Said v National Bank of Kenya Limited & another (Environment & Land Case E032 of 2022) [2023] KEELC 16373 (KLR) (13 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16373 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE E032 OF 2022

LL NAIKUNI, J

MARCH 13, 2023

BETWEEN

FAWZIYA TAHIR SAID ..... PLAINTIFF

AND

NATIONAL BANK OF KENYA LIMITED ..... 1ST DEFENDANT

TAHIR SHEIKH SAID INVESTMENT LIMITED ..... 2ND DEFENDANT

RULING

I. Introduction

1. The Notice of Motion application before this Honorable Court for hearing and determination dated 18th March, 2022. It was brought under a certificate of urgency by the Plaintiff/Applicant under the provisions of Sections 1A, 1B, 3A & 63(e) of the *Civil Procedure Act*, Order 40 Rule 1 of the Civil Procedure Rules, 2010 and Section 13(7) of the Environment & Land Court No. 19 of 2011.

II. The Plaintiff/Applicant's case

2. The Plaintiff/Applicant sought for the following orders:-

    a. Spent.

    b. There be a temporary injunction, pending the hearing and determination of this application, restraining the 1st & 2nd Defendants, their agents, servants or employees, from further advertising for sale, selling whether by public auction or private treaty, transferring, disposing or in any other way interfering with Title No. Mombasa/Block XXVI/658.

    c. There be a temporary injunction, pending the hearing and determination of this suit, restraining the 1st and 2nd Defendants, their agents, servants or employees, from further

advertising for sale, selling whether by public auction or private treaty, transferring, disposing or in any other way interfering with Title No. Mombasa/Block XXVI/658.

d. The costs of this application be awarded to the Plaintiff.

3. The application is premised on the following grounds:

a. The Plaintiff/Applicant is the beneficial owner of Apartment 8A erected in Title No. Mombasa/Block XXVI/658 (Hereinafter referred to as "The Suit Property"). She was gifted that house by her father late Tahir Sheikh Said who was the majority shareholder of the 2nd Defendant.

b. The Plaintiff resides in the said apartment with her family.

c. The Plaintiff has not been able to effect transfer of the apartment to her name since the passing on of her father. She thus have a long term tenancy having lived in the apartment for over 10 years.

d. The Plaintiff saw an advertisement in the Daily Nation of 14th March, 2022 indicating that the suit property would be sold by public auction on 4th April, 2022.

e. The Plaintiff has never been notified of the creation of a charge over the suit property.

f. In any event, the Plaintiff has not been served with statutory notices under Sections 90 & 96 of the *Land Act*, 2012, as well as under Rule 11 & 15 of the Auctioneers Rules 1997.

g. The Plaintiff has never been served with any of the aforesaid statutory notices. In fact, the first time the Plaintiff knew of the threatened sale was the advertisement appearing in the one of local dailies being "The Daily Nation" newspaper of 14th March, 2022.

h. The purported intended sale is therefore pegged on a non-existent power of sale and is, in any event it was a violation of the provisions of law which donates that very power of sale sought to be exercised.

i. The Plaintiffs would suffer irreparably if the sale was allowed to continue. Other than the fact that she had been denied a statutory right, she lived on the suit property with her family. She would therefore lose their residential home through a fraudulent and illegal process.

j. It is in the interests of justice that the application be granted in the interim and ultimately.

4. The application by the Plaintiff/Applicant was premised on the grounds, testimonial facts and the averments found under the 15 Paragraphed Supporting Affidavit of FAWZIYA TAHIR SAID the Applicant herein and the 3 annexures Marked as "FTS – 1 to 3" annexed thereto. The Applicant averred that that she was the Plaintiff and hence competent to swear this affidavit. She annexed and marked "FTS – "1 a copy of her national identification card. She averred that her late father who was the majority shareholder of the 2nd Defendant herein gifted her the Apartment no. 8A erected on Title No. Mombasa/Block XXVI/658 and as such was the beneficial owner of the said apartment and that nobody should claim any right over hers.

5. She deposed that she has lived in the apartment with her family for over ten (10) years having been among the first tenants to occupy the same said apartment with her family. She deponed that she had not been able to transfer the apartment to her name since the passing on of her father thus have a long-term tenancy having lived in the apartment for over 10 years.

