



**Otinga & another v Ola Energy Kenya Limited ((formerly Libya Kenya Limited));  
Times Touch Enterprises Limited (Intended Interested Party) (Environment and Land  
Case Civil Suit E126 of 2022) [2023] KEELC 16164 (KLR) (8 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16164 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND CASE CIVIL SUIT E126 OF 2022  
LL NAIKUNI, J  
MARCH 8, 2023**

**BETWEEN**

**IRENE JULIET OTINGA ..... 1<sup>ST</sup> PLAINTIFF**

**ALEX SHIVACHI LUYALI (SUING AS THE PERSONAL REPRESENTATIVE OF  
THE ESTATE OF LATE EZEKIEL LUYALI LUYAI) ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**OLA ENERGY KENYA LIMITED (FORMERLY LIBYA KENYA  
LIMITED) ..... DEFENDANT  
(FORMERLY LIBYA KENYA LIMITED)**

**AND**

**TIMES TOUCH ENTERPRISES LIMITED ... INTENDED INTERESTED PARTY**

**RULING**

**I. Introduction**

1. What is before this Honorable Court for hearing and its determination are three (3) applications being – the Notice of Motion application by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs – M/s. Irene Juliet Otinga and Alex Shivachi Luyali (suing as the personal representative of the Estate of late Ezekiel Luyali Luyai)” dated 2<sup>nd</sup> November, 2022; another one dated 28<sup>th</sup> November, 2022 by “the Times Touch Enterprises Limited, the Intended Interested party herein and the third one is dated 7<sup>th</sup> February, 2023 by the Defendant, “Ola Energy Kenya Limited” respectively. Apparently, though at different times, the said applications seem to have been filed under a certificate of urgency. The applications were brought under the dint of the provisions of Sections 1A, 1B and 3A of Civil Procedure Act Chapter 21 of Laws of



Kenya and Order 1 Rule 10, Order 40 Rules 1, 2, 3, 4, 8 and 10, Order 50 and Order 51 Rule 1 of the Civil Procedure Rules, 2010.

2. For ease of reference the Honorable Court has decided to deal with all the three applications simultaneously but segregate the issues as distinctively brought out from each of the applications.

## **II. The Notice of Motion dated 2<sup>nd</sup> November, 2022 by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants**

3. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants sought for the following orders:-
  - a. Spent.
  - b. That pending the inter- parties hearing of the Application, a temporary order of injunction is issued restraining the Defendants by itself, it's officers, agents and or servants from entering upon remaining on or continuing to be occupation or from in any way whatsoever and howsoever dealing with the premises on and or plot Land Reference Number 7665 Section I, Mainland North Mombasa C.R. Number 21811.
  - c. That pending the determination of the suit herein the Defendant be compelled/directed either by itself its officer, servants, agents or workmen to quit and deliver up vacant possession of all those warehouses/ premises situate on plot Land Reference Number 7665 Section I, Mainland North Mombasa C.R. Number 21811.
  - d. That pending the determination of the suit and order of injunction is issued restraining the Defendants by itself, it's officers, agents and or servants be restrained from entering upon remaining on or continuing to be occupation or from in any way whatsoever and howsoever dealing with the premises on and or Plot Land Reference Number 7665 Section I, Mainland North Mombasa C.R. Number 21811.
  - e. That the court bailiff and the OCS Dock Section Police Station to ensure compliance of the orders herein..
  - f. That costs of this Application be provided.
4. The application is premised on the following grounds:
  - a. The Plaintiffs/Applicants are the duly appointed Legal administrators of the estate of the late Ezekiel Luyali Luyai (hereinafter referred to as the "The Deceased").
  - b. The Plaintiffs/Applicants entered into a Lease agreement with the Defendant/Respondent for the parcel of land known as Land Reference Number 7665 Section I, Mainland North Mombasa C.R. Number 21811 for a term of 8 years 7 months from the year 2014.
  - c. The Defendant's lease lapsed by effluxion of time on the 30<sup>th</sup> September, 2022.
  - d. The Defendant has unlawfully and in breach of the terms of the lease refused and neglected to grant the Plaintiff vacant possession of the suit property upon demise of the lease.
  - e. The Defendant was now a trespasser by reason of lapse and effluxion of time.
  - f. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants entered into a Sale Agreement with a third party to dispose of the suit property.
  - g. The Defendant's breach of the lease agreement has interfered with the Plaintiff's ability to fulfil their obligations under the Sale Agreement to facilitate completion.



- h. The third party was now threatening to rescind the Sale Agreement by the 7<sup>th</sup> November 2022 should the Plaintiffs/Applicants not honor the obligation such as granting vacant possession of the suit property.
  - i. The Plaintiffs/Applicants had “a prima facie” case as against the Defendant.
  - j. The Plaintiffs stood to suffer irreparable loss of Kenya Shillings One Hundred and Forty Million (Kshs. 140,000,000/=) apart from being required to refund over Kshs.14,000,000/= which they have received as deposit from the purchase price, should they fail to honor the terms of the sale agreement by giving vacant possession before the rescission date.
  - k. The balance of convenience lied in granting the orders sought.
  - l. This is a clear-cut case where the orders sought to be granted.
  - m. The Defendants actions to breaching the lease agreement amounts to stealing a match as against the Plaintiffs.
  - n. There is no prejudice to be suffered by the Respondents should the court issue orders sought.
5. The application by the Applicant is premised on the grounds, testimonial facts and the averments founded under the 18 Paragraphed Supporting Affidavit of ALEX SHIVACHI LUYALI the 2<sup>nd</sup> Applicant herein and the six (4) annexures marked as “ASL 1 to 6” annexed hereto. The Applicant avers that:
- i. He was duly authorized by the 1<sup>st</sup> Plaintiff to appear, plead and swear the affidavit as the personal representatives of the Estate of the late Ezekiel Luyali Luyai.
  - ii. One of the properties forming part of the estate of the late Ezekiel Luyali Luyai was all that parcel of land known as Land Reference Number 7665 Section I, Mainland North Mombasa C.R. Number 21811. (Hereinafter referred to as “The Suit Property”). At pages 3 to 8 of the bundle of documents collectively marked and produced as exhibit “ASL-2” are true copies of the Deed and search date 30<sup>th</sup> June 2022.
  - iii. Sometime in the year 2016 or thereabout as the duly appointed Legal Representatives of the estate of the late Ezekiel Luyali Luyai we did lease out to the Defendant the suit property for a term of 8 years and 7 months, which lease commenced on the 1<sup>st</sup> Day of March 2014 and was to lapse on the 30<sup>th</sup> September 2022. At pages 9 to 46 of the bundle of documents collectively marked and produced as exhibit “ASL - 3” is a true copy of Lease Agreement dated 4<sup>th</sup> February 2016.
  - iv. Upon confirmation of the Letters of Administration and in order to distribute the estate to all the beneficiaries, administrators of the estate of Ezekiel Luyali Luyai on the 11<sup>th</sup> May 2021 did enter into a Sale Agreement with BARNSBURY INVESTMENT LIMITED. At pages 47 to 59 of the bundle of documents collectively marked and produced as exhibit “ASL - 4” was a true copy of the Sale Agreement.
  - v. In order to ensure that they granted the purchaser vacant possession of the suit property as provided in the sale agreement our Advocates in the transaction informed the Defendant of the ongoing sale, notified them of the intention not to renew the lease with the Defendant and gave an undertaking that the lease won't be affected in any way by the sale process so long as they vacated on the 30<sup>th</sup> September 2022 when the lease expired. At pages 60 to 63 of the



bundle of documents collectively marked and produced as exhibit “ASL - 5” is a true copy of letter of undertaking dated 28<sup>th</sup> October, 2020 and a letter dated 4<sup>th</sup> November, 2020.

- vi. The Plaintiff’s advocate did sometime on the 18<sup>th</sup> August, 2022 or thereabout notify the Defendant to ensure that on the effluxion of the lease term on the 30<sup>th</sup> September 2022, they should vacate and remove all their installations from the suit property as per the terms of the Lease Agreement and Deed of Variation. At page 64 to 73 of the bundle of documents collectively marked and produced as an exhibit “ASL - 6” are true copies of Deed Variation dated 10<sup>th</sup> March 2022 and letter dated 18<sup>th</sup> August, 2022.
- vii. Despite the lease between the Plaintiffs/Applicants and the Defendant having lapsed and notice of the same being issued, the Defendant had neglected and or refused to cease its operations on the suit and vacate the same thus necessitating the filing of the suit herein.
- viii. The Defendant’s action to continue operating a petrol station at the suit property was in breach of contract, contrary to law and amounts to trespass on the Plaintiffs/Applicants property which should be restrained by the court of law.
- ix. The Defendant refusal to cease operation and vacate the property was frustrating the completion of the sale agreement as the Plaintiffs/Applicants had been unable to grant the purchaser vacant possession as provided in the sale agreement.
- x. The purchaser had now threatened to rescind the sale agreement should the Plaintiffs/Applicants failed to deliver up to them vacant possession of the suit property on or before the 7<sup>th</sup> November 2022. At page 74 of the bundle of exhibit is a true copy of letter from the purchasers threatening rescission of the sale agreement.
- xi. Unless the Court intervenes by granting the orders sought the Plaintiffs and the beneficiaries of the estate of Ezekiel Luyali Luyai stand to suffer the irreparable loss as the Sale of the suit property will be rescinded on the 7<sup>th</sup> November 2022 and they may never be able to get another purchaser as well as there being a closure on the distribution of the estate of the late Ezekiel Luyali Luyai.
- xii. It is a clear cut case where the court ought to intervene by issuing the orders sought in order to prevent further breach of Lease by the Defendant. protect the sanctity of contracts, and uphold the rule of law.
- xiii. The balance of convenience lied in granting the orders sought as the lease between the Plaintiffs/Applicants and the Defendant had lapsed.
- xiv. The Defendant stood to suffer no prejudice if the orders sought were granted as the lease between it and the Plaintiffs/Applicants had lapsed, whilst the prejudice to be suffered by the Beneficiaries were irreparable as they would be denied the opportunity to finally enjoy their share of the estate and bring closure to the succession matter.
- xv. The Plaintiffs/Applicants urged that unless the Court intervened and stopped the continued operations by the Defendant on the suit property, there was a risk that the Defendant would automatically become a protected tenant by operation of the law.

