sub-divisions were transferred and registered in the name of the 5th Defendant. In this regard, learned counsel has referenced the various certificates of official search which have been annexed to the Supporting Affidavit of Paul Maiyo sworn on 16th September 2024.

81. Premised on the foregoing, learned counsel for the 5th Defendant has therefore submitted that the 5th Defendant has established and demonstrated the existence of a prima facie case with a probability of success. In addition, it has also been contended that the 5th Defendant has also demonstrated that same [5th Defendant] shall be disposed to suffer irreparable loss.

82. To buttress the submissions pertaining to the disclosure of a prima facie case and the likelihood of irreparable loss arising, learned counsel for the 5th Defendant has cited and referenced Nguruman Ltd v Jan Bonde Nielsen & Others [2014] eKLR, Pius Kipchirchir Kogo v Franc Kimeli Tenai [2018] eKLR and Simon Kipng'etich Bett v Richard C Kandie [2012] eKLR, respectively.

83. Fourthly, learned counsel for the 5th Defendant has submitted that the court proceeded to and struck out ELC NO. E193 of 2024 between Smeth Valley Ltd v Arvind Kanji Patel, The Chief Land Registrar and The Director of Survey on 16th July 2024. Nevertheless, it was contended that the striking out of the said suit was based on an error and mistake apparent on the face of record.

84. In particular, learned counsel for the 5th Defendant has submitted that the said suit was struck out on the basis that same [ELC E193 of 2024] had been filed long after the 5th Defendant had been joined/impleaded in the current suit.

85. However, learned counsel for the 5th Defendant has posited that by the time the 5th Defendant was being joined into the instant suit, the other suit, namely, ELC E193 of 2024 had already been filed. To this end, it has been contended that the order striking out the said suit was therefore based on an error and mistake on the face of record.

86. To this end, learned counsel for the 5th Defendant has implored the court to review and set aside the limb of the ruling rendered on 16th July 2024 and thereafter to restore the suit vide ELC E193 of 2024.

87. In support of the submissions that the court ought to grant the reliefs pertaining to review, learned counsel for the 5th Defendant has cited and referenced inter alia Republic v Public Procurement Administrative Review Board & 2 Others [2018] eKLR, Muyodi Corporation & Another [2006] 1 EA 243.

88. Finally, learned counsel for the 5th Defendant has submitted that the court also ought to review the limb of the ruling rendered on 16th July 2024 as pertains to the extension of the orders of status quo in favour of the 8th Defendant. In this regard, it has been posited that the extension of the orders of status quo was made post the withdrawal of the suit and hence the court lacked the requisite jurisdiction to do so.

89. To buttress the submissions that the extension of the orders of status quo post the withdrawal of a suit was in error, learned counsel has cited and referenced the holding in Ochieng & 2 Others v Onyango [2024] KECA 201; Pricila Nyambura Njue v Geochem Middle East Ltd; Kenya Berau of Standard [2021] eKLR and Public Service Commission & 4 Others v Cheruyiot & 3 Others [2022] KECA 15, respectively.

90. Arising from the foregoing, learned counsel for the 5th Defendant has implored the court to find and hold that the Application dated 16th September 2024 is meritorious. In this regard, the court has been invited to grant the reliefs sought thereunder.

e. 7th Defendant's Submissions:

91. The 7th Defendant herein was present before the court on 19th September 2024 when directions were given pertaining to the filing and exchange of written submissions. However, on 14th October 2024, learned counsel for the 7th Defendant intimated that same had not filed any written submissions.

92. Furthermore, counsel for the 7th Defendant ventured forward and intimated to the court that the 7th Defendant shall not be filing any written submissions.

f. 8th and 9th Defendants' Submissions:

93. The 8th and 9th Defendants had not filed their written submissions when the matter came up for mention on 14th October 2024. Nevertheless, learned counsel thereafter sought to procure additional timeline to file and serve written submissions.

94. However, taking into account that the parties had each been granted sufficient timelines to file and serve written submissions, the court declined the request by and on behalf of the 8th and 9th Defendants.

95. In a nutshell, it is instructive to underscore that the 8th and 9th Defendants also did not file any written submissions in respect of the three [3] sets of the Applications that underpinned the instant ruling

Issues For Determination:

96. Having reviewed the three [3] Applications filed by and on behalf of the respective parties and the responses thereto and upon consideration of the written submissions filed by the respective parties, the following issues crystalize and are worthy of determination;

    i. Whether the Supporting Affidavit sworn by the Plaintiff on the 21st May 2024 is competent and legally tenable or otherwise.

    ii. Whether the Plaintiff has established and demonstrated the requisite grounds to warrant the grant of the orders of temporary and mandatory injunction, respectively.

    iii. Whether the 5th Defendant has established and demonstrated the requisite ingredients to warrant the grant of the orders of temporary injunction of otherwise.

    iv. Whether the 5th Defendant has established the requisite ingredients to warrant review of the orders made on 16th July 2024.

    v. Whether the 1st Defendant is a necessary party to the instant proceedings or otherwise.

    vi. What reliefs, if any; ought to be granted.

Analysis and Determination:

Issue Number 1 Whether the Supporting Affidavit sworn by the Plaintiff on the 21st May 2024 is competent and legally tenable or otherwise.

97. The Plaintiff first approached the court vide the Notice of Motion Application dated the 5th March 2024, and which Application was duly supported by an affidavit. Subsequently, the Plaintiff filed an Amended Notice of Motion Application dated the 21st May 2024 and which Amended Notice of Motion is similarly supported by an Affidavit [sic] sworn on the 21st May 2024.

98. Nevertheless, looking at the Supporting Affidavit sworn on 21st May 2024, it is evident and apparent that same [Supporting Affidavit] adverts to various additions, cancelations and underlining[s] which obviously connote that the deponent of the Supporting Affidavit was undertaking amendments thereof. To my mind, a Supporting Affidavit is evidence on oath and to that extent same [Supporting Affidavit] is solemn oath and thus cannot be the subject of any cancelation, addition and/or underlining, whose net effect amounts to amendment.

99. For ease of appreciation, google defines amendment as hereunder:

> " a minor change or addition designed to improve a text, piece of legislation, etc."

100. To my mind, the moment the deponent or the legal counsel of the Deponent of an affidavit endeavours to add, cancel or avail further information to an affidavit, such an endeavour constitutes amendment. In this regard, there is no gainsaying that the Supporting Affidavit sworn on 21st May 2024 has been duly and variously amended.

101. Nevertheless, even though the Supporting Affidavit contains evidence of substantial amendments [read additions, cancelations and underlining] the deponent has however not adverted to any amendment on the title of the Supporting Affidavit. However, the question that the court must grapple with is whether or not the inclusion of additional information constitutes amendment and if so, whether an affidavit is capable of amendment.

102. Pertinently, there is no gainsaying that an affidavit is not a pleading. To the contrary, an affidavit is solemn Oath and hence constitutes evidence. Whereas a pleading, including a notice of motion application can be amended, an affidavit cannot be amended.

103. Additionally, whenever a deponent or the legal counsel for the deponent endeavours to undertake an amendment of an affidavit, such an endeavour operates to negate, nullify and invalidate the impugned affidavit. To this end, it is my humble view that the Supporting Affidavit [sic] sworn on 21st May 2024 is invalid and thus a nullity ab initio.

