



**Omar v Abushir & 4 others (Land Case 22 of 2022)
[2023] KEELC 16640 (KLR) (7 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16640 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
LAND CASE 22 OF 2022
LL NAIKUNI, J
MARCH 7, 2023**

BETWEEN

MOHAMED MAYE OMAR PLAINTIFF

AND

ALI MOHAMED ABUSHIR 1ST DEFENDANT

HADIJA MOHAMED ABUSHIR 2ND DEFENDANT

FATUMA MOHAMED ABUSHIR 3RD DEFENDANT

ZAHRA MOHAMED ABUSHIR ALI 4TH DEFENDANT

SHANI MOHAMED ABUSHIR ALI 5TH DEFENDANT

RULING

I. Preliminaries

1. The Plaintiff/Applicant, Mohamed Maye Omar herein, moved this Honorable Court for hearing and determination of the Notice of Motion application dated 2nd March, 2022. It is brought under a Certificate of urgency by the Applicant under the provisions of Order 40 Rules 1 (a), 3 and 9 of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act Cap 21, Laws of Kenya.

II. The Plaintiff/Applicant's case

2. The Plaintiff/Applicant sought for the following orders:-
 - a. Spent.
 - b. That pending the hearing and determination of this application inter parties, this Honourable Court be pleased to grant a temporary injunction restraining, barring, stopping and or preventing the Defendants, their agents, assigns, workers, representatives and or any o family



members from blocking, taking possession, interfering with the Plaintiff construction of the development on LR No. Mombasa/Block XVI/714 and any part thereof.

- c. That pending the hearing and determination of this suit, this Honourable Court be pleased to grant a temporary injunction restraining, barring, stopping and or preventing the Defendants, their agents, assigns, workers, representatives and or any of their family members from blocking, taking possession, interfering with the Plaintiff construction of the development on LR No. Mombasa/Block XVI/714 and any part thereof.
 - d. That the OCS, Makupa Police Station to ensure due compliance with the Orders.
 - e. That costs of this application be provided for.
3. The application by the Applicant was premised on the grounds, testimonial facts and averments founded in the 30 Paragraphed Supporting Affidavit of Mohamed Maye Omar the Applicant herein sworn and dated on 1st march, 2022 and three annexures marked as “MMO – 1 to 3”. In Summary, the Plaintiff/Applicant averred that:
- a. The Plaintiff was and remains the registered and beneficial owner of Land Reference No Mombasa/Block XVI/714 (herein after referred to as the Suit Land”) situate in Mombasa.
 - b. The Plaintiff’s entered into a Joint Venture Agreement (herein after referred to as “JV”) dated 20th November 2019 with the Defendants for the development of the above-mentioned parcel of land wherein it was agreed between the parties that:
 - i. The Plaintiff would construct a building consisting of two (2) Shops on the ground floor and eighteen (18) Flats going up four (4) Floors;
 - ii. The said construction was as per the plan attached to the JV Agreement;
 - iii. On completion, the building would be shared between the two parties equally with each getting nine (9) flats and one (1) Shop;
 - iv. The costs of construction and the land amounted to a total sum of Kenya Shillings Fourty Seven Million (Kshs. 47,000,000/=) (the land having been valued at a sum of Kenya Shillings Seventeen Million (Kshs. 17,000,000/=) and the costs of construction at a sum of Kenya Shillings Thirty Million (Kshs. 30,000,000/=)
 - v. The costs to be shared equally between the Plaintiff and the Defendants with each party contributing a sum of Kenya Shillings Twenty Three Million Five Hundred Thousand (Kshs. 23,500,000/=)
 - vi. The cost of the land of a sum of Kenya Shillings Seventeen Million (Kshs. 17,000,000/=) to be subtracted from the Defendants share to be paid, leaving them with a balance of a sum of Kenya Shillings Six Million Five Hundred Thousand (Kshs.6,500,000/=) to be paid to the Plaintiff;
 - vii. The Defendants share of a sum of Kenya Shillings Six Million Five Hundred Thousand (Kshs. 6,500,000/=) will be recovered by the Plaintiff by collecting rent from the eight (8) Flats and one (1) shop from the owner’s half building until full amount was paid.
 - c. Further to the aforesaid terms of the JV, the Plaintiff commenced construction of the Flats on the above-mentioned parcel of land from the date of being granted possession of the land to date.