6. It is her testimony that she only saw an advertisement in the local dailies – "The Daily Nation" newspaper of 14th March, 2022 indicating that the suit property would be sold by public auction on 4th April 2022. She annexed and marked "FTS – 3" a copy of the newspaper advertisement. She had never been notified of the creation of a charge over the suit property. In any event, she has not been served with statutory notices under Sections 90 & 96 of the *Land Act* 2012, as well as under Rules 11 & 15 of the Auctioneers Rules 1997. The Plaintiff had never been served with any of the aforesaid statutory notices. In fact, the first time the Plaintiff knew of the threatened sale was the advertisement appearing in "the Daily Nation" newspaper of 14th March, 2022. The purported intended sale is therefore pegged on a non-existent power of sale and is, in any event, violate of the provisions of law which donate that very power of sale sought to be exercised.

7. Further, the Plaintiff/Applicant claimed that the she would suffer irreparably if the sale was allowed to continue. Other than the fact that she had been denied a statutory right, she lived on the suit property with her family, she would therefore lose their residential home through a fraudulent and illegal process. This apartment was a personal gift from her later father. Thus, it was of sentimental value that could not be compensated by a monetary award if any at all. She urged the court in the interest of justice to grant her application in the interim and ultimately.

III. The 1st Defendant/Respondent's case

8. On 4th April, 2022, the 1st Respondent filed a twenty one (21) Paragraphed Replying Affidavit with seven (7) annexures marked as "MMM – 1 to 7" sworn by Michael M. Mwita dated 30th March, 2022 where he deponed as follows: -

    a. He worked for the 1st Defendant/Respondent as an A.g. Head Credit Remedial Collections and Recoveries within the bank's credit division. Therefore he was fully conversant with the facts relevant to the application before the Honourable Court, duly authorized and therefore competent to swear the affidavit.

    b. In his capacity as an employee of the 1st Defendant/Respondent bank holding the position afore stated, his duties entailed among others overseeing the process of pursuit and recovery of outstanding banking facilities due from various customers of the bank and in that regard, he had access to the records at his disposal in relations to such customers.

    c. He was aware that the 1st Defendant/Respondent bank granted, on express request, credit facilities to one of its customers known as Tahir Sheikh Said, Grain Millers Limited for an initial principal sum of Kenya Shillings Seven Thirty Five Million (Kshs. 735,000,000/-) and US Dollar Three Hundred Thousand (USD$ 300,000/-) each exclusive of interest and other bank charges on the terms and conditions set out in the duly accepted letter of offer dated 22nd November, 2013 subsequently varied pursuant to the letters dated 11th November, 2014 and 5th September, 2014. He attached copies of the said letters annexed and marked as "MMM – 1".

    d. He was aware that by the letter dated 11th February, 2014 whose copy forms part of annexures marked as "MMM – 1" above, the security clause in the letter of offer dated 22nd November, 2013 was amended to stipulate that the facilities granted thereunder were to be secured by among others a charge over title number Mombasa/Block XXVI/658 in the name of Tahir Sheikh Said Investments Limited, the 2nd Defendant herein and corporate guarantee by the said company for the sum of Kshs 735,000,000/-. As the said letter confirms on its face, the same was duly executed by both the borrower Tahir Sheikh Said Grain Millers Limited and the

proposed 2nd Defendant to signify their acceptance to be bound by the terms by the terms and conditions expressed therein.

e. He was aware that pursuant to the said accepted letter of offer and variation thereof, the 2nd Defendant created in favour of the 1st Defendant bank a legal charge dated 3rd March, 2014 and a further legal charge dated 14th April, 2014 over title Number Mombasa/Block XXVI/658 for the cumulative principal sum of Kenya Shillings Seven Thirty Five Million (Kshs. 735,000,000/-) or the equivalent thereof in whatever currency denominated to secure the payment of the banking facilities granted to the borrower Tahir Sheikh Said Grain Miller Limited. The legal charge and further legal charge afore stated where duly registered and the copies thereof are annexed and marked as "MMM - 2 (a) & (b)".

f. In light of the foregoing, he verily believed that it was apparent that the intended sale of the suit property by the 1st Defendant bank which the Plaintiff purported to challenge in this suit is pursuant to the exercise of a Chargee's statutory power of sale conferred by law on the basis the security by way of the legal charge and further charge created in its favour by the 2nd Defendant in the manner demonstrated hereinabove.

g. On the basis of the foregoing matters, he was advised by the advocates for the 1st Defendant bank that the proceedings herein was grossly incompetent and ought to be struck out with costs as such for the following among other reasons:

    i. The Plaintiff was not the proprietor of the suit property and did not claim any interest over the entire parcel of land comprised in the said property.