### **III. The Notice of Motion application dated 28<sup>th</sup> November, 2022 by the Interested Party**

6. The Interested Party/Applicant sought for the following orders:-
  - a. Spent.



- b. The Applicant, TIMES TOUCH ENTERPRISES LIMITED, be granted leave to be enjoined in these proceedings as an interested party.
  - c. That pending the inter - partes hearing and determination of this Application, this Honourable Court be pleased to stay the Order issued on 18<sup>th</sup> November 2022.
  - d. That pending the inter - partes hearing and determination of this Application, this Honourable Court be pleased to stay the proceedings in this matter to allow the intended interested party to file any and all necessary documents within such time as may be directed by the Honourable Court in response to the Application and the main suit.
  - e. That the Honorable Court at the ex parte stage do vacate the orders issued on 18<sup>th</sup> November 2022 and in place order reinstate of the status that existed on 27<sup>th</sup> September 2022 pending hearing and determination of this Application.
  - f. The Intended Interested Party be at liberty to apply for further orders and/or directions as the Honourable Court may deem fit to grant.
  - g. The costs of this application be provided for.
7. The application was brought under Article 40 of *the Constitution* of Kenya, Sections 1A, 1B, 3A of the *Civil Procedure Act*, Order 40 Rules 1, 2, and 10, Order 1 Rule 10, Order 51 of the Civil Procedure Rules.
  8. The application is premised on the following grounds:
    - a. The intended interested party had an active case against the Defendant herein whose hearing was slated for 21<sup>st</sup> February 2023 regarding Oil Libya Nyali Service Station situate on Land Reference No.MN/1/7665 with active injunctive orders. Should the orders issued herein continue being in place, the intended interested party shall suffer irreparable harm and the proceedings before the lower court shall be rendered nugatory and overtaken by events and the Court order issued therein considered “useless”.
    - b. That it was in the interest of justice that the present suit be stayed and orders granted herein vacated to avoid conflicting orders thereby exposing the court to ridicule and disrepute.
    - c. In the interest of time and due to the urgency of matter, in the event that the Intended Interested Party is admitted into these proceedings as such, they intend to raise the inter alia the following arguments in opposing the present application;
    - d. The Intended Interested Party entered into a “CODO” Service Station Agreement with the Defendant herein for the sale of petroleum products at Oilibya Nyali Service Station situate on Land Reference No.MN/1/7665 within Mombasa County.
    - e. The intended interested party had over 15 (fifteen) employees at the service station who earned their daily livelihood from the fortunes of the service station. Abrupt shut down of operations at the service station would be catastrophic and a recipe of flood gates of employment litigation against the intended interested party herein.
    - f. The Intended Interested Party had put up immense investment on the property which runs into millions of monies. If this case proceeded on without the interested party being heard, their investment would lie in ruins of wastage and destruction and shall suffer harm that could not be repaired.



- g. The Intended Interested Party had dozens of clients who purchased petroleum products on credit. Shutting down operations at the service station without been accorded a hearing would further expose the interested party to colossal loss of money as the debts will go uncollected.
  - h. The Intended Interested Party would be raising concerns on the inadequacy and improper termination notice issued by the defendant herein.
  - i. The Intended Interested Party had a different position over the matter to that taken by the parties herein.
  - j. The Intended Interested Party would be prejudiced if they were not joined as an Interested/ necessary Party to these proceedings.
  - k. This application had been made expeditiously bearing in mind the intended interested party was not aware of this suit until the reliance of the same at the lower court on 24<sup>th</sup> November 2022 and the activities of hoarding on the suit premises for preparation of demolition.
9. The application by the Applicant was premised on the grounds, testimonial facts and averments made out under the 15 Paragraphed Supporting Affidavit of Kennedy Wanjala Wekesa and 4 annexures Marked as “KWW – 1 to 4” annexed thereto for the Interested Party herein. The Applicant averred that:
- a. He was the managing director of the Intended Interested Party Company and duly authorized by the Company to swear the affidavit. (Attached and marked “KWW – 1” Authority to Appear, Plead, Execute Pleadings and Represent)
  - b. The Company entered into a “CODO” service station agreement with the Defendant herein to operate the OLA Energy service station described as OILIBYA NYALI SERVICE STATION situated on Plot No. LR NO.MN/1/7665 within Mombasa County. (Attached herewith and marked “KWW – 2” is a copy of the “CODO” service station agreement entered into between the Plaintiff/Applicant and Defendant).
  - c. The Defendant had been supplying the petroleum products to the Plaintiff as per the “CODO” agreement without fail until on 19<sup>th</sup> September 2022 when the Defendant abruptly stopped supplying the products.
  - d. On the same day of 19<sup>th</sup> September 2022, the Defendant “slapped” the intended interested party with a notice of termination of the Service Station operating agreement with respect to OLA Energy Nyali Service Station. (Attached and marked “KWW – 3” is a copy of the Notice).
  - e. Further to the foregoing, the Defendant’s notice demands that they vacate the suit property by 30<sup>th</sup> September 2022. The said notice fell short of the required time when issuing a notice to vacate.
  - f. They immediately rushed to Court having being aggrieved by the short notice and filed a suit before the ELC Court at the Magistrate’s court (CMCC Mombasa – ELC Suit No.142 of 2022-Times Touch Enterprises Limited -Versus -Ola Energy Kenya Limited).
  - g. They were granted interim injunctive orders on 27<sup>th</sup> September 2022 and had been extended until 21<sup>st</sup> February 2023.(Attached and marked “KWW – 4” is a copy of the said orders).
  - h. They were aggrieved by the notice issued by the Defendant’s as the said notice was too short considering the following reasons:-



- i. investments we have invested in the suit property;
- ii. employees we have employed who earn their daily livelihood from the operations of the service station;
- iii. our long terms commitments, i.e. supplying fuel to companies and individuals on an agreement basis;
- iv. clients who have purchased petroleum products on credit (the hurdle is they may never pay for the petroleum products);
- v. the setting up of a service bay and a car wash; and
- vi. the notice period was insufficient.
- i. The intended interested party did not have any interest with regards to the ownership of the suit property but the aspect of land use of the suit property.
- j. It had come to the attention of the intended interested party that KenHA intended to compensate all parties in the suit property and the valuation was done with the intended interested party already in possession of the suit property.
- k. It was also evident that the Plaintiffs/Applicant and the Defendant had colluded to ensure the intended interested party herein did not gain from the proceeds of the compulsory acquisition that is in process to compensate all parties on the suit property.
- l. It was therefore in the interest of justice and fairness that this Application be certified urgent and be heard and determined on a priority basis.
- m. It was fair and just and in the best interest of justice that the orders sought herein be granted and this affidavit is in support of the Application.
- n. It was also important that the service station operates as it used to, for the sake of the employees and ourselves to enable us continue earning our livelihood as the impugned notice is illegal and they shall continue to suffer harm that is irreparable.

**IV. The Defendant’s Response to the Notice of Motion application dated 2<sup>nd</sup> November, 2022 by the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs/Applicants**

10. The Defendant responded to the application through a 13 paragraphed Replying Affidavit sworn by KELVIN GATHARA who is the Associate Legal Counsel of the Defendant Company. The Defendant through its representative avers that:
- a. The Affidavit was in opposition of the Notice of Motion application dated 2<sup>nd</sup> November, 2022.
  - b. The Defendant entered into the Lease Agreement dated 4<sup>th</sup> February 2016 (Herein referred to as “the Lease”) for a term of 8 years and 7 months commencing on 1<sup>st</sup> March 2014 with the Plaintiffs herein.
  - c. The Defendant entered into a Service Station Operating Agreement dated 30<sup>th</sup> April 2019 (the Agreement) between the Defendant on the one hand and Times Touch Enterprises Limited (the Licensee) on the other, for the operation of a petrol station erected on Land Reference No. 7665, Mainland North, Mombasa (the Suit Property). There is now produced and shown to me a true copy of the Agreement annexed hereto and marked “KG-1”.



- d. Under Clause 3.2.1 of the Agreement granted the Licensee a right to occupy the Suit Property entitled “strictly as a licensee”. Under Clause 3.2.4 further provided as follows:-
- “Where the Defendant is not owner to the Premises, the right to occupy shall be subject to the lease under which the Premises so leased to the Company are subject to.”
- e. The Licensee’s occupation of the Suit Property was therefore subject to the continued existence of the Defendant’s rights under the Lease. Should the Lease expire, the license would also automatically expire.
- f. In recognition of this eventuality, under the provision of Clause 19.2 (iii) of the Agreement provided for automatic termination, without notice, in the following terms:
- “Notwithstanding any provisions herein contained, Company may, in its sole discretion and from time to time, terminate this Agreement immediately without notice to the Operation upon the occurrence of any of the following events:
- (iii) any agreement relating to the lease or ownership or possession of the Service Station is, for any reason whatsoever, terminated or not renewed or the land on which the Service Station is erected is under compulsory acquisition by government.”
- g. Before the Lease lapsed, the Defendant invoked Clause 19.2( iii) and sent the Licensee a notice of termination dated 19<sup>th</sup> September 2022 notifying it of the automatic termination and requesting the Licensee to deliver vacant possession. He annexed and marked a copy of the letter as “KG - 2”.
- h. The Licensee thereafter filed ELC Case No. 142 of 2022 in the Chief Magistrate’s Court at Mombasa. On 27<sup>th</sup> September 2022, that Court issued an injunction restraining the Defendant from evicting the Licensee. He annexed and marked copies of the pleadings as “KG - 3”.
- i. The order of 27<sup>th</sup> September effectively prevented the Defendant from handing over vacant possession.
- j. The Defendant therefore would not object to the granting of orders to vacate the premises.