- d. The construction was yet to be completed. The Plaintiff was however ready, able and willing to complete the said development.
- e. Sometimes in January 2022, the Defendants without any colour of right, unlawfully and without any regard to the established terms of the JV, intentionally and deliberately encroached and trespassed onto the Development and proceeded to occupy two (2) Flats on the 1st Floor thereon prior to the development being completed.
- f. The above was despite the fact that the development was yet to be completed and further, that the Flat they were to occupy upon completion was only one as the Plaintiff was to retain, manage and collect rent from the remaining Flats so that he could recover his sum of Kenya Shillings Six Million Five Hundred Thousand (Kshs. 6,500,000/=).
- g. In addition to the above unlawful and wrongful occupation, the Defendants had since the wrongful occupation herein above mentioned, interfered with the Plaintiff's works in completing the construction of the development by causing mayhem to the construction workers thereon thus denying the Plaintiff an opportunity to fully complete the development.
- h. The Defendants action of forcefully moving into the Development prior to the same fully completed was an affront to the JV Agreement and a breach of the fundamental terms of the said JV Agreement.
- i. Further, the Defendants action of interfering with the development has jeopardized the Plaintiff role in the JV Agreement as the Plaintiff had been restrained and prevented from undertaking the development and thus unable to continue to perform his obligation under the Agreement.
- j. The Plaintiff averred that as a result of the said interference, the Plaintiff had been deprived of and denied its rights to complete the development, thus causing a major delay in the completion thereby causing the Plaintiff to suffer loss and damage loss and damage as it had been unable to complete the development owing to the illegal and unlawful actions by the Defendant.
- k. The Plaintiff further averred that the said interference and taking of possession by the Defendant into the Plaintiff's parcel of development is wrongful, illegal, unlawful and without any justification whatsoever.
- l. In addition, the Plaintiff deponed that the said encroachment by the Defendant was an infringement of the Plaintiff's property rights and was against the law and further contrary to the terms of Joint Venture Agreement.
- m. The Plaintiff deposed that after the trespass and encroachment, the Defendants proceeded to illegally, unlawfully and wrongfully occupy Two Flats on the 1st Floor of the development without the Plaintiff's knowledge, or consent or authority.
- n. The Plaintiff stated that the Defendants' action of trespassing, encroaching and development onto the Plaintiffs parcel of land was wrongful, illegal, unlawful and an infringement of the Plaintiff rights to its property.
- o. The Plaintiff deponed that as a result of the said trespass, the Plaintiff had been deprived of and denied its rights to use, utilize and enjoy its property and it has consequently suffered loss and damage.



- p. The Plaintiff averred that it wrote a letter dated 18th January 2022 addressed to the Defendants wherein the Plaintiff demanded that the Defendants removed all the house hold items that they had placed and stored in the two Apartments on the 1st Floor so that the Plaintiff could complete the said development.
- q. The Plaintiff stated that the said Defendants declined to heed to the demand by the Plaintiff but continued with their wrongful occupation of the Two Flats on the 1st Floor and further denying the Plaintiff rights to continue with the Construction.
- r. The Deponent held that despite due demand made, the Defendants have blatantly and capriciously failed to heed the Plaintiffs legitimate demands.
- s. He deposed that the Defendant with total impunity had deliberately chosen to ignore the demands issued to it by the Plaintiff and had continued to illegally and unlawfully trespass and encroach onto the Plaintiff's units, to the detriment of the Plaintiff.
- t. In the circumstances, the Plaintiff had approached this Court seeking protection from interference and compliance with the fundamental terms of the JV Agreement.
- u. The Plaintiff stated that as the exclusive registered proprietor of the suit land, he held all rights, interest and title over it under the law.
- v. Therefore, by reason of the matters pleaded herein above, the Plaintiff stated that the Defendants who occupy its property illegally and without any colour of right are an impediment to the Plaintiff's rights to the said property.
- w. The Defendants' occupation of the Plaintiffs property had the undesirable effect of defeating the rights and interests of the Plaintiff over the subject property, contrary to the mandatory Provisions of Section 25 of the *Land Registration Act*, No. 3 of 2012.
- x. The Plaintiff further stated that the Defendants had no right or any interest, legal or otherwise, to occupy the Plaintiff's property. The said occupation was therefore illegal and a brazen affront to the law. The Defendants' action of encroaching on and occupying the Plaintiff's parcel of land aforesaid amounts to an arbitrary deprivation of the Plaintiff's Rights and Interests over the subject property.
- y. Despite demand made and notice of the Plaintiff's intention to sue having been given, the Defendants had refused, neglected and/or failed to vacate the subject property, thereby to vacate the subject property, thereby rendering this suit necessary. The Plaintiff stated that there was no other suit pending, and there had been no previous proceedings, in any court between the parties herein over the same subject matter and that the cause of action related to the Plaintiff named herein.
- z. It was only and in the interest of justice that an injunction be granted to prevent the Defendants/Respondents from further trespassing and or interfering with the Applicants property pending the hearing and determination of the dispute by this Honorable Court. In view of the nature of this matter and so as to protect the interest of the Applicant and its property it was imperative that a temporary injunction be issued restraining the Respondent, his agents, assigns and servants from interfering with the Applicants parcels of land pending the hearing and determination of this application and eventually the suit. It was in the best interest of all parties that the orders herein be granted.
- i. The Plaintiff was and remained the registered and beneficial owner of the suit land.