104. To buttress the exposition of the law that an affidavit cannot be subjected to amendment of whatsoever nature, it suffices to cite and reference the decision of the Court of Appeal in the case of *Superior Homes (Kenya) PLC v Water Resources Authority & 9 others (Civil Appeal E330 of 2020)* [2024] KECA 1102 (KLR) (19 August 2024) (Judgment), where the court held and observed as hereunder:

> 76. Section 2 of the *Civil Procedure Act* defines "pleading" as follows:
>
> "pleading" includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant." From the above, an affidavit is not a pleading, and alleged special damages set out in an affidavit cannot be considered as pleaded special damages.
>
> Indeed, in Stephen Boro Githua v. Family Finance Building Society & 3 Others [2015] eKLR this Court held that:"As is trite law the contents of an affidavit constitute evidence on oath. An affidavit does not constitute a pleading. A pleading includes a summons, petition, a statement of claim or demand or a defence, a reply to a defence or counterclaim, all of which are subject to amendment, unlike an affidavit, which is evidence."

105. Secondly, there is the question as to whether the deponent of the Supporting Affidavit sworn on 21st May 2024 appeared before the commissioner of oaths in accordance with the provisions of Section 5 of the *Oaths and Statutory Declarations Act*. Instructively, paragraph 11 of the Supporting Affidavit states

that the deponent of the affidavit is currently outside the country. In my understanding, it means that at the time when the current affidavit and the Application were being prepared and commissioned, the deponent was not within the country.

106. For ease of appreciation and to put paragraph 11 of the Supporting Affidavit into perspective, it suffices to reproduce same. Same are reproduced as hereunder:

> " That I am currently outside the country and it seems that the 1st, 5th, 6th and 7th Defendants were monitoring my movements and illegally encroached and entered the suit property knowingly that I am not in the country".

107. My reading of the said paragraph [supra] drives me to the conclusion that as at the 21st May 2024, the deponent of the Supporting Affidavit was outside the country. In this regard, there is no gainsaying that the deponent could not therefore have appeared before the commissioner of Oaths who administered the oath in the manner adverted to at the foot of the Supporting Affidavit.

108. Quite clearly, there is a contradiction between the contents of paragraph 11 of the Supporting Affidavit and the jurat thereof insofar as the deponent would have not been outside the country yet at the same time same [deponent] was appearing before a commissioner of oath at Nairobi on even date.

109. Suffice it to posit that the Supporting Affidavit sworn on 21st May 2024 has not been sworn or declared in accordance with the provisions of Section 5 of the *Oaths and Statutory Declarations Act*, Chapter 15, Laws of Kenya.

110. On the other hand, there is a simmering perspective which touches on and concerns false swearing of affidavit and perjury. This aspect, creates some level of doubt in the mind of the court as to the veracity of the contents of the Supporting Affidavit.

111. Be that as it may, it is my humble opinion that where an affidavit is not sworn and commissioned in accordance with the provisions of Section 5 of the Oaths and Statutory Declaration Act, such an affidavit is negated and rendered invalid.

112. To this end, I adopt, endorse and reiterate the holding of the court in the case of REGINA MUNYIVA NTHENGE v KENYA COMMERCIAL BANK LTD (Civil Case 65B of 2003) [2005] KEHC 287 (KLR) (26 January 2005), where the court held thus;

> The second issue raised by the applicant is that the Application should be treated as unopposed because the Replying Affidavit is defective since it is not properly commissioned. Section 5 of the *Oaths and Statutory Declarations Act* provides that:
>
> "Every Commissioner for Oaths before whom any oath or affidavit is taken or made ...shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made in the jurat."
>
> The affidavit is shown as having been sworn at Machakos in the presence of Leah Mbuthia Commissioner of Oaths on 13/10/03 but whose stamp reads Nairobi. If the affidavit was sworn at Machakos, it should have been before a Commissioner for oaths in Machakos and the stamp should show likewise. The only conclusion one can reach on looking at this affidavit is that the place the affidavit was sworn and where it was commissioned are two different places. That is irregular and unacceptable and that affidavit is, therefore, fatally defective as it was not sworn in the presence of a Commissioner for Oaths.

It is likely that stamp was just affixed. This court would have no alternative but strike off the Replying Affidavit as it is not properly commissioned and that means that the Application would stand unopposed.

The other point taken by the applicant is whether the affidavit in reply was filed in time and whether it was properly on record. Order 50 Rule 16 (1) provides as follows:

113. The importance of complying with Section 5 of the Oaths and Statutory Declaration Act, Chapter 15, Laws of Kenya, was also highlighted by the Supreme Court in the case of *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli,Elijah Mbogo & Independent Electoral and Boundaries Commission (Civil Application 26 of 2018*) [2018] KESC 58 (KLR) (Civ) (7 September 2018) (Ruling), where the court held as hereunder;

(6) As regards the 1st Respondent, upon embarking on consideration of his 'Replying Affidavit', it came to the notice of the Court that the said affidavit is not signed, dated or commissioned. This posed the question to the Court: what is the effect of an affidavit that is not signed by the person who is said to be the deponent, not dated and/or commissioned by a Commissioner for Oaths/or magistrate?

(7) The making of affidavits is governed by the *Oaths and Statutory Declarations Act*, Cap 15 Laws of Kenya. Section 5 of the Act provides, thus:

"Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."

Further, Section 8 states:

"A magistrate or commissioner for oaths may take the declaration of any person voluntarily making and subscribing it before him in the form in the Schedule."

Hence, an affidavit must clearly state the place and date where it was made and it must be made before a Magistrate or a Commissioner for oaths.

114. Arising from the foregoing analysis, my answer to issue number one is threefold. Firstly, the Supporting Affidavit sworn on 21st May 2024 has been variously amended contrary to and in contravention of the provisions of the Oaths and Statutory Declaration Act, Chapter 15 Laws of Kenya.

115. Secondly, to the extent that an affidavit is solemn oath and thus not capable of amendment, whatsoever, the impugned amendments which are contained in the body of the Supporting Affidavit herein does render same [Supporting Affidavit] invalid and illegal for all intents and purposes.

116. Thirdly, that it is inconceivable that the deponent of the Supporting Affidavit would be said to be outside the country and whilst outside the country, the said deponent magically appears before a commissioner of oaths at Nairobi on 21st May 2024. Instructively, the commissioning of the Supporting Affidavit by the named commissioner of oaths whilst the deponent was outside the country calls into question the integrity of the oath that was [sic] administered.

117. In short, the Supporting Affidavit sworn on 21st May 2024 is rendered invalid on the basis of the infractions and omissions that were highlighted in the preceding paragraphs. To this end, the Supporting Affidavit courts being struck out and is hereby struck out from the record of the court.

Issue Number 2 Whether the Plaintiff has established and demonstrated the requisite grounds to warrant the grant of the orders of temporary and mandatory injunction, respectively.

118. The Plaintiff herein has approached the court seeking various reliefs. Notably, the Plaintiff has sought for an order of temporary injunction, mandatory injunction as well as a permanent injunction. Suffice it to point out that an order of permanent injunction cannot issue and/or be granted by a court of law on the basis of an interlocutory Application like the one beforehand.

119. To buttress the foregoing observations, it suffices to take cognizance of the holding of the court in the case of *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib (Civil Appeal 24 of 2016)* [2018] KEHC 5027 (KLR) (26 July 2018) (Judgment), where the court elaborated on and highlighted the import and tenor of a permanent injunction.

120. For coherence, the court stated and held as hereunder;

> 8. It is apparent from the pleadings that the Respondent was seeking a permanent injunction against disconnection of his electricity by the Appellant. A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.