**V. The Plaintiff’s response to the Notice of Motion application dated 28<sup>th</sup> November, 2022 by the Interested Party**

11. The 1<sup>st</sup> Plaintiffs/Applicants responded to the application through a 18 paragraphed Replying Affidavit sworn by ALEX SHIVACHI LUYALI who was the 1<sup>st</sup> Plaintiff herein averred that:
- i. In response to Paragraph (c), (d) and (e) of the Supporting Affidavit I do wish to state that whilst the Plaintiffs/Applicants were strangers to the averments therein as the same involved CODO service station agreement between the Defendant and the intended Interested Party, the Plaintiff averred that they were duly registered proprietors of all that parcel of land and premises situated on Plot No. LR. No.MN/1/7665 and only leased the same to the Defendant the suit property for a term of 8 years 7 months which lease commenced on the 1<sup>st</sup> day of March 2014 and was to lapse on the 30<sup>th</sup> September 2022 and thus any other agreement entered into by the Defendant should have abided with the duration of the lease.



- ii. Further the lease between the Plaintiffs/Applicants and Defendant did not have any provision which allowed the Defendant to sub - lease, license the suit parcel of land for a term longer than the period provided for in the lease agreement.
- iii. It was quite clear from the 'CODO' service station agreement between the Defendant and the intended interested party that the same provided for under Clause 3.2.1 as follows:-
  - “ where the Defendant is not owner of the premises, the right to occupy shall be subject to the lease under which the premises so leased to the company are subject to”
- iv. From the afore stated Clause it was quite clear that the duration of the intended interested party license was subject to the terms of the lease between the Plaintiff/Applicant and the Defendant and no more.
- v. For Clause 19.2 (iii) of the CODO serve agreement provided for automatic termination without notice in the following terms:-
  - “Notwithstanding any provisions herein contained, the company may, in its sole discretion and from time to time terminate this Agreement immediately without notice to the operation upon occurrence of any of the following events.....
- vi. Any agreement relating to the lease or ownership or possession of the service station is, for any reason whatsoever terminate or not renewed or the land on which the service station is erected is under compulsory acquisition by government”
 

Thus once termination notice was issued to the Intended Interested Party his license stood terminated even if the notice was for one day.
- vii. The lease between the Plaintiffs and the Defendant having lapsed on 30<sup>th</sup> September 2022 and not been renewed by the parties, the Intended Interested Parties license automatically terminates on the said date in accordance with Clause19.2 (ii) of CODO Service Agreement and thus the Intended Interested Party has no right whatsoever to continue its operation on the Suit Parcel of land and premises.
- viii. In response to the contents made out under Paragraph (f) and (g) of the said Supporting Affidavit he averred that the Plaintiffs/Applicants were strangers to the allegations therein.
- ix. Further in response to the averments made out in Paragraph(f) and (g) of the said Supporting Affidavit, the Court herein was a superior court of record and was not bound or subject to any orders of the Subordinate Court.
- x. The reasons stated in Paragraph (h) of the Supporting Affidavit could not in any way legally alter the terms of the lease between the Plaintiff/Applicant and the Defendant as well as the terms of the CODO Service Agreement between the Defendant and the Intended Interested Party and in any event there were various laws which adequate provide remedies to cure the breaches which may arise between the Defendant and the Intended Interested Party but not to try and litigation process to unlawfully extend his lease.
- xi. Further in response to paragraph (h) of the said Affidavit, the Intended Interested Party had not provided any proof whatsoever to substantiate the allegations therein.



- xii. In response to the averment made out under Paragraph (i) of the said affidavit the allegations therein amounted to the Intended Interested Party eating from bothside of the mouth as it could not claim that it's only interested on the aspect of land use of the suit property while it was aware that the same was tied to the Defendant having an active lease over the Suit Property and Premises.
- xiii. In reply to paragraph (j) and (k) of the said Affidavit, he denied the same stating that the Plaintiffs were not aware of any intended compulsory acquisition of the suit property. The Intended Interested Party being a licensee had not provided any legal basis for its entitlement to compensation upon compulsory acquisition by the government if at all there was such a process.
- xiv. In response to the averments made out under Paragraph (m) of the said Affidavit, the orders sought by the Intended Interested Party should not be granted as doing so:
  - a. Will unlawfully extend the lease between the Plaintiff and the Defendant which lapsed on 30<sup>th</sup> September 2022 and also the CODO Service Agreement.
  - b. It would amount to act in the theatre of absurdity as the Honourable Court which is Superior Court on Record will be subjugate itself to Subordinate Court.
  - c. The loss to be suffered by the Plaintiffs and the beneficiaries of the Estate of the late Ezekiel Luyali Luyai is irreparable as they would be denied the opportunity to complete the land transaction of Kenya Shillings One Forty Million (Kshs. 140, 000, 000.00) on offer which they may never get again during their lifetime.
  - d. The Plaintiff/Applicants and other beneficiaries of the estate would be denied closure as the distribution of the estate of their late father was concerned.
- xv. In response to paragraph of the said Affidavit he denied that irreparable harm would be suffered by the Intended Interested Party as it had no legal claim/right to be allowed to continue its operation on the suit property as its CODO Service Agreement lapsed on the 30<sup>th</sup> September 2022 a fact denied by the Intended Interested Party.
- xvi. It was quite clear that the Intended Interested Party was only trying to utilize the court process to extend his CODO Service Agreement which lapsed upon effluxion of the lease agreement between the Plaintiff/Applicant and the Defendant and which action could be seen from the orders been sought in the Civil Suit ELC No. 142 of 2022 which required that the Defendant be compelled to continue supplying oil products until the determination of the suit a fact which the Intended Interested Party knows may take years yet in his own pleadings he admitted he only required a month's notice to vacate.
- xvii. The affidavit was in opposition to the application dated 28<sup>th</sup> November, 2022 and prayed for the same to be dismissed with costs.

## **VI. The Notice of Motion Application dated 7<sup>th</sup> February, 2023 by the Defendant**

- 12. On 14<sup>th</sup> February, 2023, the Defendant in an interesting turn of events though the Law firm of Kaplan & Stratton Advocates filed a Notice of Motion application dated 7<sup>th</sup> February, 2023. They brought it under the provisions of Sections 1A, 1B, 3A and 34 of the *Civil Procedure Act*, Cap. 21 and Orders 40 and 51 Rule 1 of the Civil Procedure Rules, 2010. They sought for the following orders:
  - a. Spent.



- b. That pending the hearing and determination of this application “inter partes” this Court be pleased to issue an interim order of status quo on access to Plot No. Land Reference. No. MN/I/7665;
  - c. That this Honorable Court be pleased to allow the Defendant access to the suit property for purposes of removing its service station facilities and equipment.
  - d. That the Costs of this application be provided for.
  - e. That any other or further relief that this Honorable Court may deem fit.
13. The said application was premised on the grounds, testimonial facts and averments made out under the twelve (12) Paragraphed Supporting Affidavit of KELVIN GATHARA sworn and dated the 7<sup>th</sup> February, 2023 and one annexature marked as “KG -1” annexed hereto. He deponed being an Associate Legal Counsel of the Defendant and hence familiar to the facts of the case and competent to swear the said affidavit herein on behalf of the Defendant. In summary, he deponed as follows:-
- a. He was aware that the Defendant entered into the Lease Agreement dated 4<sup>th</sup> February, 2016 for a term of 8 years and 7 months commencing on 1<sup>st</sup> March, 2014 with the Plaintiffs herein over the suit property.
  - b. The Defendant had various service station facilities and equipment on the property that it allowed its Licensee, the Interested Party to use.
  - c. Following the termination of the Lease, the Defendant sought to remove its items from the suit property but was prevented from doing so as a result of a lawsuit filed by the Licensee.
  - d. The Landlord, being the Plaintiff herein, subsequently filed this suit seeking vacant possession.
  - e. At all times, the Defendant had been ready and willing to hand over vacant possession as per the terms of the Lease.
  - f. There was currently pending a ruling on the Plaintiff’s interlocutory application for possession scheduled for delivery on notice.
  - g. Further, the Court has issued a “Status Quo” order preventing the Defendant from accessing the property.
  - h. It had come to the Defendant’s attention that on 28<sup>th</sup> January, 2023, unknown parties accessed the suit property and removed the Defendant’s facilities and equipment in disregard of this Court’s orders.
  - i. The Defendant was apprehensive that unless it was allowed access to the suit property to remove its facilities and equipment, the same would either be damaged or stolen.
14. The application was served upon all parties. On 28<sup>th</sup> February, 2023, this Honorable Court provided specific directions with stringent timelines on how to finalize the said application. However, despite of this, there was no responses on it filed by neither the Plaintiffs/Applicants nor the Interested Party. For that reason, the Court concluded that the application was unopposed and the orders sought were allowed accordingly.

## VII. Submissions

15. On 9<sup>th</sup> December, 2022 while all the parties were present in Court, they were directed to have the Notices of Motion application dated 2<sup>nd</sup> November, 2022 and 28<sup>th</sup> November, 2022 be disposed of



by way of written submissions. Pursuant to that, all the parties complied accordingly. Thereafter, the Honorable Court reserved a ruling date on Notice.