- ii. The Plaintiff's entered into a Joint Venture Agreement (herein after referred to as JV) dated 20th November 2019 with the Defendants for the development of the above-mentioned parcel of land wherein it was agreed between the parties that.
- iii. It was in the best interest of all the parties that the orders herein be granted. Unless the orders sought granted, he would suffer irreparable injury.

III. The 1st Defendant/Respondent's case

4. On 22nd April, 2022, the 1st Respondent filed a 17 Paragraphed Replying Affidavit sworn by Ali Mohamed Abushir dated 22nd April, 2022 with two (2) annexures marked as "AMA 1 and 2" where he averred that: -
 - a. He was the 1st Defendant herein and fully conversant with the matters in issue herein and authorized by the 2nd, 3rd, 4th and 5th Defendants to swear this affidavit on their behalf and on his own behalf. He annexed and marked as "AMA – 1" a copy of the authority to plead.
 - b. The Contents of the supporting affidavit sworn by Mohamed Maye Omar on 1st March 2022 (hereinafter the said affidavit) had been read and explained to him by his advocates on record and he understood the same and in reply hereto he stated as follows:
 - i. The contents of paragraph 2 of the said affidavit were correct save that it was also a term of the said agreement that the plaintiff would complete the construction within a period of 18th months from the date of the agreement.
 - ii. He averred that after signing of the agreement they complied with the terms of the agreement by handing over possession of the property to the Plaintiff as agreed in the joint venture agreement.
 - iii. He further deposed that despite handing over possession as agreed the Plaintiff failed to comply with the terms of the joint venture agreement by failing to complete the construction within the agreed time thereby exposing us to great loss and/or damage by rendering the us homeless.
 - c. With regards to the contents of Paragraphs 4 and 5 of the said affidavit he denied that their entry into the property was unlawful or without colour of right for reasons that:-
 - i). They were the lawful owners of the property.
 - ii). The entry into the suit property was pursuant to breach of the joint venture agreement by the plaintiff.
 - iii) That the entry into the property was necessary to mitigate the damage being occasioned by the Plaintiff's breach.
 - d. Further to the forgoing, he had established that the Plaintiff obtained the building plan by fraudulently presenting signatures purportedly appended by them to the building department and by reason, thereof he avers that the plaintiff acted maliciously with view of obtaining an unfair advantage over us in the joint venture.
 - e. With regard to the contents of Paragraph 7 of the said affidavit he asserted that upon the receipt the letter mentioned therein they instructed their advocates on record to inform the Plaintiff that by reason of breach of his part of the agreement they had terminated the same. Annexed hereto and marked as "AMA - 2" was a true copy of the said letter