121. The question as to whether or not an order of permanent injunction can be issued by a court vide an interlocutory Application was also elaborated by the court in the case of *Headmaster Kiembeni Baptist Primary School & Another v Pastor of Kiembeni Baptist Church (Civil Appeal 103 of 2004)* [2005] KEHC 2273 (KLR) (14 June 2005) (Judgment), where the court held as hereunder;

> I have also seen in other cases in which parties make Applications for interlocutory injunctive order similar to the one made in this matter which if granted as prayed would have the effect of granting permanent or mandatory injunctions and sometimes even eviction orders. Such practice is to be highly discouraged. Courts on their part should be wary of such Applications bearing in mind the fact that Order 39 does not provide for grant of permanent injunctions at interlocutory stage. See also Shah _v – Shah (1981) KLR 374.

122. Flowing from the foregoing decision, it is crystal clear that an order of permanent injunction cannot be sought for and or obtained on the basis of an interlocutory Application. In this regard, the court shall not concern itself with the prayer for permanent injunction as highlighted at the foot of prayer number 10 of the subject Application.

123. The court is therefore left to deal with the claims pertaining to and concerning temporary and mandatory injunction. In this regard, I shall therefore endeavour to ascertain and/or discern whether the Plaintiff has placed before the court plausible and cogent material to underpin the grant of the orders of temporary and mandatory injunction or otherwise.

124. To start with, the Plaintiff herein contends that the suit properties, namely, L.R Nos. 2255/1 and 2255/2 were registered in the name of Kanji Naran Patel, now deceased. Subsequently, upon the death of the deceased, the Plaintiff together with another sought for and obtained grant of letters of administration. Furthermore, it has been contended that the letters of administration were thereafter confirmed vide certificate of confirmation of grant issued on 14th February 1997.

125. Additionally, learned counsel for the Plaintiff has submitted that by virtue of being the legal administrator of the estate of the deceased, the Plaintiff herein is vested and bestowed with the lawful rights over and in respect of the suit properties.

126. To the extent that the suit properties are stated to belong to the estate of the deceased, it has been contended that no third party, the Defendants/Respondents not excepted, can deal with the suit properties without the permission and/or consent of the Plaintiff. However, it has been contended that the 1st, 5th, 6th and 7th Defendants have illegally entered upon and trespassed onto the suit property.

127. Based on the foregoing, it has been contended that the impugned actions by and on behalf of the 1st, 5th, 6th and 7th Defendants constitutes a violation of the proprietary rights of the Plaintiff. In particular, the provisions of Sections 24 and 25 of the *Land Registration Act* have been variously cited.

128. On the other hand, the 5th Defendant has contended that what has been referenced as the suit property by the Plaintiff herein were hitherto registered in the name of Sirikwa Auto Spares who thereafter sold and transferred the suit properties to and in favour of the 5th Defendant.

129. Furthermore, the 5th Defendant has contended that prior to and before purchasing what constitutes the suit properties, same [5th Defendant] undertook due diligence and ascertained that Sirikwa Auto Spares was indeed the registered owners of the properties in question. Consequently, the 5th Defendant confirms that same thereafter proceeded to and bought the two named properties.

130. Other than the foregoing, the 5th Defendant has also contended that upon purchasing the two named properties, same [the two properties] were transferred and registered in the name of the 5th Defendant. Thereafter it has been contended that the 5th Defendant proceeded to and caused the properties to be sub-divided culminating into the creation of 13 parcel of lands.

131. Arising from the foregoing, learned counsel for the 5th Defendant has therefore submitted that the 5th Defendant is a bona fide purchaser for value without notice of any defect in the Title of her predecessor.

132. Additionally, it has also been submitted that the properties that have been adverted to by the Plaintiff, namely, L.R No. 2255/1 and 2255/2, respectively, were long sub-divided and are thus non-existent. In this regard, it has been contended that the orders of temporary injunction that are being sought pertaining to L.R No. 2255/1 and 2255/2, cannot lawfully be issued and/or be granted.

133. Having reviewed the rival submissions by the parties, I beg to take the following position. Firstly, there is evidence that L.R No. 2255/1 and 2255/2 [the suit properties] have since been subdivided culminating into 13 parcels of land. Besides, there is also evidence that the resultant sub-divisions have since been duly registered and the requisite indentures have been availed before the court.

134. For good measure, the fact that the suit properties have since been sub-divided culminating into the resultant parcel of lands seems to be conceded by the Plaintiff herein. In particular, a glance at the Amended Plaint dated 21st May 2024 adverts to a prayer seeking to cancel [sic] the purported titles arising from the sub-division.

135. To my mind, the sub-division of L.R No's 2255/1 and 2255/2, respectively, would have the effect of extinguishing the named parcel of lands. Suffice it to point out that whether or not the sub-division was lawful or otherwise is a question of fact and law to be determined during a plenary hearing.

136. Be that as it may, the moment the original parcel of land is subjected to sub-division and the process is concluded culminating into the issuance of resultant titles, one cannot be heard to seek orders directed to and/or in respect of the non-existent parcel of land. In this regard, I am afraid that the prayer for

temporary injunction that is being sought for by the Plaintiff are in respect of non-existent parcels of land.

137. Secondly, there is no gainsaying that the 5th Defendant contends that same [5th Defendant] bought/ purchased L.R No's 2255/1 and 2255/2 [suit properties] from Sirikwa Auto Spares. In this regard, there is a pre-supposition that Sirikwa Auto Spares acquired the properties from someone. Nevertheless, the critical point is that the Plaintiff herein has not sought to implead [sic] Sirikwa Auto Spares, who is a critical party and who is the one said to have sold the properties to the 5th Defendant.

138. Yet again, I am afraid that there is a lacuna that impacts upon the Plaintiff's claim and thus negates proof of a prima facie case.

139. Thirdly, it is not lost on this court, that the Plaintiff's averments and documentation underpinning the claim to the suit property were contained at the foot of the Supporting Affidavit sworn on 21st May 2024. However, the said Supporting Affidavit has since been found to be deficient and invalid.

140. Having found and held that the Supporting Affidavit sworn on 21st May 2024 is invalid, there is no gainsaying that every other document that was attached thereto stood vitiated and were also rendered invalid. For coherence, it is worth repeating that whilst dealing with issue number one, the court held that the Supporting Affidavit is a candidate for expungement from the record of the court. For good measure, same [Supporting Affidavit] was indeed struck out.

141. Arising from the foregoing argument, it then means that the Application for injunction is only supported by the Supplementary Affidavit sworn on 7th August 2024. However, it suffices to underscore that the said affidavit does not advert to the question of ownership of the suit properties by the estate of the Deceased. In any event, the said Supplementary Affidavit has not exhibited any evidence of ownership of the suit properties by the estate of the deceased.

142. Pertinently, the court is left in a situation where the Plaintiff's claim as pertains to ownership of the suit properties is in limbo. Nevertheless, it is not lost on the court that the burden of establishing and demonstrating a prima facie case lies in shoulder of the Plaintiff.

143. To my mind, the totality of the issues which have been highlighted and addressed in the preceding paragraphs, drives me to the conclusion that the Plaintiff herein has neither demonstrated nor established a prima facie case with a probability of success.

144. To buttress the foregoing exposition of the law, I beg to reference the holding in the case of Mrao Ltd v First American Bank of Kenya Ltd & 2 others (Civil Appeal 39 of 2002) [2003] KECA 175 (KLR) (7 March 2003) (Judgment); where the Court of Appeal elaborated on the meaning and import of Prima facie case.

145. For good measure, the court stated thus:

> 4. A prima facie case in a civil Application includes but is not confined to a "genuine and arguable case." It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

146. Furthermore, what constitutes a prima facie case was re-visited by the Court of Appeal in the case of *Nguruman Limited versus Jan Bonde Nielson (Environment & Land Case 120 of 2010)* [2014] KEHC 1718 (KLR) (10 October 2014) (Ruling).