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

16. On 2<sup>nd</sup> December, 2022, the Learned Counsels for the Plaintiffs/Applicants through the Law firm of Messrs. Olwande Oballa Advocates filed their submissions dated 2<sup>nd</sup> December, 2022 and filed on the same day. Mr. Olwande Advocate commenced his submission by stating that before the Court was the Plaintiff's Application dated 2<sup>nd</sup> November 2022. It was supported by the Supporting Affidavit sworn by Alex Shivachi Luyali on the 2<sup>nd</sup> November 2022. The Plaintiff fully relied on the grounds on the face of the Application and the averment in the Supporting Affidavit of Alex Shivachi Luyali sworn on the 2<sup>nd</sup> November 2022 together with the annexures thereto. The Plaintiffs/Applicant sought for the following prayers in their application dated 2<sup>nd</sup> November, 2022:-
  - a. Spent
  - b. Spent
  - c. That pending the determination of the suit herein the Defendant be compelled/directed either by itself its officer, servants, agents or workmen to quit and deliver up vacant possession of all those warehouses/ premises situate on plot Land Reference Number 7665 Section I. Mainland North Mombasa C.R. Number 21811.
  - d. Abandoned.
  - e. That the Court Bailiff and the OCS Dog Section Police Station to ensure compliance of the orders herein.
  - f. Costs of the Application
17. The Learned Counsel submitted that the brief facts giving rise to the application were that the Plaintiffs/Applicants were the duly appointed Legal Administrators of the Estate of the Late Ezekiel Luyali Luyai and were the registered proprietors of all that parcel of land known as Land Reference Number 7665 Section Mainland North Mombasa C.R Number 21811 (Hereinafter the "Suit Property and Premises"). At pages 1 of the bundle of exhibit marked "ASL - 1" is Certificate of Confirmation of Grant and at Pages 3 to 8 was a true copy of the Title Deed and Certificate of Postal Search. The Plaintiffs/Applicants entered into a Lease Agreement with the Defendant for the Suit Property and Premises for a term of 8 years and 7 months from the year 2014. At Pages 9 to 47 of the bundle of exhibit marked "ASL - 1" was a true copy of lease dated 4<sup>th</sup> February 2016. The lease between the Plaintiff/Applicant and the Defendant lapsed through effluxion of time on the 30<sup>th</sup> September 2022. The Learned Counsel informed Court that the Plaintiffs/Applicants had entered into a Sale Agreement with Messrs Barnsbury Investment Limited to acquire the suit property and premises for a sum of Kenya Shillings One Forty Million (Kshs. 140, 000, 000.00). At pages 47 to 59 of the bundle of exhibit marked "ASL - 1" was a sale agreement dated 11<sup>th</sup> May 2021. The Defendant had expressly admitted to the lapse of the Lease Agreement and undertaken to grant the Plaintiffs/Applicants vacant possession of the Suit Property and Premise on 30<sup>th</sup> September 2022. At pages 60 to 62 of the bundle of exhibit marked "ASL - 1" was true copies of letter dated 28<sup>th</sup> October 2020 and 4<sup>th</sup> November 2020. The Defendant had now failed to grant vacant possession of the Suit Property and Premises despite the lease having lapsed.
18. The Learned Counsel submitted that the aforesaid facts were not denied by the Defendant. On the contrary, the Defendant admitted as such in the Replying Affidavit sworn by Kelvin Gathara on



the 22<sup>nd</sup> November 2022 and filed in Court on 23<sup>rd</sup> November 2022. The Counsel held that it was instructive to note that from the contents of Paragraph 12 of the said Replying Affidavit, Mr. Gathara stated that:

“The Defendant therefore would not object to the granting of orders to vacate the premises”

In essence, according to the Counsel, the Defendant was not opposed to the granting of prayers numbers 3, 5 and 6 of the Application as prayed. Despite the Defendant agreeing to the allowing of the Application as prayed, he sought to be granted the orders of mandatory injunction.

19. The Learned Counsel further submitted that the law on Mandatory Injunctive Orders was laid down in the case of “Civil Appeal 19 of 1998, Andrew Kamau Mucuha – Versus - Ripples Limited and in the case of Kenya Breweries Limited & Anor v Washington O. Okiya (2002) eKLR. The Court of Appeal in the latter held as follows;

“A Mandatory Injunction ought not be granted on an Interlocutory Application in the absence or special circumstances and then only in clear cases either where the court that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the Defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a Mandatory Interlocutory Injunction, they had to feel a higher degree of assurance that at the trial it would appear that the Injunction had rightly been granted that being a different and higher standard than was required for a Prohibitory Injunction.”

20. The Learned Counsel submitted that in the case of: “Nation Media Group & 2 others – Versus - John Harun Mwau (2014) eKLR, the Court of Appeal said:-

“It is trite law that for an Interlocutory Mandatory Injunction to issue, an Applicant must demonstrate existence of special circumstances. A different standard higher than that in Prohibitory Injunction 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 Injunction can only be granted in exceptional and in the clearest of cases.”

21. The Learned Counsel submitted that from the aforestated cases it was quite clear that for the Court to grant the orders sought by the Plaintiffs herein they must prove the following whether there was:

- i) Existence of special circumstance;
- ii) Exceptional and clearest of cases;
- iii) Whether the Defendant is trying to steal a march against the Plaintiffs.

22. The Learned Counsel submitted on the issue whether there existed special circumstance to warrant the issuing of Mandatory Injunction orders. From the facts of the instant case herein, according to the Counsel, it was quite clear that there existed special circumstance to warrant this Honorable Court intervention by issuing a Mandatory Injunction as against the Defendant. These were:-

- i. The lease executed between the Plaintiffs/Applicants and the Defendant had lapsed and the same applied to the CODO Service Agreement between the Defendant and the Interested Party a fact which was not denied by all the parties.



- ii. The Plaintiffs/Applicants had clearly shown that it had already entered into a sale agreement for the Suit Property and Premises with Barnsbury Investment Limited for a sum of Kenya Shillings One Fourty Million (Kshs. 140, 000, 000.00) and which transaction was under threat of being rescinded should the Plaintiff fail to grant vacant possession of the Suit Property and Premises thus leading to irreparable loss to the Plaintiffs/Applicants and other beneficiaries of the Estate of the Late Ezekiel Luyali Luyai as they would not only loose the offered price but will have to refund the deposit already paid.
23. Hence, from these surrounding facts and inferences, the Learned Counsel argued that the current circumstances were special and which required the interventions of the Honourable Court as the failure by the Defendant to hand over vacant possession allegedly due to an existence of a Court order obtained from a Sub – ordinate Court - the Mombasa Magistrate Court in ELC Case No.142 of 2022 by the Intended Interested Party (who clearly had no legal claim as his license lapsed on the 30<sup>th</sup> September 2022 when the lease between the Plaintiffs/Applicants and the Defendant extinguished and hence lacked any cause of action nor basis over the matter.
24. On the issue of whether there existed the clearest of cases, the Counsel contended that the current matter as already submitted was clear cut to warrant the granting of the orders sought. This was due to the fact that all parties to the suit were in agreement that the lease between the Plaintiffs/Applicants and the Defendant and the CODO Service Agreement between the Defendants and its Licensee(Interested Party) died a natural death on the 30<sup>th</sup> September 2022. Therefore the orders sought ought to be granted.
25. On whether the Defendant and Interested Party were stealing a march against the Plaintiffs/Applicants, the Counsel averred that from the facts of the matters herein it was quite clear that the Defendant had already admitted that it's lapsed but was unable to grant back a vacant possession because of the existence of a Court Order obtained by its licensee from the Sub – ordinate Court in ELC CMCC (Mombasa) No. 142 of 2022.
26. The Counsel reiterated that it was instructive to note that at Pages 46 -58 of the Replying Affidavit filed by the Defendant were pleadings in ELCC Case No.142 of 2022 in the Chief Magistrate Court. A clear reading of the pleading the Plaintiffs/Applicants in the said suit did not dispute that its license lapsed upon the expiry of the lease between the Plaintiffs/Applicants and the Defendant. He noted that their only issue was that it was not given adequate notice by the Defendant. In fact at page 53 of the Replying Affidavit paragraph (d) stated:-
- “The nature of the Notice served upon the Plaintiff is to immediately vacate from the Suit Property and Premises, instead of the Defendant giving the Plaintiff ample time (the least 1 month) to secure their invested property and inform their clients”
27. The Counsel submitted that to prove that indeed the licensee (Interested Party) intended to steal a march against the Plaintiffs/Applicants herein by having their license extended unlawfully through litigation, they obtained interim orders on the 27<sup>th</sup> September 2022. As of today the 2<sup>nd</sup> December 2022, two months had lapsed, yet they had not vacated. In any case, they still alluded that they only required notice of at least one month to vacate. The Defendant's licensee was being disingenuous and only wanted to use the process of litigation to continue occupying the Plaintiffs/Applicants property. This could be seen from the fact that at pages 52 to 53 of the Replying Affidavit of Kelvin Gathara prayers 4 and 6 of the Application dated 27<sup>th</sup> September 2022. They sought that the Defendant be compelled to continue supplying the Petroleum products to the Plaintiff's licensee firstly until determination of the Application and thereafter until determination of the suit. Clearly what more



proof was needed to show the craftiness on the part of the licensee (interested party) other than this. The Counsel added that they knew that their License lapsed on the 30<sup>th</sup> September 2022 but still went ahead to seek orders to be supplied with petroleum products until their suit was heard and determined which would take years to the detriment of the Plaintiffs/Applicants in the current suit.