- f. In any event he deposed that the Plaintiff is merely seeking to evict them from the suit property without taking any measures to cover the loss that they may suffer as a result of his breach of the agreement. He further averred that the real reason the Plaintiff was keen on evicting them as the Plaintiff had sought to distribute the apartments in a manner that would give the Plaintiff a bigger area that theirs which was against the joint venture agreement.
- g. With regards to the contents of Paragraphs 10, 11, 12, 13, 14, 15, 17, 18,19, 20 and 21 he stated as follows:-
 - i). He denied that the Plaintiff was the exclusive owner of the property.
 - ii). Their entry into the suit property was lawful as they were the true owners and had invited the Plaintiff to a joint venture investment pursuant to a written agreement.
 - iii). The Plaintiff breached the joint venture agreement thereby necessitating their action.
- h. Further to the foregoing he averred that pursuant to the joint venture agreement the plaintiff proceeded to demolish our existing house and transferred our title document into his names.
- i. The Plaintiff took advantage of their property by transferring the title into his sole names despite the fact that we have equal right of ownership with him as per the joint venture agreement.
- j. The Plaintiff was in breach of his own terms of the joint agreement by failing to complete within the agreed term. The Plaintiff fraudulently presented a building plan purportedly signed by them. The Plaintiff fraudulently transferred the title document into his sole names despite their interest in the plot.
- k. He prayed for the application to be dismissed with costs.

IV. The Plaintiff's response to Replying affidavit

5. Upon seeking and being granted leave of Court, the Plaintiff filed a 14 Paragraphed Supplementary Affidavit dated 16th May, 2022 and filed the same date in response to the new issues raised from Replying Affidavit by the Defendant/Respondent. He stated that:
 - a. He maintained that the Defendant's entry onto the suit premises was unlawful as they had occupied two flats instead of one, causing him to suffer financial loss as he could not recoup his investment, by way of collecting rent from one of the flats as was agreed under Clause 6 the Joint Venture agreement of 20th November 2019.
 - b. The Defendant's claims that they had entered into the suit premises because he have breached the terms of the joint venture agreement and their further allegation that they had terminated the JV agreement was a ploy to unjustly enrich themselves by and keep him from recovering his investment.
 - c. In response to the averments made out under the contents of Paragraphs 13 and 14 of the Replying affidavit, he stated that as per the terms of the joint venture agreement, the parties were to share the cost of the land and construction of the premises on the land which totaled to a sum of Kenya Shillings Fourty Million (Kshs. 47,000,000/=) equally.
 - d. The provision of Clause 5 of the agreement stated that the cost of the land would be subtracted from the total cost of sum Kenya Shillings Fourty Seven Million (Kshs. 47, 000,000/=) leaving



the Defendants to pay only a sum of Kenya Shillings Six Million Five Hundred Thousand (Kshs. 6,500,000.00/=). He had used enormous amount to construct the said development.

- e. Further, Clause 6 of the agreement stated that he would pay the full amount of the construction together with the land, leaving the Defendants to only pay Kenya Shillings Six Million Five Hundred Thousand (Kshs. 6,500,000.00/=) which he would then recover by collecting rent from the eight (8) flats and (1) one shop that would be allocated to the Defendant's.
- f. It was on the strength of the JV agreement and particularly provisions of Clauses 5 and 6 of the agreement that the Defendants willingly and legally transferred the parcel of land to himself.
- g. The Defendants allegations that he had fraudulently transferred the title document to his name was untrue as they willingly without any coercion or duress entered into the JV agreement with him and agreed that he would cover entire the cost of the land and construction of the premises and it was on the strength of the said JV that they freely executed the transfer instruments.
- h. The Defendants had admitted to this very fact in Paragraph 13 of their Replying affidavit. They admitted that the transfer of title to his name was done pursuant to the JV agreement.
- i. It was obvious that the Defendants now sought to unjustly enrich themselves at his expense by claiming that he had breached the terms of the JV agreement and purporting to terminate the agreement in its entirety.
- j. As stated in his supporting affidavit, he was ready and willing to complete construction of the premises as agreed, but these efforts had been frustrated and scuttled by the Defendants illegal occupation of the premise and their continuous interference with the construction process.
- k. It was evident that the Defendants had not suffered any loss as alleged in their Replying affidavit.

V. Submissions

6. On 23rd June, 2022 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 2nd March, 2022 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and a ruling date was reserved on Notice by Court accordingly.