    ii. The Plaintiff's alleged interest relates to just a unit of the suit property which was not registered and was therefore unrecognizable or protected in law; and

    iii. Not being the charger under the security created in favour of the 1st Defendant, the Plaintiff lacks the requisite standing in law for want of privity to purport to agitate a claim based on alleged invalidity of the security created in favor of the 1st Defendant over the suit property.

h. It was within his knowledge that the validity of the security created in favor of the 1st Defendant bank and its right to realize the same in exercise of a chargee's statutory power of had been the subject of extensive litigation between the two Defendants herein in a previously filed and pending suit being "Mombasa High Court Civil Suit Number 86 of 2016, Tahir Sheikh Said Investments Limited vs National Bank of Kenya Limited & 2 Others.

i. He was aware that in the said previous filed and pending suit between the Defendants, the High Court had on more than once determined on "prima facie" basis that;

    i. The security by way of legal charge and further legal charge created over the suit property in favour of the 1st Defendant bank by the 2nd Defendant was valid;

    ii. The monies secured under the said facility have not been repaid;

    iii. All the requisite statutory notices have been issued and served by the 1st Defendant bank; and

    iv. The 1st Defendant bank was entitled to realize its security over the suit property in exercise of its chargee's statutory power of sale as no basis for grant of an order injunction at the interlocutory stage could be sustained.

j. He annexed a copy of the ruling delivered on 25th January, 2022 by the Honorable Mr. Justice Mativo in the aforesaid suit "Mombasa High Court Civil Suit Number 86 of 2016, Tahir Sheikh Said Investments Limited – Versus - National Bank of Kenya Limited & 2 Others and marked the same as "MMM – 3" which confirmed the foregoing and from which it would also be noted that until delivery of the ruling, the 2nd Defendant had been enjoying interim injunctive orders restraining the sale of the suit property since 29th November, 2018 when on of the applications subject of the ruling was filed.

k. It was within his knowledge that it is pursuant to the ruling afore stated that the 1st Defendant procured to have the public auction of the suit property now challenged in this suit scheduled in exercise of its chargee's statutory power of sale as affirmed by the High Court.

l. In view of the matters stated in the proceeding paragraphs, he verily believed that the entire proceedings herein constitute a gross abuse of the process of the Honourable Court and bear the hallmarks of an action commenced in connivance and/or collusion between the Plaintiff and the 2nd Defendant after the latter failed to secure injunctive orders to restrain the sale of the suit property pending the hearing and determination of its suit in the High Court otherwise it defies logic why the Plaintiff would make the 2nd Defendant a party in a suit without articulating any specific complaint or seeking any specific relief against it.

m. Further and without prejudice to the foregoing, in view of the pendency of the High Court matter aforesaid as well as the rulings delivered therein, the application herein was "the Doctrine Re - Judicata and the entire suit was breach of "doctrine Sub – Judice" for violating the clear provisions of Section 6 of the *Civil Procedure Act*, Cap 21 Laws of Kenya.

n. Notwithstanding the terms of the ruling by the High Court referred to hereinabove, he annexed and marked copies of statutory notices dated 3rd May, 2018 and 23rd August, 2018 as "MMM – 4" issued by the 1st Defendant as well as the postage receipts confirming dispatch of the same by registered post by way of demonstration that the provisions of Sections 90 and 96 of the *Land Act* 2012 were complied with.

o. Similarly, he annexed and marked the same as "MMM – 5" were copies of the 45 days' redemption notice and notification of sale together with the respective postage receipts confirming services of the same by registered post in compliance with the dictates of the Auctioneers Rules, 1997.

p. Further and notwithstanding the express finding by the High Court in the suit referred to hereinabove that the secured debt due and owing to the 1st Defendant has not been repaid, he annexed and marked "MMM – 6" copies of the statements of account on the various secured loan accounts confirming that the debt to date remains outstanding.

q. In discharge of the obligation imposed upon it by the provisions of Section 97 of the *Land Act*, 2012, the 1st Defendant had for purposes of the scheduled public auction now challenged in this suit caused the suit property to be valued to determine its forced sale value. He annexed a copy of the valuation report `by Premier Valuers dated 3rd March 2022 and marked it as "MMM – 7".

r. It was plainly apparent that the said valuation report that the extent of the outstanding secured debt as disclosed in the statements of account referred to hereinabove far much exceeds what could reasonably be realized from a sale of the suit property in exercise of the 1st Defendant's

chargee's statutory power of sale and therefore the continued delay in disposal of the same was clearly inimical to the interests of both the charge as well as the charger.

s. In view of the matters aforestated, the application herein did not satisfy the conditions upon which courts grant the orders sought at an interlocutory stage. He verily believed that the same ought to be rejected with costs.