28. The Counsel asserted that it was quite clear that the Defendant's Licensee was hell bent on abusing the process of the Court to allow it continuing operating at the Suit Property and Premises. This was because they clearly knew and admitted that their license lapsed on the 30<sup>th</sup> September 2022 when the lease between the Plaintiffs/Applicants and the Defendant expired but still and adamantly so wanted to rely on the injunction issued by the Subordinate Court to continue operations. This amounted to stealing a march as against the Plaintiffs/Applicants. The Learned Counsel asked the court to allow their application.

### **B. The Written Submissions by the Interested Party**

29. On 9<sup>th</sup> December, 2021, the Learned Counsels for the Defendants through the Law firm of Messers. S. Ruwa & Company Advocates filed their written submissions dated 8<sup>th</sup> December, 2022. Mr. Tajbhai Advocate commenced by stating that the Plaintiffs/Applicants herein filed an Application dated 2<sup>nd</sup> November 2022 seeking for orders as captured in their Application. The interested party on their part filed an Application dated 28<sup>th</sup> November 2022 sought for orders of stay of the orders issued by this Honourable Court on 18<sup>th</sup> November 2022 and orders to be enjoined in this suit. On 5<sup>th</sup> December, 2021, by the consent of the parties, the interested party was allowed to be enjoined in the suit. As a result, the prayers 1 and 2 of the application by the Interested Party had since been spent.
30. The Learned Counsel submitted that the issues for determination were:
- a. Which party between the Plaintiffs/Applicants and the interested party shall suffer the greatest prejudice?
  - b. Whether this Honorable Court should vacate its orders issued on 18th November 2022?
  - c. Whether the Injunctive orders sought by the Plaintiff should be granted?
31. On the issue of which party between the Plaintiff and the Interested party shall suffer the greatest prejudice the Learned Counsel submitted that the interested party had been in possession of the suit property since 30<sup>th</sup> April 2019. He held that the Interested Party had been conducting a business of operating a petrol station and all services related to running a petrol station, including selling of LPG gas and lubricants. They also invested heavily on the suit property by erecting a service bay to service motor vehicles and a car wash to entice motor vehicle owners to use the petrol station situated on the suit property. They had not only invested millions on improving the suit property but was at the threat of losing more investments considering they had petroleum products, lubricants and LPG gas that form part of the Interested Party's stock to enable them run the business smoothly. At the same suit property there were four petrol tanks underneath that each house two thousand (2000) litres of petrol.
32. The Counsel informed Court that the Interested Party had also employed over fifteen (15) staff who were carrying out the effective and efficient running of the Interested Party's business and now were at a risk of unemployment especially noting that the Plaintiffs/Applicants had decided to hoard off the property forcefully. The Interested Party had creditors who had been fueling their motor vehicles with petrol on credit and who had enjoyed services on credit and were yet to pay the Interested Party and bearing in mind the Interested Party had had arrangements with other creditors to fuel their motor vehicle on a monthly credit basis. The Interested Party were at a risk of losing all their monies and was now exposed to various litigation ranging from creditors to employment litigation. The suit property



harbored petroleum products that the Plaintiffs/Applicants had no authorization to deal with and/or dispose of the same as they lacked the requisite license from the energy regulatory authority. Apart from not being authorized the products in the said suit property were highly inflammable and a risk to the general public, bearing in mind the suit property was located on a busy highway.

33. The Counsel averred that in the case of "Mary Nchekei Paul – Versus - Francis Mundia Ruga [2019] eKLR the Court of Appeal Judge D.K Musinga stated as follows in paragraph 12 of their decision:-

“Lastly, if the application is not granted, the applicant shall be evicted from the land in dispute, where she is currently residing. On the other hand, if the application is allowed, the Respondent will have to wait for about a year or so before the appeal is determined. I do not think that the degree of prejudice that he stands to suffer is too much compared to the prejudice that the applicant shall endure if I do not allow the application.”

34. The Counsel submitted that the Interested Party was the most prejudiced party between the Plaintiffs/Applicants and the Defendant in this suit. As such the balance shifted to the Interested Party and neither the Plaintiffs/Applicants nor the Defendant shall suffer any prejudice. Why the Plaintiffs/Applicants shall not suffer any prejudice? This question was answered by the very fact that the Plaintiffs/Applicants in their supporting affidavit in support of the Notice of Motion Application at page 49 have attached a sale agreement and Clause 2.4 which stated as follows:-

“The Property is sold subject to the existing lease referred to in Sub - Clause 2.2 above existing easements, caveats, restrictions, terms and conditions (if any) subject to which the vendor holds the title but otherwise free from all encumbrances.”

35. It was the contention by the Counsel that the Sub - Clause 2.2 mentioned above stated as follows:-

“The sale includes all the land consisting of the property but does not include any immovable or movables subject to the lease between the vendors and Libya Oil Kenya Limited (Now the Ola Energy Kenya Limited) dated 4th February 2016, a copy of which is attached as Schedule A to this Agreement”

36. He held that the alleged fear of the Plaintiff as per its Application that the intended purchaser has threatened to rescind the sale agreement of the Plaintiffs/Applicants would not have granted them vacant possession by the 7<sup>th</sup> November 2022 was neither here or there. In fact there was no prejudice that the Plaintiffs/Applicants would suffer as their fear had been catered for in the sale agreement at page 47 of their application. For the Defendant, they obviously were not suffering any prejudice, first because they never wished to participate in any application as they had nothing to lose. Secondly, they were the reason the Plaintiffs/Applicants and the Interested Party were suffering due to their negligence, don't care attitude and lack of informing the Interested Party of any variance to the lease and/or lapse of the lease.

37. He informed Court that the Defendant were “sitting pretty” while they were supporting the Plaintiffs/Applicants cause to have the Interested Party evicted to avoid compensating the Interested Party as per the Clause 19.4.2 of the “CODO” contract. In fact the Interested Party was a greater prejudice now that they could access the suit property and the inventory of the goods was never taken thus at a further loss at the advantage of the Defendant. The Interested Party was not aware of any lease and/or the duration of the lease between the Plaintiffs and the Defendant. He argued that the Interested Party had a legitimate expectation that the “CODO” agreement would automatically be renewed annually and if at all it were to lapse it would be on 30<sup>th</sup> April 2023. The Interested Party shall suffer the greatest



prejudice of all the parties in this suit if at all the Notice of Motion Application dated 2<sup>nd</sup> November 2022 was allowed. They therefore pray that the Interested Party's Application dated 28<sup>th</sup> November 2022 be allowed in terms of prayer 5 in view of the above submissions.

38. With regard to whether this Honorable Court should vacate its orders issued on 18<sup>th</sup> November 2022, the Counsel submitted that the said orders were issued in the absence of the Interested Party. It be borne in mind they were not parties to the suit at that particular instance. Thus, they were never given an opportunity to be heard noting that they were in possession of the suit property. The Plaintiffs/Applicants and the Defendant deliberately decided to “sideline” the Interested Party in order for them to get a favourable order and/or decision. He opined that the principles of natural justice entailed that an aggrieved party should be given an avenue to be heard and a chance to put forward their case. The Interested Party suffered and continued to suffer prejudice noting that:-
- a. They were in possession of the suit property,
  - b. Had over 15 employees thus the order affects their socio-economic rights;
  - c. The Defendant would be allowed to go “scoot free” by giving an irregular and an improper notice;
  - d. The Interested Party had several creditors who had not settled their bills;
  - e. The Interested Party had stock in the said suit property which was not only highly inflammable but also not accounted for; and
  - f. The Interested Party had invested heavily in the suit premises.
39. The Counsel asserted that it was crystal clear that the Interested Party had a stake in these proceedings though it was not party ab initio due to the fact that the Plaintiffs/Applicants and the Defendant misled this Honourable Court and wanted to win a match through the back door. The Interested Party's interest was never articulated and was not able to champion their case. The pursuit of a particular outcome was reserved to the parties to the controversy, including the interested party as was held by the Supreme Court in the case of: “Trusted Society of Human Rights Alliance - Versus- Mumo Matemo & 5 others 2015 eKLR. This being the case, the Interested Party herein being party to the dispute ought to have had a chance to champion their case before this Honourable Court issued its orders on 18<sup>th</sup> November 2022. The Learned Counsel prayed that the orders issued on 18<sup>th</sup> November, 2022 be vacated to enable the interested party to champion its case, to stop suffering and the interested party to champion its case, to stop suffering and the interest of justice to take its course.
40. On the issue of whether the Injunctive orders sought by the Plaintiffs/Applicants should be granted, the Learned Counsel submitted that the Interested Party had been in possession of the suit premises since 30<sup>th</sup> April 2019. The Plaintiffs/Applicants herein had not been in possession of the suit since the year 2014. The interim orders issued by this Honourable Court on 18<sup>th</sup> November 2022 in the absence of the Interested Party greatly prejudiced them in that they could not access the suit property anymore. To make matters worse, he added, the Plaintiffs/Applicants had hoarded off the suit premises thus limiting any access to the Interested Party. The basis for the orders being sought by the Plaintiffs/Applicants was:-
- a. Existence of special circumstance.
  - b. Exceptional and clearest of cases.
  - c) Whether the Defendant is trying to steal a march against the Plaintiffs



41. The Counsel opined that what the Interested Party was going through was a good example of existence of special circumstance. Firstly, such that the products that were in the suit property were high inflammable and the Interested Party was the only one authorized and licensed to deal with the same as between the Plaintiffs and the Interested Party. Secondly, the level of prejudice that the Interested Party shall suffer was irreparable, considering there were goods and assets that belonged to the Interested Party in the suit property that the Interested Party could not access. This was an exception and clearest of cases for the Interested Party such that if you look at the lease as between the Plaintiffs/Applicants and the Defendant at clause 3.9 it stated:-

“upon the expiration or sooner determination of this lease, or within three (3) months thereafter to permit the lessee to remove all trade fixtures, all fittings, machinery, plant and equipment including all storage tanks, signage, pumps and.....”.