A. Written Submissions by the Plaintiff/Applicant

7. On 27th May, 2022, the Learned Counsel for the Plaintiff/Applicant herein through the Law firm of Messrs. Khalid Salim & Company Advocates filed their written submissions dated even date. 27th May, 2022. Mr. Khalid Advocate provided a background information of the suit holding that the Plaintiff/Applicant moved Court seeking temporary orders of injunction restraining, barring, stopping and or preventing the Defendants, their agents, assigns, workers, representatives and or any of their family members from blocking, taking possession, interfering with the Plaintiff construction of the development on the suit land and any part thereof pending the hearing and determination of this suit.
8. The Plaintiff also sought that the OCS Makupa police station do ensure compliance with the said orders. The Respondent/Defendants had opposed the application through a Replying Affidavit sworn by Ali Mohamed Abushir dated 22nd April 2022.



9. The Counsel gave the brief facts of the matter by stating the Plaintiff was and remained the registered owner of the suit land situate in Mombasa. The Plaintiff and the Defendants entered into a joint venture agreement sometime in 20th November 2019 over the said parcel of land where they agreed as per the terms of the JV agreement stated above.
10. On the issue of whether the Plaintiff had met the threshold for grant of temporary injunction the Learned Counsel submitted that the Plaintiff sought from this Honorable Court an order of injunction preventing Defendants, their agents, assigns, workers, representatives and or any of their family members from blocking, taking possession, interfering with the Plaintiff construction of the development on the suit land and any part thereof pending the hearing and determination of this suit. He stated that the often cited case of “Giella – Versus - Cassman Brown set out the three grounds to be met when a Court was to consider an application for injunction. These were:
 - i. A prima facie case with a probability of success.
 - ii. The applicant should show that he would suffer irreparable harm which would not adequately be compensated by an award of damages.
 - iii. If the court is in doubt, it would decide an application on a balance of convenience.
11. The Learned Counsel stated that this position was reiterated in the case of:- ”Hollander Ned Security Services Limited – Versus - Jacqueline Wangui Hill & 2 others [2019] eKLR where the Court in granting the orders of injunction stated as follows:

“ This being an application for interlocutory injunction, the Plaintiff was only required at this stage to demonstrate that he has a prima facie case with a probability of success and that he stands to suffer irreparable damage.”
12. On the issue of “Prima facie” case, the Counsel held that both parties admitted that they willingly, without any coercion, entered into a joint venture agreement over the subject property. The contents of the joint venture agreement were not in dispute. The fact that the Plaintiff solely contributed to the construction of the premises erected on the subject property was also not in dispute. The Plaintiff also had proprietary rights to the property having shown this by way of a title issued in January 2022. As it stood the only interest the Defendants had was the eight (8) flats and one (1) shop that they were to be allocated after construction of the shop. The claim made by the Defendants over the procedure on how the Plaintiff acquired the said title was through fraud means was not supported by any evidence. This had not strictly been proven.
13. Additionally, the Learned Counsel held that the Defendants had failed to show what rights had been infringed or would be infringed or how they would suffer should the orders sought not be granted. As submitted above, the Defendants had not shown any evidence that they contributed monetarily to the joint venture agreement and as per the agreement. The Plaintiff was to recover a sum of Kenya Shillings Six Thousand Five (Kshs. 6,500,000.00/=) from the Defendant's share of flats. By their illegal occupation of the premises, the Plaintiff was not able to continue with the smooth construction of the suit premises and the Plaintiff would eventually not be able to collect rental income from the flats as had agreed in the joint venture agreement.
14. The Learned Counsel submitted that the Plaintiff averred that as the registered legal owner of the suit premise, he held ban indefeasible title, right and interest to the subject premises as envisaged under the provision of Section 26 of the [Land Registration Act](#) which provides as follows. Despite the above issuance and vesting of title to the Plaintiff, the Defendant had resorted to illegally invading the subject



property as well as the construction thereon and had taken over two flats. In doing this, the Defendants were not only infringing on the Plaintiff right to the property but their actions had caused substantial delay to the completion of the project, something that the Plaintiff was willing to do.