147. For ease of appreciation, the honourable court of appeal stated as hereunder:

> " Prima facie" is a Latin phrase for "at first sight", whose legal meaning and Application has been the subject of varying interpretation by courts in many jurisdictions. Phrases like "a serious question to be tried", "a question which is not vexatious or frivolous", "an arguable case" have been adopted to describe the burden imposed on the applicant to demonstrate the existence of prima facie case. The leading English House of Lords case of the American Cyanamid Co. Ethicon Ltd [1975] AC 396 is a case in point. The meaning of "prima facie case", in our view, should not be too much stretched to land in the loss of real purpose. The standard of prima facie case has been applied in this jurisdiction for over 55 years, at least in criminal cases, since the decision in Ramanlal Trambaklal Hatt V. Republic [1957] E.A. 332.
>
> Recently, this court in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for "prima facie case" in civil cases in the following words:
>
> "In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case.
>
> It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."
>
> We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.
>
> We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely.

148. Having come to the conclusion that the Plaintiff herein has neither established nor demonstrated the existence of a prima facie case, taking into account inter alia the non-existence of the suit properties and the failure to implead a critical player in the dispute, the question that does arise is whether the court ought to venture forward and discuss the issue of irreparable loss or otherwise.

149. In my humble view, the conditions which underpin/ anchor the grant of an order of temporary injunction are sequential in nature. In this regard, it is incumbent upon every Applicant, the Plaintiff not excepted, to surmount the first hurdle, namely, proof of prima facie case before venturing to the next.

150. Instructively, where an Applicant is unable to demonstrate and/or establish the existence of a prima facie case, then it is needless to venture forward and address the question of irreparable loss.

151. Put differently, the court is only called upon to venture forward and interrogate the existence or otherwise of irreparable loss where the Applicant has established and demonstrated a prima facie case with a probability of success.

152. To this end, I am reminded of the legal position that was espoused by the Court of Appeal in the case of Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86, where the Court of Appeal stated and held as hereunder;

> If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between.

153. Arising from the foregoing decision, it suffices to point out that having neither established nor demonstrated a prima facie case, this court is therefore not enjoined to consider whether or not irreparable loss would ensue, if the orders of temporary injunction are not granted.

154. Nevertheless and before departing from the subject issue, it is imperative to address the question of mandatory injunction. Suffice it to point out that an order of mandatory injunction can and does issue at an interlocutory stage. However, before granting such an order, the court must be satisfied that the Applicant has demonstrated a strong case and that the issue complained of can be remedied in a summary manner.

155. At any rate, there is no gainsaying that the grant of an order of mandatory injunction requires a proof which is slightly above the standard required in respect of an Application for temporary injunction. Simply put, the threshold for granting an order of mandatory injunction involves demonstration of peculiar and exceptional circumstances.

156. As pertains to the circumstances under which an order of mandatory injunction can issue, it suffices to cite and reiterate the holding of the Court of Appeal in the case of *Nation Media Group, Wilfred Kiboro & Wangethi Mwangi v John Harun Mwau (Civil Appeal 298 of 2005*) [2014] KECA 308 (KLR) (Civ) (17 October 2014) (Judgment).

157. For good measure, the court stated thus;

> It is trite law that for an interlocutory mandatory injunction to issue an applicant must demonstrate existence of and special circumstances. See *KENYA BREWERIES LIMITED vs. WASHINGTON OKEYO, Civil Application No. 332 of 2000*.
>
> Likewise, in volume 24 Halsbury's Laws of England, 4th Edition paragraph 948, the learned authors state as follows:
>
> > "A mandatory injunction can be granted on an interlocutory Application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff.... a mandatory injunction will be granted on an interlocutory Application."

158. Furthermore, the Court of Appeal ventured forward and stated as hereunder;

> We agree with Mr. Mogere that in an Application for a mandatory injunction the balance of convenience is not the only principle which an applicant has to satisfy as stated by the learned Judge at page 34 of the ruling. A different and higher standard than that in prohibitory injunctions is required before an interlocutory mandatory injunction is granted. Besides, existence of exceptional and special circumstances must be demonstrated as we have stated, a temporary mandatory injunction can only be granted in exceptional and in the clearest of cases. See *KENYA AIRPORTS AUTHORITY vs. PAUL NJOGU MUNGAI & OTHERS Civil Application No. 29 of 1997* (CA). As the court stated in the case of LOCABAIL INTERNATIONAL FINANCE LTD. vs. AGROEXPERT & OTHERS [1986] 1 ALL ER 901, the court has to have "a high degree of assurance that at the trial it would appear that the injunction had rightly been granted.....".

159. Having come to the conclusion that the Plaintiff herein has not satisfied the court on the existence of a prima facie case, I am afraid that the Plaintiff herein cannot partake of and/or procure an interlocutory mandatory injunction. For good measure, the threshold for granting an interlocutory mandatory injunction is higher than the one to be laid before the court for the grant of orders of temporary injunction.

160. In a nutshell, my answer to issue number two is threefold. Firstly, though the Plaintiff is seeking for orders of temporary injunction to restrain the impugned actions being taken over and in respect of L.R No's 2255/1 and 2255/2, there is no gainsaying that the two named properties are non-existent. In this regard, the orders of temporary injunction being sought for would be in futility.

161. Secondly, the Plaintiff was obliged to establish and demonstrate the existence of a prima facie case. However, the averments and documents which were essential towards demonstration of a prima facie case were contained at the foot of the Supporting Affidavit sworn on 21st May 2024. Sadly, the said affidavit was found to be fatally incompetent and was invalidated.

162. Notably and as a consequence, the Plaintiff herein has failed to demonstrate the existence of a prima facie case.

163. Thirdly, where one, the Plaintiff not excepted, cannot meet the lower threshold for grant of a temporary injunction, then no doubt, no order of mandatory injunction can issue and/or be granted.

Issue Number 3 Whether the 5th Defendant has established and demonstrated the requisite ingredients to warrant the grant of the orders of temporary injunction or otherwise.

164. Other than the Plaintiff herein who had sought for orders of temporary; mandatory and permanent injunction and which have been addressed in the preceding paragraphs, it is also worth recalling that the 5th Defendant also filed an Application for temporary injunction. For good measure, the Application by the 5th Defendant is dated 16th September 2024.

165. According to the 5th Defendant, same [5th Defendant] bought L.R No's 2255/1 and 2255/2 from M/s Sirikwa Auto Spares. Thereafter the two properties are said to have been transferred and registered in the name of the 5th Defendant.

166. Additionally, the 5th Defendant contended that upon the transfer and registration of L.R No's 2255/1 and 2255/2 in her [5th Defendant's] name, same proceeded to and caused the two properties to be subdivided into various sub-plots. In this regard, it was posited that there arose a total of 13 parcels of land and which have since been titled.

167. Other than the foregoing, the 5th Defendant also contended that upon purchasing and acquiring L.R No's 2255/1 and 2255/2, same [5th Defendant] entered upon and took possession of the properties. Furthermore, it was also contended that the 5th Defendant proceeded to and erected a perimeter wall.

168. Suffice it to underscore that the erection of the perimeter wall on the suit property has been adverted to and confirmed by the Plaintiff in his affidavit. To this end, there is no gainsaying that indeed the 5th Defendant was in occupation of the suit properties.

169. Further and in any event, it suffices to state that the perimeter wall that is complained of by the Plaintiff, is a structure which could not have been erected in a day. The obvious implication is that the 5th Defendant had been in occupation of the suit property for some time.

170. Other than the foregoing, there is also the aspect pertaining to the fact that L.R No's 2255/1 and 2255/2, respectively, have since been sub-divided and various title documents issued in favour of the 5th Defendant.