42. The Learned Counsel submitted that it was clear that the lease gave the Defendant herein an extra three (3) months upon expiration of the lease to do all as mentioned above. Therefore, the question begged was why were both the Defendant and Plaintiffs/Applicants were in a rush to have the suit property vacated? Was it because they had colluded to steal a march from the Interested Party and not compensate them as expected or perhaps they never realized that the provision of Clause existed? Or they knew it existed and decided to do a deed of variation without informing the Interested Party of the same. What was seemingly surprising was that, all along the Defendant's and the Plaintiffs/Applicants had been taking steps to dispose of the suit premises without informing the Interested Party at all of even “a spark” of their activities with regards to the lease. The alleged sale agreement entered by the Defendant herein with the prosecutive purchaser Barnsbury Investments Limited on 11<sup>th</sup> May 2021 clearly made reference to the lease entered between the Plaintiffs/Applicants and Defendant in the year 2016 and the deed of variation was done after the sale agreement was entered into, thus the 3 months grace period as mentioned above still applied.

43. In conclusion, the Counsel held that the Plaintiffs/Applicants Application dated 2<sup>nd</sup> November 2022 never fulfilled the threshold required to be granted the orders sought and the favour tilted towards the Interested Party who would continue to suffer prejudice if the orders granted on 18<sup>th</sup> November 2022 were not lifted. They therefore prayed that their application dated 28<sup>th</sup> November 2022 be allowed with costs and that of the Plaintiffs dated 2<sup>nd</sup> November, 2022 be dismissed with costs.

### **VIII. Analysis and Determination**

44. I have carefully read and considered the pleadings herein, the written submissions, the myriad of cited authorities by the parties herein and the relevant and appropriate provisions of *the Constitution* of Kenya, 2010 and statutes. In order to arrive at an informed, reasonable, just, equitable and fair decision, the Honorable Court has condensed the subject matter into six (6) salient issues for determination as follows:-

- a. Whether there should be an order for stay of proceedings and for the orders given on 18<sup>th</sup> November, 2022 to be set aside or lifted to allow the Interested Party herein to file any and all necessary documents?
- b. Whether the Notice of Motion application dated 2<sup>nd</sup> November, 2022 by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants meets the threshold required of granting the temporary injunction order under the provision of Order 40 Rules 1 of the Civil Procedures Rules, 2010.



- c. Whether the Notice of Motion application dated 28<sup>th</sup> November, 2022 by the Interested Party herein meets the threshold required of granting the order under the Provision of Order 1 Rule 10 (4) and Order 40 Rules 1, 2 and 10 of the Civil Procedures Rules, 2010.
- d. Whether the Notice of Motion application dated 7<sup>th</sup> February, 2023 by the Defendant herein should be granted under the provision of Order 40 and Order 51 of the Civil Procedure Rules, 2010.
- e. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants are entitled to be granted Mandatory injunction orders at the Interlocutory stage.
- f. Who will bear the Costs of Notice of Motion applications of 2<sup>nd</sup> November, 2022, 28<sup>th</sup> of November, 2022 and 7<sup>th</sup> February, 2023 respectively.

ISSUE a). Whether there should be an order for stay of proceedings and for the orders given on 18<sup>th</sup> November, 2022 to be set aside or lifted to allow the Interested Party herein to file any and all necessary documents?

- 45. Under this Sub heading, on 18<sup>th</sup> November, 2022, the Honorable Court granted the Plaintiffs/Applicants with interim orders as prayed. These orders only restrained the Defendant from alienating or wasting the suit property. The intention was to preserve the suit property. Certainly, the orders were granted in the absence of the Interested Party. Clearly by then they had not been made a party to these proceedings. Subsequently, it was on 5<sup>th</sup> December, 2021, by consent of the parties herein, that they were joined in the suit. However, upto now, the Interested Party has not showed the Honorable Court how they were prejudiced by the said orders. On the contrary, I dare say, the said orders were beneficial even to the Interested Party.
- 46. It is on record that the Interested Party have indicated having been in possession of the suit property since 30<sup>th</sup> April 2019. The nature of their business was the operation and running of a petrol station and all related services. These included selling of Petroleum products, LPG gas and lubricants. In the Course of time, they informed Court having heavily invested and caused improvement on the suit property. This was by erecting a service bay for servicing motor vehicles and a car wash to entice motor vehicle owners to use the petrol station situated on the suit property. Further, they held that they were at verge of losing more investments considering that they had large stock of petroleum products, lubricants and LPG gas on site. Indeed, from the same suit property there were four (4) petrol tanks underneath that each housed two thousand (2000) litres of petrol. Therefore, for these reasons, the Interested Party felt they needed to have had their application dated 28<sup>th</sup> November, 2022 heard and the orders of staying proceedings and setting aside the orders grant on 18<sup>th</sup> November, 2022 granted.
- 47. Juxtapose, while vehemently opposing the orders sought, the Plaintiffs/Applicants pressed having entered into a Lease Agreement with the Defendant for the Suit Property and Premises for a term of 8 years and 7 months from the year 2014. They stressed the lease between them and the Defendant lapsed through effluxion of time on the 30<sup>th</sup> September 2022. Besides, on abundance of caution, they had entered into a Sale Agreement with a third party a prospective purchaser Messrs. Barnsbury Investment Limited to acquire the suit property and premises for a sum of Kenya Shillings One Hundred and Fourty Million (Kshs. 140, 000, 000.00). Undoubtedly, all these were weighty issues which would require keenness while making any determination under this sub heading whatsoever.



48. Analytically, the Court is guided by the case of: Kenya Wildlife Service – Versus - James Mutembei [2019] eKLR where the Court held that: -

“Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent...”

Under the provision of Order 1 Rule 10 (2) of the Civil Procedure Rules, 2010 on joinder of parties, provides for a party to be enjoined in a suit as a necessary party as follows:

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

49. Nonetheless, this issue is now under the bridge taking that by Consent the Interested Party were already joined as a party to this suit. Suffice to say, the Honorable Court sees no reason as to why it should stay its proceedings. After all, it is conceded by all parties that orders granted were meant to preserve the suit property till the hearing of this suit. Taking that there was nothing indicating said orders denied the Interested Party an opportunity to be heard, the prayer seeking stay of proceedings thereof is not only unfounded, unmeritorious but also and baseless. Nonetheless, guided by the Principles of natural justice the Interested party was already accorded time to file in their papers accordingly.

ISSUE b). Whether the Notice of Motion application dated 2<sup>nd</sup> November, 2022 by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants meets the threshold required of granting the temporary injunction order under the provision of Order 40 Rules 1 of the Civil Procedures Rules, 2010.

50. Primarily, amongst other provisions of the Law cited in the Notice of Motion application dated 2<sup>nd</sup> November, 2022 the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants herein is the provision of Order 40 Rule 1 of the Civil Procedure Rules 2010. Order 40 Rule 1 provides as follows: -

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

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



51. The principles applicable in an application for an injunction were laid out in the celebrated case of “Giella – Versus - Cassman Brown & Co Limited (1973) EA 358, where it was stated:-

“First an applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

52. The three (3) conditions set out in the Giella (Supra), need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of:- “Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others [2014] eKLR,

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

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

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

54. Undoubtedly, the following facts as set out from the filed pleadings are confirmed. They are undisputed. These are that:-

- a. The Plaintiffs/Applicants were the duly appointed Legal Administrators of the Estate of the Late Ezekiel Luyali Luyai and are the registered proprietors of all that parcel of land known as Land Reference Number 7665 Section Mainland North Mombasa C.R Number 21811 hereinafter the “Suit Property and Premises”.
- b. The Plaintiffs/Applicants entered into a Lease Agreement with the Defendant for the Suit Property and Premises for a term of 8 years and 7 months from the year 2014. Thus, the lease between the Plaintiffs/Applicants and the Defendant lapsed through effluxion of time on the 30<sup>th</sup> September 2022.



- c. The Plaintiffs/Applicants have entered into a Sale Agreement with a prospective purchaser trading in the names and style of “Messrs Barnsbury Investment Limited to acquire the suit property and premises for a consideration of a sum of Kenya Shillings One Fourty Million (Kshs. 140, 000, 000.00).
- d. The Defendant has expressly admitted from its filed pleadings to the lapse of the Lease Agreement and undertaken to grant the Plaintiffs/Applicants vacant possession of the Suit Property and Premise on 30<sup>th</sup> September 2022.
- e. Despite of this The Defendant has not yet granted vacant possession of the Suit Property and Premises despite the lease having lapsed on the grounds that they were prevented from doing so from the court orders obtained by the Interested Party from the Sub-Ordinate Court and the ones on status quo to be maintained by the Plaintiffs/Applicants.

Indeed, these facts are admitted by the Defendant in the Replying affidavit dated 22<sup>nd</sup> November, 2022 where it is stated that ‘the Defendant therefore would not object to the granting of orders to vacate the premises’.