15. On whether the Plaintiff would suffer irreparable harm which would not adequately be compensated by an award of damages, the Counsel stated that the Plaintiff stood to suffer even after having acquired good Title to the premises. He stressed that the Plaintiff enjoyed indefeasible rights to enjoy and utilize his property as he so wished pursuant to the provisions of Section 26 of the Land Registration Act. The valuable consideration that was made by the Applicant to the Defendant was that which involved the Applicant's hefty and heavy investment in the construction on the premises, a fact duly acknowledged and not denied by the Respondents herein. From the above it was quite forthright that since the Plaintiff/Applicant was the established lawful proprietor, he has numerous rights that have been infringed including his guaranteed constitutional right to and protection of his property pursuant to Article 40. Despite the above issuance and vesting of title to the Applicant, the Respondents had been constantly interfering with the Plaintiff's possession of the suit premises, issuing threats and or harassing the Plaintiff in various ways including but not limited to interfering with the ongoing construction by unlawfully taking possession thereof. It was their submission that if the Plaintiff's proprietary interest is not protected, then the damage suffered to the Plaintiff would be grave and incapable of any monetary compensation. In any event, the Defendants have not demonstrated to this court is they are in any position to compensate the Plaintiff for any losses incurred. Further, due to the Defendant's illegal invasion of the 2 flats the Plaintiff had been rendered unable to complete said structures.
16. On the last limb, the Learned Counsel held that where the Court was still in doubt, it shall decide on the balance of convenience. Who would be harmed the most if an injunction was granted? The Plaintiff opined that the balance of convenience tilted in his favor as he was the registered owner of the subject property, holding a valid title, and further, there is a JV agreement that is binding on both parties. The Defendants had also not denied moving into the two flats, a clear violation of the Plaintiff's proprietary rights and this Court was bound to protect this right. The Defendants were not and would not be prejudiced in any way whatsoever if the said Orders were granted as the suit property would ultimately be preserved for the benefit of all parties.

B. The Written Submissions by the Defendant/Respondents

17. On 15th June, 2022, the Learned Counsel for the Defendants through the Law firm of Messrs. A. O. Hamza & Company Advocates filed their written Submissions dated even date. Mr. Hamza Advocate recapped that the Plaintiff's Application sought for injunctive orders to restrain the Defendants from blocking, taking possession, interfering with the Plaintiff's construction of the development on the suit land. According to the application, the Plaintiff was the alleged sole owner of the suit property.
18. The Learned Counsel held that the application further stated that the parties entered into a joint venture agreement dated 20th November 2019. The agreement provided that the Plaintiff would construct on the property 2 shops on the ground floor and 18 flats going upward to the 4th floor. The Plaintiff did not however state that when the joint venture agreement was entered into the title document for the plot was in the Defendant's names. The Plaintiff did not also state that at the time of the agreement the Plaintiff's residential premises was on the suit property and that by reason of the agreement the same was demolished and possession given to the Plaintiff in December 2019 and that the Plaintiff was to commence construction immediately and complete the same within a period of 18 months from the date of handing over possession.