171. I am aware that there is contention touching on and concerning the legality or otherwise of the sub-division of L.R No's 2255/1 and 2255/2. However, it is not lost on this court that the question of legality or otherwise of the sub-division process and the resultant titles, is a matter that can only be interrogated during a plenary hearing.

172. At this juncture, it suffices to underscore that the 5th Defendant appears to have been issued with titles pertaining to the sub-divisions. In addition, there is no gainsaying that the said titles emanated from the 2nd Respondent. Besides, it is worth pointing out that the 5th Defendant has also availed certificate of official search [sic] issued by the 2nd Defendant.

173. To my mind, the title documents fronted by the 5th Defendant and coupled with the certificates of official search demonstrate that the 5th Defendant has some legal rights or interests in the resultant titles. At any rate, it suffices to point out that the certificates of official search are deemed as prima facie evidence of ownership.

174. As pertains to the evidential value of certificate of official searches or extract of titles, it is imperative to cite and reference the provisions of Sections 34 and 35 of the *Land Registration Act*, 2012.

175. Same states as hereunder:

> Searches and copies. 34.
>
> A person who requires an official search in respect of any parcel, shall be entitled to receive particulars of the subsisting entries in the register, certified copies of any document, the cadastral map, or plan filed in the registry upon payment of the prescribed fee.
>
> Evidence. 35.
>
> (1) Every document purporting to be signed by a Registrar shall, in all proceedings, be presumed to have been so signed unless the contrary is proved.
>
> (2) Every copy of or extract from a document certified by the Registrar to be a true copy or extract shall, in all proceedings, be received as prima facie evidence of the contents of the document.
>
> (3) Every entry or note in or on any register, cadastral map or filed plan shall be received in all proceedings as conclusive evidence of the matter or transaction that it records.
>
> (4) No process for compelling the production of the register, or of the cadastral map, or of any filed instrument or plan, shall issue from any court except with the leave of that court, which

leave shall not be granted if a certified copy or extract will suffice, and any such process, if issued, shall bear thereon a statement that it is issued with the leave of the court.

176. Other than the foregoing, it is also instructive to take cognizance of the holding in the case of Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others [2019] eKLR, [per Ouko PCA], where the court stated as hereunder:

> If a certificate of lease duly issued by the Registrar is prima facie evidence of ownership and if the owner is proved to have exercised due diligence at the point of acquisition, on what basis could the appellants' petition for protection under Article 40 be defeated?
>
> It has long been accepted beyond debate that the land registration process in Kenya is a product of the Torrens system. This was acknowledged in, among a long line of decided cases, this Court's judgments in Dr. *Joseph Arap Ngok V. Justice Moijo ole Keiwua & 5 others, Civil Appeal No. Nai. 60 of 1997* and *Charles Karathe Kiarie & 2 Others V Administrators of Estate of John Wallance Muthare (deceased) & 5 others, Civil Appeal 225 of 2006*.
>
> Under that system, the title of a bona fide purchaser for value without notice of fraud cannot be impeached;
>
> that the land register must mirror all currently active registrable interests that affect a particular parcel of land; that the Government, as the keeper of the master record of all land in Kenya and their owners, guarantees indefeasibility of all rights and interests shown in the land register against the entire world; and that in case of loss arising from an error in registration, the Government guarantees the person affected of compensation. Finally, the statutory presumption of indefeasibility and conclusiveness of title based on the register can be rebutted only by proof of fraud or misrepresentation which the buyer is himself shown to have been involved.

177. I am aware that what is before me is an interlocutory application for temporary injunction. I am equally aware that what constitutes prima facie evidence may not be conclusive evidence. For good measure, the conclusivity of the evidence must await the requisite interrogation and due cross-examination during the plenary hearing.

178. However, the point is that the documentation that have been put forth by and on behalf of the 5th Defendant and which have been certified by the Chief Land Registrar, appear [I repeat, appear] to espouse a position that the resultant parcel[s] of Land belong to and are registered in the names of the 5th Defendant.

179. Without belabouring the point, I beg to underscore that the totality of the evidence placed before me demonstrate that the 5th Defendant has indeed established a prima facie case with a probability of success. In any event, there is no gainsaying that the 5th Defendant has filed a counterclaim.

180. Other than the question of prima facie case, which I have alluded to in terms of the preceding paragraphs, there is the aspect of irreparable loss. Suffice it to posit that if the registered owner who has demonstrated a prima facie case is denied and deprived of the right of entry, occupation, possession and use, then no doubt irreparable loss will accrue.

181. Pertinently, what constitutes irreparable loss has received various judicial pronouncements. In particular, irreparable loss was defined by the Court of Appeal in the case of Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others [2015] eKLR

> Giella V Cassman Brown & Co Ltd (supra) stipulates that an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages. In Nguruman Limited V. Jan Bonde Nielsen & 2 Others (supra), this Court stated as follows on irreparable injury or damage:
>
> "On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

182. Without belabouring the point, I hold the view that on a prima facie basis, the 5th Defendant has established and demonstrated a likelihood of irreparable loss accruing and/or arising unless injunctive orders are issued.

183. Notably and unlike the Plaintiff, the 5th Defendant is only seeking for orders of temporary injunction and not mandatory injunction. In this regard, the connotation is that the 5th Defendant is in actual and constructive possession of the suit properties.

184. Flowing from the arguments which have been adverted to in the preceding paragraphs, my answer to issue number three [3] is threefold. Firstly, the 5th Defendant has established and demonstrated on a prima facie basis that same is currently the registered proprietor of the various sub-divisions that arose from L.R No's 2255/1 and 2255/2, respectively.

185. Secondly, having demonstrated on a prima facie basis that same [5th Defendant] is the registered proprietor of the resultant sub-divisions, there is no gainsaying that same [5th Defendant] shall be disposed to suffer irreparable loss.

186. Thirdly, it is my humble view, that the 5th Defendant, unlike the Plaintiff has met and satisfied the requisite conditions/ ingredients to warrant the grant of orders of temporary injunction.

Issue Number 4 Whether the 5th Defendant has established the requisite ingredients to warrant review of the orders made on the 16th July 2024.

187. The 5th Defendant herein has also sought for the orders of review and essentially review of the orders of the court issued on 16th July 2024. In particular, the 5th Defendant is aggrieved with the limb of the order which struck out the 5th Defendant's suit, namely, Nairobi ELC No. E193 of 2024 between Smeth Vally Ltd versus Arvind Kanji Patel, The Chief Land Registrar and The Director of Survey.

188. To the extent that the 5th Defendant was/is aggrieved by the said orders, same [5th Defendant] is now before the court seeking to have the impugned ruling and order reviewed and set aside. Furthermore,

the 5th Defendant is desirous that upon review and setting aside of the said ruling and order, the court be pleased to restore Nairobi ELC No. E193 of 2024.

189. According to the 5th Defendant, there are errors and mistakes apparent on the face of the said ruling including the fact that Nairobi ELC No. E193 of 2024 was filed before the 5th Defendant was joined into and made a party in the instant matter.

190. On the other hand, learned counsel for the Plaintiff has submitted that the limb of the Application by the 5th Defendant and which seeks the orders of review is not only misconceived but same is legally untenable. Furthermore, learned counsel for the Plaintiff has posited that the court is functus officio having made precipitate and deliberate orders striking out Nairobi ELC No. E193 of 2024.

191. In addressing the 5th Defendant's prayer for review of the order arising from the ruling of 16th July 2024, I beg to adopt and deploy a two-pronged approach.