55. The Honorable Court has sought refuge from the case of ”Mbuthia – Versus - Jimba credit Corporation Ltd 988 KLR 1, where Court held that;

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

56. Similarly, in the case of:- Edwin Kamau Muniu – Versus - Barclays Bank of Kenya Limited the Court held that:-

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

57. What compelled the Plaintiffs/Applicants to institute this suit was that despite of the Defendant admitting the terms of the Lease agreement had expired, they still failed to give vacant possession. Exclusively, the Plaintiffs/Applicants only need to be granted vacant possession of the suit property. By and large, the Interested Party seems to be claiming to have more rights to the suit property than the Plaintiffs/Applicants. Their contention is that they had been in possession of the suit premises since 30<sup>th</sup> April 2019. They argued that the Plaintiffs/Applicants herein had not been in possession of the suit since the year 2014. They further advanced an argument that the interim orders issued by this Honorable Court on 18<sup>th</sup> November 2022 in their absence greatly prejudiced them as they could not access the suit property anymore. To make matters worse, they averred that the Plaintiffs/Applicants had hoarded off the suit premises thus limiting any access to the Interested Party. The above notwithstanding, this Court has already established that the Plaintiffs/Applicants bear the absolute and indefeasible legal proprietary interest, title and rights over the suit property vested by law. Indeed. the Defendant has conceded to this fact (refer to paragraph 12 of the Replying Affidavit by Kelvin Gathara). Evidently, as shown from their pleadings, the Defendant has in essence allowed the Plaintiffs/Applicants’ application as prayed. By these facts alone, it accords the Plaintiffs/Applicants not only the right, protection but also preservation to the suit property. Therefore, as regards the first condition, the Court is fully satisfied that the Plaintiffs/Applicants have established having a “prima facie” case with a probability of success and hence they ought to be granted the orders.



58. With regard to the second limb for granting the interim orders. Ideally, the Applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. The Court of Appeal in the case of Nguruman Limited (supra), held that:-

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

59. The judicial decision of the case of Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (2018) eKLR provides an explanation for what is meant by “irreparable injury” and it states:-

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

60. In the instant case, it has been demonstrated that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants would suffer irreparable damages and where they may not be adequately compensated by an award of damages. It is not hidden that their property is at grotesque risk by the continued occupation of the suit property by both the Defendant and the Interested Party after the expiration of the Lease Agreement. Undisputedly, the Defendant and the Interested Party are under an obligation to vacant possession. Additionally, the Plaintiffs/Applicants have demonstrated that irreparable injury will be occasioned to them if an order of temporary injunction is not granted as they stand to lose an already advanced sale transaction entered with a prospective and innocent purchaser for value of the property. Indeed, they have not only executed a sale agreement but also received 10% deposit of the purchase price which if the sale of land fails to go through, they will be compelled to refund.

61. Quite clearly, the Plaintiffs/Applicants herein have shown Court that they would not be able to be compensated through damages taking that the lease terms have expired and the continuous occupation by both the Defendant and the Interested Party. Therefore, once more the Plaintiffs/Applicants have satisfied the second condition as laid down in the Giella’s case (Supra).

62. On the third limb, the Applicant has to demonstrate that the balance of convenience tilts in their favour. Likewise, in the case of Pius Kipchirchir Kogo (Supra) it defined the concept of balance of convenience as:

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



that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

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

63. Additionally, in the case of:- Paul Gitonga Wanjau – Versus - Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR, the Court dealing with the issue of balance of convenience expressed itself thus:-

“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

The decision of the case of: “Amir Suleiman – Versus - Amboseli Resort Limited [2004] eKLR where the learned Judge offered further elaboration on what is meant by “balance of convenience” and stated:-

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

64. The application of tis principles to the instant case. The Plaintiffs/Applicants’ contention is that the balance of convenience tilts in their favour. As indicated above, there exists an innocent purchaser for value for the suit property. Further, in the case of:- “Robert Mugo wa Karanja – Versus - Ecobank (Kenya) Limited & Another [2019] eKLR where the Court in deciding on an injunction application stated:-

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

65. Hence in summary and based on the myriad of precedents cited hereof, I am convinced that there is a lower risk in granting the orders than not. In fact, if the orders are not granted, the properties in dispute might be in danger of being dealt in the manner set out in the application and apprehended by the Plaintiffs/Applicants. In view of the foregoing, therefore I find that the Plaintiffs/Applicants have met the criteria for grant of orders of temporary injunction.



**Issue c). Whether the Notice of Motion application dated 28<sup>th</sup> November, 2022 by the Interested Party herein meets the threshold required of granting the order under the Provision of Order 1 Rule 10 (4) and Order 40 Rules 1, 2 and 10 of the Civil Procedures Rules, 2010.**

66. Upon being joined by Consent, and based on the principle of natural Justice the Interested Party filed an application dated 28<sup>th</sup> November, 2022. They sought several orders including being granted the temporary injunction orders. From the very onset, I wish to respond to some of the issues that the Interested Party raises in the said application. I dare say that it appears they seem to be venturing more into academic discourse than nought. Although, from the face value, their has been carefully drafted or worded but clearly it is not lost in the eyes of the Court what they are seeking and the purpose of the order. Primarily, they seem to be seeking for the preservation of the suit land parcel pending the hearing and determination of the suit herein. It is true that the provisions under Order 40 of the Civil Procedure Rules, 2010 there is no specific reference to a ‘prohibitory’ order. The term prohibitory order is commonly used in execution proceedings relating to immovable property. For instance, under Order 22 Rule 48 (1) of the Civil Procedure Rules, 2010 provides that:

“Where the property to be attached in immovable, the attachment shall be made by an order prohibiting the judgement – debtor from transferring or charging the property in any way, and all persons from taking any benefit from the purported transfer or change, and the attachment shall be complete and effective upon registration of a copy of the prohibitory order or inhibition against the title to the property.”

67. It is also true that although the Provisions of Order 40 of Civil Procedure Rules 2010 makes provision for the issuance of temporary injunctions, it does not specifically mention a “prohibitory” injunction which is in essence a restraining injunction. The provisions of Order 40 Rule 10 of the Civil Procedure Rules, 2010 grant jurisdiction for the court to issue an order of “preservation” of any property which is the subject matter of a suit.

68. The provision of Section 68 of the [Land Registration Act](#) provides for an order of “inhibition”. Its purpose is clear to the Court. Section 68 (1) provides as follows:

1. The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until occurrence of a particular event, or generally until further order, the registration or any dealing with any land, lease or charge.

69. At this juncture, I wish to categorically state that this court is enjoined to dispense justice expeditiously without undue regard to procedural technicalities under the Provisions of Article 159 (2) of [the Constitution](#) of Kenya 2010 and Section 19 of the [Environment and Land Court Act](#) of 2011. Therefore, based on the legal reasoning stated herein, I find and hold that this Honorable Court has jurisdiction to grant such an order.

70. The last issue for consideration is whether the granting of a prohibitory order would violate the rights of the proprietor of land under the Provisions of Sections 24 and 25 of the [Land Registration Act](#) No. 3 of 2012. I have no hesitation in answering this question in the negative. The most obvious reason would be that even the said Act itself provides for such restrictions on the rights of a proprietor. For these reasons, I find that the Notice of Motion application dated 28<sup>th</sup> November, 2022 by the Interested Party lacking merit and merely intended to over stretch court on unnecessary issues of no much value to the subject matter.



**Issue No. d). Whether the Notice of Motion application dated 7<sup>th</sup> February, 2023 by the Defendant herein should be granted under the provision of Order 40 and Order 51 of the Civil Procedure Rules, 2010.**

71. From records, the Defendant on 14<sup>th</sup> February, 2023 filed a Notice of Motion application dated 7<sup>th</sup> February, 2023 and seeking the orders as already set out herein. Despite having served it upon the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants and the Interested Party herein and direction taken by court on how to dispose it in the presence of all parties none of them filed any responses.
72. In the given circumstances, therefore the Notice of Motion application dated 7<sup>th</sup> February, 2023 by the Defendant stands unopposed and all the reliefs sought thereof are hereby granted as prayed from the face of it. I need say no more as far as the said Notice of Motion application is concerned.

**Issue No. e). Whether the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants are entitled to be granted Mandatory injunction at the Interlocutory stage.**

73. Under this Sub - heading, I will now consider whether mandatory injunction orders can be issued at the interlocutory stage. Further, whether the Plaintiffs/Applicants are entitled to be granted the said orders restraining the Defendant and the Interested Party onto the suit property. Unlike temporary Injunction which are granted only to be in force for a specified time or until the issuance of further orders from Court, Permanent Injunction are rather different. They are perpetual in nature and ordinarily issued after a Suit has been heard and finally determined. Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under the provisions of Sections 1A, 3 & 3 A of the Civil Procedure Rules, 2010 if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just seat, wait and watch under these given circumstances. In the cases of: Joseph Kaloki t/a Royal Family Assembly – Versus - Nancy Atieno Ouma [2020] eKLR and “Malier Unissa Karim – Versus - Edward Oluoch Odumbe (2015) eKLR Court held as follows:-

“The test for granting a Mandatory Injunction is different from that enunciated in the “Giella –Versus - Cassman Brown case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of “Kenya Breweries Limited -Versus - Washington Okeyo (2002) EA 109” had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 24 Halsbury Laws of England 4<sup>th</sup> Edition Paragraph 948 which states 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 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 attempts to steal a march on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application”.

Further the same Court of appeal in the case of:- “Jay Super Power Cash and Carry Limited – Versus - Nairobi City Council and 20 others CA 111/2002” held that:-

“This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass



are compensable in damages. A wrong doer cannot keep what he has taken balance he can pay for it”.

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

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

74. Additionally, the law on Mandatory Injunctive Orders was laid down in the case of “Civil Appeal 19 of 1998, Andrew Kamau Mucuha – Versus - Ripples Limited. The Court of Appeal in the latter held as follows:

“A Mandatory Injunction ought not be granted on an Interlocutory Application in the absence or special circumstances and then only in clear cases either where the court that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the Defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a Mandatory Interlocutory Injunction, they had to feel a higher degree of assurance that at the trial it would appear that the Injunction had rightly been granted that being a different and higher standard than was required for a Prohibitory Injunction.”