19. The Learned Counsel submitted that despite possession having been given to the Plaintiff during the year 2019, the Plaintiff failed to complete construction within the agreed time and by reason thereof the Defendants whose residential house was demolished had no other option but to terminate the agreement and take possession so as to mitigate the damage and by reason thereof the Plaintiff had been seeking to evict the Defendants on the pretext that he was the sole owner of the suit property. The Defendants had opposed the application on grounds inter-alia:-
- a. The Defendants had fraudulently transferred title of the suit property into the Plaintiff's own names.
 - b. Fraudulently presenting a building plan.
 - c. That the Plaintiff was in breach of the joint venture agreement by failing to complete within the stipulate period.
20. On whether the Plaintiff should be granted the injunction orders sought, the Counsel, the Courts are guided by the principles set out under the "Locus Clasicus" case of: "Giella – Versus - Cassman Brown & Company Limited (1973) EA 358 in which the court outlined the conditions that a party must satisfy for the Court to grant an interlocutory injunction. First of which was that a party must show a prima facie case with a probability of success. Secondly, an injunction would not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court was in doubt it would decide an application on the balance of convenience.
21. He relied on two Maxims and the principles of equity to wit "he who comes to equity must come with clean hands" and "he who sought equity must do equity". In the instant case, he argued on prima facie that it was clear that the Plaintiff was in breach of the very agreement that was the basis of this suit. The Plaintiff committed a material non – disclosure to Court by failing to disclose that he failed to complete construction within time, which according to the agreement commenced during the year 2020 and was to be completed in December 2020. The Plaintiff did not also disclose that prior to the commencement of construction he demolished the Defendant's residential home. Further, he never disclosed that prior to the commencement of construction he demolished the Defendant's residential home. The Learned Counsel asserted that on their part, they had raised very serious issues including the fraudulent transfer of title and a fraudulent building plan being issued which if not taken seriously they could lead to a serious failure of justice.
22. In view of the foregoing the Plaintiff could not be said to have "a Prima facie case" as his entire suit was based on a breach of contract to which the Plaintiff was the main author. The Plaintiff should be estopped from relying on the provision of Section 26 of the *Land Registration Act* as the same section provides an exceptions. He held that in this case the Defendants had denied that they transferred the suit property to the Plaintiff. The Defendants had further stated that the transfer to the Plaintiff was fraudulently. The fraud complained of was committed by the Plaintiff and not any other person. Even on a look at the joint venture agreement there was no mention of or any indication that the parties intended to transfer the plot into the plaintiff's names, meaning that the transfer into the Plaintiff names was fraudulent.
23. On the issue of whether there would be anyone to suffer irreparable harm, he held that the Plaintiff's Investment on the suit property was clearly quantifiable. On the issue of the balance of convenience, the Learned Counsel submitted that in this case the balance of convenience tilted in the favour of declining to grant the orders sought as allowing the application would render the Defendants whose home was demolished will be rendered homeless at the expense of the Plaintiff who has not suggested



any remedy as a result of the delay he caused. The Defendant's movement into the suit property was necessitated by the Plaintiff's breach material breach of contract. The Learned Counsel concluded by praying that the Plaintiff's application to be dismissed with costs.

VI. Analysis ad Determination

24. I have carefully read and considered the pleadings herein and the relevant provisions made by the by the Learned Counsels. In order to arrive at an informed decision, the Honorable Court has three (3) framed the following three (3) issues for determination.
- a. Whether the Notice of Motion application dated 2nd March, 2022 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.
 - b. Whether the parties are entitled to the relief sought.
 - c. Who will bear the Costs of Notice of Motion application 2nd March, 2022.

ISSUE a). Whether the Notice of Motion application dated 2nd March, 2022 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.

25. The application herein is premised under Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst the provisions of the law. Which provides as follows: -

Order 40, Rule 1

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

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

26. The principles applicable in an application for an injunction were laid out in the celebrated case of “Giella – Versus - Cassman Brown & Co Ltd (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.”

27. The three (3) conditions set out in Giella (supra), need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out



by the Court of Appeal in the case of:- Nguruman Limited – 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”.

28. In dealing with the first condition of prima facie case, the Honorable Court guided by the definition melted down in MRAO Limited v 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”

29. The Plaintiff/Applicant avers that he is and remains the registered owner of the parcel of land known as Land Reference No Mombasa/Block XVI/714 situate in Mombasa. The Plaintiff and the Defendants entered into a joint venture agreement sometime in 20th November 2019 over the said parcel of land where they agreed that the Plaintiff will construct a building consisting of 2 Shops on the ground floor and 18 Flats going up 4 Floors which was as per the plan attached to the Joint Venture Agreement. On completion, the building would be shared between the two parties equally each getting nine flats and one shop. The costs to be shared equally between the Plaintiff and the Defendants with each party contributing a sum of Kenya Shillings Twenty Three Million Five Hundred Thousand (Kshs. 23,500,000/=) with the cost of the land being valued at a sum of Kenya Shillings Seventeen Million (Kshs. 17,000,000/=) to be subtracted from the Defendants share to be paid, leaving them with a balance of a sum of Kenya Shillings Six Million Five Hundred Thousand (Kshs. 6,500,000/=) to be paid to the Plaintiff. The Defendants share of a sum of Kenya Shillings Six Million Five Hundred Thousand (Kshs.6,500,000/=) will be recovered by the Plaintiff by collecting rent from the 8 Flats and one shop from the owners half building until full amount is paid. The Plaintiff begun construction on the premises but before the construction was completed, the Defendants moved into two of the flats and have since frustrated the process of completion. The Defendants have also prevented the Plaintiff from collecting any rent from one of the flats as agreed in the joint venture agreements. The Plaintiff contends that the Defendants actions are a violation and an infringement of his proprietary rights and that this has caused him to suffer loss and damage.