192. Firstly, it is worthy to point out that learned counsel for the 5th Defendant elaborately addressed the court on the timelines when the 5th Defendant's suit, namely, Nairobi ELC No. E193 of 2024 was filed. Furthermore, learned counsel for the 5th Defendant also addressed the court on the question on when the 5th Defendant was joined into the instant matter. For good measure, the elaborate address by learned counsel for the 5th Defendant are aptly captured in the proceedings of the court. [See page 200 of the record of Application filed by the 5th Defendant].

193. From the foregoing, what comes out clearly is that the court took into account, the representations that were made by and on behalf of the 5th Defendant and thereafter the court came to an intentional and deliberate conclusion culminating into the striking out of the impugned suit.

194. Suffice it to posit that the court may or may not have been wrong, but the critical point is that the court made an intentional and deliberate decision informed by the law. In this regard, if the court was wrong then what arises out of the decision is an erroneous interpretation and application of the law. Simply put, there is a dichotomy between an erroneous exposition of the law on one hand; and an error and mistake, on the other hand.

195. Whereas an error and mistake can attract an application for review under the provisions of Order 45 of the Civil Procedure Rules 2010; an erroneous exposition of the law can only be redressed vide an appeal in accordance with the prescription of the law.

196. To my mind, the impugned decision made on 16th July 2024 does not espouse any error or mistake. Furthermore, what the 5th Defendant seeks to canvass as an error or mistake is a critical interpretation and application of the law. Suffice it to posit that the application by the 5th Defendant is a disguised invitation to have the court to sit on appeal over and in respect of own decision.

197. I am afraid that the invitation which has been disguised as a review, will be tantamount to this court sitting on appeal on own decision. Such a recourse is inimical and antithetical to the rule of law and the general administration of justice at large.

198. To underscore the dichotomy of what constitutes an error and mistake on one hand and an erroneous exposition of the law on the other hand, it suffices to take cognizance of the decision in *National Bank of Kenya Limited v Ndungu Njau (Civil Appeal 211 of 1996)* [1997] KECA 71 (KLR) (27 May 1997) (Judgment), where the court considered the distinction between the two [2] concepts.

199. For coherence, the Court stated thus:

> A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.
>
> In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent.
>
> If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise, we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.

200. Quite clearly, this court reviewed the elaborate and comprehensive submissions by learned counsel Mr. Rapando who appeared for the 5th Defendant on 16th July 2024 and thereafter the court made a conscious, intentional and deliberate finding underpinned by the impugned rulings. For coherence, if the 5th Defendant was aggrieved, same [5th Defendant] was at liberty to appeal.

201. Arising from the foregoing, I am not persuaded that the order striking out Nairobi ELC No. E193 of 2024 is amenable to review either in the manner sought or otherwise.

202. Notwithstanding the foregoing, there is yet another perspective that merits mention and a short discussion. To this end, it is instructive to recall that vide the orders issued on 16th July 2024, the court struck out Nairobi ELC No. E193 of 2024 and thereafter granted liberty to the 5th Defendant to file a Statement of Defence and Counterclaim in respect of the instant matter.

203. First forward, there is no gainsaying that the 5th Defendant duly complied with the limb of the order pertaining to the filing of a Statement of Defence and Counterclaim. For ease of appreciation, the 5th Defendant has since filed an elaborate counterclaim which reproduces the same reliefs as the ones which were contained at the foot of the Plaint vide Nairobi ELC No. E193 of 2024.

204. Consequently, the question that does arise is what shall happen if the 5th Defendant's suit, namely, Nairobi ELC No. E193 of 2024 were to be restored. Simply put, the 5th Defendant would be having a suit and a cross suit touching on the same subject matter.

205. Quite clearly, the outcome of the limb of the Application seeking for review would be untidy and otherwise an absurdity. To my mind, the 5th Defendant is properly before the court vide the counterclaim and if same [5th Defendant] ultimately proves her case, same [5th Defendant] would partake of the same reliefs/ remedies as the ones which stood at the foot of Nairobi ELC No. E193 of 2024.

206. Premised on the foregoing, I am afraid that the limb of the Application that seeks for review of the ruling and the resultant order made on 16th July 2024 is not only misconceived, but same is legally untenable.

207. Finally, on the issue of review, the 5th Defendant has also sought for review of the ruling rendered on 16th July 2024 as pertains to the extension of the interim orders that had hitherto been granted in ELC No. E130 of 2024. Instructively, the 5th Defendant's argument is that the said interim orders were extended after the suit had been withdrawn.

208. However, what the 5th Defendant is not disclosing is that the withdrawal of ELC No. E130 of 2024 was a stop gap measure towards the filing of a defence and a counterclaim by the 8th Defendant in respect of the instant matter.

209. Furthermore, it is not lost on this court that the circumstances preceding the withdrawal of ELC No. E130 of 2024 were such that the Plaintiff in the said suit was deserving of interim protection to avert an injustice and undue prejudice.

210. Lastly, it is imperative to underscore that this court is both a court of law and a court of equity. Besides, this court is imbued with inherent/ intrinsic jurisdiction pursuant to Section 3A of the *Civil Procedure Act* and Section 13[7] of the *Environment and Land Court Act*. Consequently, the extent and scope of this courts intrinsic and residual jurisdiction is unfettered, provided the orders are intended to serve the ends of justice.

211. Before departing from the issue, it suffices to underscore the extent, scope and tenor of what constitutes inherent jurisdiction. To this end, the decision of the Supreme Court of Kenya in the case of Narok County Government versus Ntutu & 2 others (Petition 3 of 2015) [2018] KESC 11 (KLR) (11 December 2018) (Judgment) is succinct and apt.

212. For coherence, the Supreme Court highlighted the extent and scope of inherent jurisdiction in the following manner;

> 95. We are also persuaded by the Supreme Court of India decision in Delhi Judicial Service v State of Gujarat and Ors. 1991 AIR 2176, 1991 SCR (3) 936 delivered on 11 September, 1991, where the court deliberated on this unique jurisdiction in these words:
>
> "...this court as a court of record has power to punish for contempt of itself and also something else which could fall within the inherent jurisdiction of a court of record. In interpreting *the Constitution*, it is not permissible to adopt a construction which would render any expression superfluous or redundant. The courts ought not accept any such construction.
>
> While construing article 129, it is not permissible to ignore the significance and impact of the inclusive power conferred on the Supreme Court. Since, the Supreme Court is designed by *the Constitution* as a court of record and as the Founding Fathers were aware that a superior court of record had inherent power ....."
>
> 96. We are further persuaded by the South African Supreme Court decision in the case of Andre Oosthuizen v Road Accident Fund (258/10) [2011] ZASCA 118 (06 July 2011) where the court, while invoking its inherent jurisdiction held that:
>
> "Our courts derive their power from *the Constitution* and the statutes that regulate them. Historically the supreme court (now the high court), in addition to the powers it enjoyed in terms of statute, has always had additional powers to regulate its own process in the interests of justice. This was described as an exercise of its inherent jurisdiction."
>
> 97. We furthermore note that Jerold Taitz succinctly describes the inherent jurisdiction of the Supreme Court as follows in his book, 'The Inherent Jurisdiction of the Supreme Court' (1985) pp 8-9:

"...This latter jurisdiction should be seen as those (unwritten) powers, ancillary to its common law and statutory powers, without which the court would be unable to act in accordance with justice and good reason. The inherent powers of the court are quite separate and distinct from its common law and its statutory powers, eg in the exercise of its inherent jurisdiction the court may regulate its own procedure independently of the Rules of Court."

98. . Back home, the Court of Appeal in addressing the point at hand in Kenya Power & Lighting Company v Njumbi Residents Association & another [2015] eKLR cited Ouko J (as he then was) In the matter of the Estate of George M'Mboroki, Meru HCSC No. 357 of 2004 and aptly put it that;

"... the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular, to ensure the observance of the due process of the law, to prevent abuse of process to do justice between the parties".