75. Similarly, in the case of:- Nation Media Group & 2 others – Versus - John Harun Mwau (2014) eKLR, the Court of Appeal said:-

“It is trite law that for an Interlocutory Mandatory Injunction to issue, an Applicant must demonstrate existence of special circumstances. A different standard higher than that in Prohibitory Injunction 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 Injunction can only be granted in exceptional and in the clearest of cases.”

76. From these elaborate and plethora precedents, the Court is fully convinced that graphically the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants herein have proved there was:

- i) Existence of special circumstance.
- ii) Exceptional and clearest of cases.
- iii) Whether the Defendant is trying to steal a march against the Plaintiffs.

The special circumstance to warrant the issuing of Mandatory Injunction is in form of the facts of the case herein. These are:-

- a. The lease agreement between the Plaintiffs/Applicants and the Defendant having lapsed. The same applied to the CODO Service Agreement between the Defendant and the Interested Party a fact which is not denied by all the parties.
- b. The Plaintiffs/Applicants have clearly shown that they have already entered into a sale agreement for the Suit Property and Premises with a prospective purchaser trading



in the names and style of Barnsbury Investment Limited for a consideration of a sum of Kenya Shillings Fourty Million (Kshs. 140, 000, 000.00) The transaction is under threat of being rescinded should the Plaintiffs/Applicants fail to grant vacant possession of the Suit Property and Premises thus leading to irreparable loss to the Plaintiffs and other beneficiaries of the Estate of the Late Ezekiel Luyali Luyai. They will not only loose the offered price but will have to refund the deposit already paid.

77. Therefore, the current circumstances are special and which require the interventions of the Honorable Court as the failure by the Defendant to hand over vacant possession allegedly due to a court order obtained at the Mombasa Magistrate Court in ELC Case No.142 of 2022 by the Intended Interested Party. In any case for argument sake though this court is not bound by the subordinate court but clearly, the Interested Party has no legal claim as their license lapsed on the 30<sup>th</sup> September 2022 when the lease between the Plaintiffs/Applicants and the Defendant extinguished.
78. On the issue of whether there exists the clearest of cases. As already submitted it is clear cut the matter warrants in granting of the orders sought. All parties to the suit are in agreement that the lease between the Plaintiff/Applicants and the Defendant and the CODO Service Agreement between the Defendants and its Licensee(Interested Party) died a natural death on the 30<sup>th</sup> September 2022. Therefore the orders sought ought to be granted.
79. On the issue of whether the Defendant and Interested Party are stealing a march against the Plaintiffs/Applicants. Undoubtedly, the Defendant has admitted that the lease agreement lapsed but is unable to grant back a vacant possession because of Court Order obtained by its licensee in the Sub-Ordinate Court - ELC Case No. 142 of 2022 Mombasa Magistrate Court and that of 18<sup>th</sup> November, 2022 by the Plaintiffs/Applicants from this Court. The Interested Party seem to be stating that their only issue was not having given adequate notice by the Defendant. In fact, at page 53 of the Replying Affidavit paragraph (d) they state as follows;

“The nature of the Notice served upon the Plaintiff is to immediately vacate from the Suit Property and Premises, instead of the Defendant giving the Plaintiff ample time (the least 1 month) to secure their invested property and inform their clients”

Furthermore, through the Notice of Motion application dated 7<sup>th</sup> February, 2023 the Defendant herein is seeking for orders to be allowed to access and remove all its assets from the suit premises. From this, it's a clear indication of the Defendant acting in good faith and willing to abide by the terms and conditions of the Lease. To the Defendant the reason they have now approached Court on their own volition was because they had been prevented from providing vacant possession of the suit premises arising from the Court orders issued to the Interested Party by the Sub Ordinate Court and recently an order of “Status Quo” issued to the Plaintiffs/Applicants by this Court. As a result they got stuck and at cross roads. Under the contents of Paragraphs numbers 3, 5 and 7 of the Supporting Affidavit by Kelvin Gathara dated 7<sup>th</sup> February, 2023, the Defendant confessed and stated its willingness to provide the Plaintiffs/Applicant with vacant possession. They stated as follows:-

“Following the termination of the Lease, the Defendant sought to remove its items from the suit property but was prevented from doing so as a result of a lawsuit filed by the Licensee.....

The Landlord, being the Plaintiff herein, subsequently filed this suit seeking vacant possession.



At all times, the Defendant had been ready and willing to hand over vacant possession as per the terms of the Lease.

There was currently pending a ruling on the Plaintiff's interlocutory application for possession scheduled for delivery on notice.

Further, the Court has issued a "Status Quo" order preventing the Defendant from accessing the property....."

80. I hold that the licensee (Interested Party) were stealing a match against the Plaintiffs/Applicants herein through litigation process at the lower Court. They are hell bent on abusing the Court process. In spite of them knowing that their License lapsed on the 30<sup>th</sup> September 2022 they still go ahead to seek orders from the Sub-Ordinate Court to be supplied with petroleum products until their suit is heard and determined which may take years to the detriment of the Plaintiffs/Applicants herein in the current suit. They were attempting to having their license extended unlawfully through litigation. In the process, they obtained the interim orders on the 27<sup>th</sup> September 2022.

Although, they alluded they only required notice of at least one month to vacate, as of today, had not yet vacated They are being disingenuous. They only want to use the process of litigation to continue occupying the Plaintiffs/Applicants property. Besides, with due respect to the Sub -ordinate Court, its trite law that this Court is not bound by the orders and directives from that Court whatsoever. As such those orders are set aside henceforth.

81. Therefore, in summary, the Honorable Court is fully convinced that there exists special circumstances in this matter there are exceptional and clearest cases and the Interested party using the Sub-Ordinate Court trying to steal a match against the Plaintiffs/Applicants. That will warrant the grant of a mandatory injunction. I am also convinced that this case is so clear that it ought to be decided at once. There are no competing claims by all the parties to cause for any further interrogation. As ever stated, the Judicial resources – time, manhour and monies is so precious. There is need to spare it the breath. Thus, my hands are tied as I proceed to grant the orders of Mandatory injunctions to the Plaintiffs/Applicants.

**Issue f). Who will bear the Costs of Notice of Motion applications of 2<sup>nd</sup> November, 2022, 28<sup>th</sup> of November, 2022 and 7<sup>th</sup> February, 2023 respectively.**

82. It is now well established that the issue of Costs is at the discretion of the Court. Costs mean the award that is granted upon a party at the conclusion of a legal action, process and proceedings of any litigation thereof. The proviso of the provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. (See the Supreme Court case of:- "Jasbir Rai Singh Rai - Versus – Tarlochan Singh (2014) eKLR and Rosemary Wairimu Munene – Versus – Ihururu Dairy Co – operative Society (2014) eKLR).

In the instant case, the Court finds that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/ Applicants have not only fulfilled the conditions set out under Order 40 Rules 1, 2, 4 and 10 of the Civil Procedure Rules, 2010 but are also entitled to the orders of mandatory injunction. From the surrounding facts, it's a 'fait compli' case. Be that as it may, its just reasonable, equitable and fair that each party to bear their own costs.

**IX. Conclusion and Disposition**

83. Ultimately, having conducted such an elaborate and comprehensive analysis of the framed issues herein, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Clearly, based on the preponderance of probability, the Plaintiffs/



Applicants have established a case against both the Defendant and the Interested Party herein. For avoidance of doubt and in a nutshell, I proceed to order as follows:-

- a. That the Notice of Motion application dated 2<sup>nd</sup> November, 2022 by the Plaintiff/Applicants herein is found to have merit and is hereby allowed as per the Court's discretion and the preservation of the suit property.
- b. That an order for Mandatory injunction compelling the Defendant/Respondent and the Interested Party, their servants, agents and any other person purporting to act under its authority or instructions pursuant to the Provision of Section 152E of the *Land Act*, No. 6 of 2012 within the next thirty (30) days from the date of the delivery of this Ruling to vacate the property known as Land Reference Number 7665 Section I, Mainland North Mombasa C.R. Number 21811 situate within Mombasa County be and is hereby granted.
- c. That the Notice of Motion application dated 28<sup>th</sup> November, 2022 be and is hereby dismissed for lack of merit.
- d. That an order hereby do issue allowing the Defendant and the Interested Party by themselves, their officers, agents and or servants within the next thirty (30) days from the day of the delivery of this ruling into having free access and entering the premises on and or plot Land Reference Number 7665 Section I, Mainland North Mombasa C.R. Number 21811 solely to remove all its fixed assets and other items being petrol station facilities and equipment and oil products belonging to them.
- e. That failure to observe this order under (d) above, the Plaintiffs/Applicants to be at liberty to remove the said items without causing any damage to them and keep them in safe custody all these exercise of removal and demurrage incurred to be at the expense of the Defendant and the Interested Party herein.
- f. That an order of permanent prohibitory injunction do issue restraining the parties to this suit, their agents, workers, contractors, or other persons acting under its instructions from trespassing, entering into and/or occupying in any other manner from interfering with the parcel of land known as Land Reference Number 7665 Section I, Mainland North Mombasa C.R. Number 21811.
- g. That an order directing the Officer In Charge of Mombasa Dog Unit Police Station to ensure full and smooth compliance of these orders without fail.
- h. That each party to bear their own of these three (3) applications.

It is so ordered accordingly.

**RULING, DELIVERED, SIGNED AND DATED AT MOMBASA THIS 8<sup>TH</sup> DAY OF MARCH 2023.**

**HON. JUSTICE L. L. NAIKUNI, (JUDGE)**

**ENVIRONMENT AND LAND COURT**

**MOMBASA**

**In the presence of.**

- a. M/s. Yumna, Court Assistant;
- b. Mr. Olwande Advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants.
- c. Mr. Kahura Advocates for the Defendant/Respondent.



d. Mr. Tajbhai Advocates for the Interested Party.