30. In the case of “Mbuthia – Versus - Jimba credit Corporation Ltd 988 KLR 1, the court held that;
- “In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties cases.”
31. 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.”
32. In the present case, it is evident that the Plaintiff/Applicant is the owner of the suit property and he entered into a joint venture agreement with the Defendants and there is an alleged breach of agreement. There is no doubt in the mind of court that there is a dispute between the parties that can only be determined by entertaining and maintaining the conduct of this suit.
33. Regarding this first condition though, the facts of the case are fairly clear. The Plaintiff is the legal owner of the suit property and he entered into a joint venture agreement with the Defendants who allegedly breached this agreement. The Defendants also claim to be the registered owners of the subject property. They admit entering into a joint venture agreement with the Plaintiff. They however state that the Plaintiff maliciously obtained building plans by presenting signatures purportedly signed by them. They also state that the Plaintiff is in breach of the joint venture agreement as he failed to complete construction of the agreed premises within 18 months, and they also allege that the Plaintiff has fraudulently transferred the title to the suit property to himself. In the circumstances, I find that the Plaintiff/Applicant on the strength of the proprietary rights, interest, and title vested in him by the provisions of Section 26 of the Land Registration Act, No. 3 of 2012 he has established that he has a prima facie case with a probability of success.
34. With regards to the second limb of the Court of Appeal in “Nguruman Limited (supra), held that,
- “On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”
35. On the issue whether the Applicant will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. It is not hidden that the Applicant’s property is at risk evidenced by annexure marked as “MMO – 1” which is a title deed document indicating that the Applicant is the legal proprietor of the suit property.



36. Quite clearly, the Plaintiff/Applicant would not be able to be compensated through damages as he has shown the court that his rights to the suit property by the encroachment of his boundary from beacon to beacon. He has therefore satisfied the second condition as laid down in Giella's case.
37. On the issue of balance of convenience, I find that it tilts in favour of the Plaintiff/Applicant as he is the legal and registered owner of the land which is the suit property.

ISSUE e). Who will bear the Costs of Notice of Motion application 2nd March, 2022.

38. Costs is an issue of the discretion of the Court. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. In this case, as Court finds that the events or results of the case is that the Plaintiff/Applicant has fulfilled all the three (3) conditions set out in the "Giella case (Supra) as governed under the provision of the provision of Order 40 Rules 1, 2 and 4 of the Civil Procedure Rule, 2010 this application shall be deemed to have merit and is hereby allowed with costs to the Plaintiff as against the Defendants.

VII. Conclusion & Disposition

39. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to preponderance of probability and the balance of convenience. Clearly, from the face value, the Plaintiff/Applicant has a case against the Defendants/Respondents.
40. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-
- a. That the Notice of Motion application dated 2nd March, 2022 is found to have merit and is hereby allowed in its entirety.
 - b. That an order of Temporary injunction do and is hereby issued restraining, barring, stopping and or preventing the Defendants, their agents, assigns, workers, representatives and or any o family members from interfering with the Plaintiff construction of the development on LR No. Mombasa/Block XVI/714 and any part thereof pending the hearing and determination of the Suit.
 - c. That for expediency sake, this Suit to be heard within the next One Hundred and Eighty (180) days from the date of the delivery of this Ruling on 25th July, 2023. There be a mention date on 9th May, 2023 for Pre – Trail Conference under the provision of Order 11 of the Civil Procedure Rules, 2010.
 - d. That the costs of this application are awarded to the Plaintiff as against the Defendants.

It Is So Ordered Acordingly.

RULING DELIEVERED, SIGNED AND DATED AT MOMBASA THIS 7TH DAY OF MARCH 2023.

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

ENVIRONMENT AND LAND COURT

MOMBASA

In the presence of:

M/s. Yumna, Court Assistant.

No appearance for the Plaintiff/Applicant

Mr. Hamza Advocates for the Defendants/Respondents