99. Further in Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited [2014] eKLR the Court of Appeal set out the principles to guide the Court in exercising inherent jurisdiction in these words;

"The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection..." (Emphasis added.)

100. The conclusion drawn from the above citations is that this court, indeed any other appellate court, even where there are no specific provisions to do an act, has inherent and/or residual powers to act in a fair or equitable manner in the interest of justice and/or to ensure the observance of the due process of the law. Therein also lies the power for the court to act to prevent abuse of court process by one party so that fairness is maintained between all parties.

101. The consequence of the foregoing is that, we find that this matter warrants this court's consideration, and to what extent given its importance. The issue before us, we are certain, is also exceptional and would require that we invoke this court's inherent jurisdiction to hear and determine the same in the context of the appeal before us. In this regard, we echo our pronouncement in the case of Fredrick Otieno Outa v Jared Odoyo Okello & 3 others, [2017] eKLR where in considering the question whether this court can review its own judgment, the court said that in exceptional circumstances, and so as to meet the ends of justice, the court may invoke its inherent jurisdiction to consider and review its own judgment. Hence, we invoke this court's inherent jurisdiction to admit and consider this appeal limited only to a consideration of the question;

213. Arising from the foregoing analysis, I am not persuaded that any basis has been laid and/or established to warrant the grant of the orders of review in the manner adverted to at the foot of the Application dated 16th September 2024.

Issue Number 5 Whether the 1st Defendant is a necessary party to the instant proceedings or otherwise.

214. Other than the Application filed by the Plaintiff and the 5th Defendant, it is imperative to state that the 1st Defendant herein also filed an application and in respect of which same [1st Defendant] sought to have her name expunged from the proceedings.

215. According to the 1st Defendant, the dispute beforehand touches on and concerns ownership of L.R No's 2255/1 and 2255/2 [which have since subdivided]. Furthermore, the 1st Defendant contends that same [1st Defendant] has no rights, interests or claim whatsoever over the suit properties.

216. On the other hand, the 1st Defendant has also posited that same is not associated with the 5th Defendant. In any event, it has been contended that the dispute beforehand essentially pits the Plaintiff on one hand and the 5th Defendant on the other hand.

217. Premised on the foregoing, learned counsel for the 1st Defendant has therefore submitted that the 1st Defendant is neither interested in the suit property nor is same [1st Defendant] a necessary party.

218. On the contrary, learned counsel for the Plaintiff has submitted that the 1st Defendant is a necessary party to the suit. In particular, it has been contended that the 1st Defendant was sighted on the suit property on the date when the offensive invasion occurred.

219. On the other hand, it has been submitted that the 1st Defendant is the registered owner of motor vehicle number KBH 193W, which motor vehicle was used and deployed during what has been termed as the trespass to the suit property.

220. Having reviewed the rival submissions, it is not lost on the court that the dispute beforehand relates to ownership of L.R No's 2255/1 and 2255/2 [which have since been subdivided]. To this end, the court will be engaged with the question of who is the legitimate owner of the suit properties as between the Plaintiff on one hand and the 5th Defendant on the other hand.

221. To my mind, even assuming that the 1st Defendant was an agent of the 5th Defendant [which is not the case] no suit could be filed against the 1st Defendant in her own personal capacity. For good measure, there is no gainsaying that a company, the 5th Defendant not excepted, is separate and distinct from its shareholders, promoters, subscribers and/or directors.

222. At any rate, though the Plaintiff adverts to the fact that the 1st Defendant was sighted on the suit property and that her motor vehicle namely KBH 193W was utilized, there is however no nexus or proximity that has been established between the 1st Defendant and the suit properties.

223. In my humble view, a necessary party is such a party who will be affected by the proceedings and orders of the court or better still, whose presence will enable the Court to arrive at a just decision in a matter. Furthermore, a necessary party is one against whom a direct relief is being sought and/or pursued. In any event, the relief being sought must be precipitate and realistic. [See Pravin Bowry v John Ward [2015] eKLR].

224. To my mind, I am unable to discern any nexus between the 1st Defendant and the suit properties. Similarly, I am also unable to discern any claim the Plaintiff has or would have against the 1st Defendant. For clarity, if there was doubt about the identity of the person who had [sic] trespassed onto [sic] the Plaintiff's properties, then the coming to the fore of the 5th Defendant clarified the scenario.

225. Nevertheless, I am certain in my mind, that all the reliefs and remedies, if any, that the Plaintiff is keen to pursue can be pursued and procured without the involvement of the 1st Defendant.

226. Finally, it is my finding and holding that the 1st Defendant herein has been improperly impleaded and joined in the instant suit. In this regard, the court is seized of the requisite jurisdiction to decree the striking out of the 1st Defendant's name from the suit vide the provisions of Order 1 Rule 10[2] of the Civil Procedure Rules, 2010.

227. Arising from the analysis, my answer to issue number five is to the effect that the 1st Defendant has been improperly joined and/or impleaded improperly. For good measure, the dispute beforehand pits the Plaintiff on one hand and the 5th Defendant on the other hand, as concerns the ownership of the Suit properties.

228. Be that as it may, the Government officers and Departments have been impleaded on the basis of their statutory functions and/or mandates.

Issue Number 6 What reliefs, if any, ought to be granted.

229. The Plaintiff sought for a myriad of reliefs at the foot of the Application dated 21st May 2024. Suffice it to point out that the details of the reliefs under reference were reproduced and highlighted in the preamble of the ruling herein.

230. Given the diverse nature of the reliefs being sought by the Plaintiff, it is instructive to consider the feature of the main reliefs sought and thereafter render a determination as to whether or not the reliefs would suffice, taking into account the evidence and the applicable Law.

231. To start with, the Plaintiff herein had sought for an order of temporary injunction barring the 1st, 5th, 6th and 7th Defendants either by themselves, agents, servants and/or any one acting under their instructions from demolishing the Plaintiff's structures standing on L.R No's 2255/1 and 2255/2 [the suit properties].

232. As pertains to whether or not the order of temporary injunction would issue, it suffices to recall that whilst dealing with issue number two [2]; this court found and held that the suit properties in respect of which the injunctive orders are being sought are non-existent.

233. Additionally, it is also worthy to recall that the court also found and held that M/s Sirikwa Auto Spares, who is said to have sold the suit properties to the 5th Defendant prior to their subsequent sub-division, was not impleaded. In this regard, it is the finding of the court that the prayer for temporary injunction is not merited.

234. The second pertinent relief that has been sought for by the Plaintiff is an order of mandatory injunction whose purport is to compel the 1st, 5th, 6th and 7th Defendants to remove the structures and the perimeter wall fence erected on [sic] the Plaintiff's land. It is not lost on the court that the grant of an order of mandatory injunction requires proof of peculiar and exceptional circumstances. However, the court was not treated to any such exceptional and peculiar circumstances in the manner espoused by the law.

235. Notwithstanding the foregoing, there is no gainsaying that the court found and held that currently the suit properties stand sub-divided and hence same are non-existent. Furthermore, it is also worth recalling that the court found that the 5th Defendant currently holds titles to and in respect of the resultant sub-divisions.

236. In this regard, it is therefore my finding and holding that an order of mandatory injunction is not apposite in the instant case. For coherence, the grant of such an order, may at this juncture be inimical to the provisions of Sections 24 and 25 of the *Land Registration Act*, 2012.

237. The third pertinent relief that has been sought relates to an injunction to restrain the 2nd Defendant [Chief Land Registrar] from issuing certificates of title to the 1st, 5th, 6th and 7th Defendants as pertains to the suit property. Nevertheless, there is no gainsaying that the 5th Defendant availed and exhibited to the court copies of indenture duly registered at the land registry relating to the titles of the suit properties.

238. For good measure, evidence abound that the indenture[s] in favour of the 5th Defendant were registered in the year 2021.

239. Quite clearly, the Plaintiff is seeking for a temporary injunction to bar the Chief Land Registrar from issuing [sic] certificate of titles over the suit properties, yet such titles were already issued. In my humble view, the prayer to prohibit and/or bar the issuance of [sic] certificate of titles is overtaken by events and rendered otiose.

240. The fourth pertinent prayer relates to an order of injunction to bar and/or prohibit the 3rd Defendant from processing, preparing and/or issuing Deed plans pertaining to the sub-divisions. Yet again, there is no gainsaying that the subdivisions that arose from the suit properties, were duly processed and concluded. Suffice it to point out that the deed plans were prepared, checked and approved culminating into the issuance of the certificates of title underpinning the resultant parcels of land.

241. To my mind, the injunctive orders being sought as against the 3rd Defendant [Director of Survey] are also misconceived and legally untenable. For coherence, the grant of such an injunctive order would be an exercise in futility and vanity.

242. The fifth pertinent relief that has been highlighted at the foot of the Amended Notice of Motion Application relates to an order of permanent injunction. Suffices it to point out that an order of permanent injunction is a precipitate and substantive order and same can only issue at the tail end of a hearing. For good measure, an order of permanent injunction is underpinned by a judgment and not otherwise.

243. At any rate, there is no gainsaying that an order of permanent injunction cannot issue at the foot of an interlocutory application. This legal position is trite, hackneyed and well established. [See *Headmaster Kiembeni Baptist Primary School & Another v Pastor of Kiembeni Baptist Church (Civil Appeal 103 of 2004*) [2005] KEHC 2273 (KLR) (14 June 2005) (Judgment)].

244. The final substantive prayer relates to the consolidation of various suits, namely, ELC E193 of 2024, ELC E130 of 2024 and ELC E170 of 2024 with the current suit. Whereas the prayer was ipso facto meritorious at the time of the filing of the Application, same [prayer for consolidation] was rendered superfluous by supervening circumstances.

245. Notably, on 16th July 2024, the advocates for the parties in ELC E130 of 2024 and ELC E170 of 2024 sought leave to withdraw the suits and to be allowed to file counterclaim[s] in respect of the instant matter. Notably, the said suits were duly withdrawn and are now non-existent.

246. On the other hand, the suit vide ELC No. E193 of 2024 was the subject of a ruling rendered on the same date, namely, 16th July 2024; and wherein the court proceeded to and struck out the suit. Furthermore, the court granted liberty to the Plaintiff to file a counterclaim in respect of the instant matter.

247. It is worth recalling that the Plaintiff in ELC No. E193 of 2024 and who is the 5th Defendant herein has since filed a Counterclaim. Arising from the foregoing, it is crystal clear that the various suits [whose details have been highlighted vide prayer 15 of the Application] are no longer in existence. In this regard, the prayer for consolidation was rendered moot.

248. Other than the Plaintiff, the 5th Defendant also filed an application dated 16th September 2024 and wherein same sought for a plethora of reliefs. In this regard, it suffices to examine the various reliefs sought and determine whether same are meritorious or otherwise.

249. To start with, the 5th Defendant sought to have the orders issued on 8th April 2024 vide Nairobi ELC No. E130 of 2024 and subsequently extended on 16th July 2024 to be reviewed and set aside. Instructively, the 5th Defendant contended that the said orders ought not to have been extended post the withdrawal of the suit underpinning the issuance.

250. Be that as it may, this court whilst dealing with issue number four [4] found and held that the extension of the said orders was intended to address the intervening situation between the withdrawal of the suit and the actualization of the liberty which was granted to the Plaintiff in ELC No. E130 of 2024, to file a Counterclaim.

251. Other than the foregoing, it is not lost on this court that the court is imbued with inherent, intrinsic and residual jurisdiction to achieve the interests of justice and avert a miscarriage of justice.

252. The second aspect of the reliefs sought by the 5th Defendant concerns the review of the Ruling rendered on 16th July 2024 and the limb striking out ELC No. E193 of 2024. Yet again, it is worth recalling that the court has since addressed the absurdity that is likely to accrue and/or arise, if the said prayer is allowed.

253. Finally, the 5th Defendant sought for an order of temporary injunction to prohibit the Plaintiff, the 8th and 9th Defendants from entering upon and or interfering with the resultant sub-divisions which are currently registered in the name of the 5th Defendant.

254. Whilst dealing with issue number three [3], this court found and held that prima facie, the 5th Defendant is currently registered as the proprietor of the various parcels of land namely L.R No's 2255/3 up to 2255/16, respectively. In this regard, the court found and held that the 5th Defendant therefore merits the protection and vindication by the court.

255. In a nutshell, it is worth recalling that the court came to the conclusion that the 5th Defendant had established and demonstrated a basis for the grant/issuance of orders of temporary injunction.

256. Finally, the 1st Defendant filed an application and wherein same sought to be struck off the instant suit. Notably, the 1st Defendant contended that same has no claim and/or stake in the suit property.

257. Having reviewed the Application dated 6th May 2024, and the response thereto, the court came to the conclusion that the 1st Defendant was not properly impleaded. In any event, the court also found and held that no relief or claim is attributable to the 1st Defendant. In this regard, the finding of the court was to the effect that the 1st Defendant's name ought to be struck out.

Final Disposition:

258. Flowing from the analysis, [details contained in the body of the ruling], it must have become crystal clear that the Plaintiff herein was unable to discharge the burden of proof cast upon him. In short, the Plaintiff has neither established nor demonstrated the requisite ingredients that underpin the grant of the orders of temporary, mandatory and permanent injunction.

259. On the contrary, the 5th Defendant has placed before the court plausible and cogent evidence to demonstrate that same [5th Defendant] is currently the registered owner of L.R No's 2255/3 up to 2255/15, respectively.

260. In the premises, the final orders that commend themselves to the court are as hereunder;

a. The Plaintiff's Amended Notice of Motion Application dated 21st May 2024, be and is hereby dismissed in its entirety.

i. Costs of the Application be and are hereby awarded to the 1st and 5th Defendants only.

b. The 1st Defendant's Application dated 6th May 2024, be and is hereby allowed.

i. Consequently, the 1st Defendant's name be and is hereby struck off the record of the court.

ii. Costs of the Application and the suit be and are hereby awarded to the 1st Defendant.

iii. The costs in terms of [ii] shall be borne by the Plaintiff

c. The Application dated 16th September 2024, be and is hereby allowed in terms of prayer [g] only.

i. The costs of the Application shall be borne by the Plaintiff.

261. Taking into account the orders of the court [details highlighted in the preceding paragraph], there is no gainsaying that the orders of interim injunction and status quo that had hitherto been issued in favour of the Plaintiff are now overtaken by events.

262. Consequently and in this regard, the interim orders of injunction and status quo hitherto granted and variously extended are hereby vacated/discharged.

263. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF NOVEMBER 2024

OGUTTU MBOYA,

JUDGE.

In the presence of:

Benson – court Assistant.

Ms. Anyango Opiyo for the Plaintiff.

Mr. Elias Ouma for the 1st Defendant.

Mr. Allan Kamau [Principal litigation counsel] for the 2nd, 3rd and 4th Defendants.

Mr. Rapando for the 5th Defendant.

Mrs. Maina for the 7th Defendant.

Ms. Koile for the 8th and 9th Defendants.