IV. Submissions

9. On 14th June 2022 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 18th March, 2022 be disposed of by way of written submissions. Pursuant to that all the parties obliged and a ruling date was reserved on Notice by Court accordingly. The 1st Defendant filed their submissions. By the time this Honourable Court retired to write this ruling the Plaintiff has not filed their submissions

A. The Written Submissions by the 1st Defendant/Respondent

10. The Learned Counsel for the 1st Respondent filed their written submissions on 27th September, 2022 where they submitted that in the application under consideration, the Plaintiff seeks an order of restraining the adverse dealings in the suit property pending the hearing and determination of the suit.

11. The Learned Counsel submitted that the 1st Defendant opposes the application on the basis of the replying affidavit sworn on 30th March, 2022 by its officer Michael M. Mwita. They humbly reiterated and/or adopted the depositions in the said replying affidavit as well as the terms and contents of the annexures thereto. In so far as the Plaintiff's application seeks a temporary order of injunction at an interlocutory stage, they submitted that the principles upon which courts consider and determine such applications are now well settled. The same were laid down in the celebrated case of "Giella vs Cassman Brown & Company Limited [1973] E.A. 358 thus:

> " The conditions for the grant of an interlocutory injunction are now well settled in East Africa. 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 adequately be compensated by an award of damages. Thirdly, if the Court is in doubt it will decide the case on the balance of convenience."

12. The Learned Counsel submitted that on the other hand, the law is now settled that these principles are to be considered by the court sequentially such that the second would not fall for consideration if the Applicant has not satisfied the first one. In "Kenya Commercial Finance Co. Limited – Versus - Afraha Education Society (2001) 1 EA 87, the court of Appeal clearly expressed itself on the manner in which those principles are to be applied. The Court in this regard held;

> " The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is
>
> i. Whether the Applicant has laid out a prima facie case with a probability of success;
>
> ii. Whether the Applicant might suffer irreparable injury if the injunction is not granted; and

iii. (if there is doubt) whether the balance of convenience favours the Applicant.....

The High Court erred in falling to establish whether the first case with a probability of success. It was not proper for the court to go straight to make the order on a balance of convenience. The conditions for granting an interlocutory injunction are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt the third one can be addressed..."

13. The Learned Counsel submitted that the law on the subject is also in their humble view settled that even where a prima facie case is established, the court is still bound to consider in line with the principles addressed hereinabove, the question as to whether damages would have been a sufficient remedy. The Court of Appeal in the case of "Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others [2014] eKLR, affirmed this approach thus:-

> "In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
>
> (a) establish his case only at a prima facie level,
>
> (b) demonstrate irreparable injury if a temporary injunction is not granted, and
>
> (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.
>
> These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. 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."

14. The Learned Counsel submitted that it was also relevant to bear in mind that at this interlocutory stage, the Honorouble Court ought not to delve into making definite findings on the issues in dispute in a matter. This way, the possibility of usurping the role of the judicial officer who would eventually hear and determine the main case was avoided. Approaching the matter at hand from the foregoing understanding of the Applicable legal principles, they invited the court to find that the Plaintiff's application was without any merit whatsoever. The uncontroverted material on record confirms that the 2nd Defendant was the registered proprietor of the suit property while the 1st Defendant was the proprietor of the legal charge and a further charge registered thereon to secure the repayment of a substantial sum of money in respect of credit facilities granted on request which remains outstanding.

15. The Learned Counsel submitted that the Plaintiff did not purport to assert any interest in the entire of the suit property. Under the contents of Paragraphs 2 and 3 of the supporting affidavits confirm that

she only claims interest in a unit of the suit property identified as Apartment No. 8A. From the said paragraphs, it was also evident that the Plaintiff's predicates the said claim and interest on the basis of an alleged gift from a person who was clearly not registered proprietor of the suit property.

16. In view of this, the Learned Counsel submitted that not being the charger, the contract, lacks the requisite legal standing to maintain an action seeking to challenge the exercise of any remedy by the 1st Defendant pursuant to the said security instruments created and registered in its favour over the suit property. For this proposition, they respectfully referred to the decision in "Nairobi Mamba Village – Versus - National Bank of Kenya [2002] 1EA 197 in which this principle was upheld with the court holding thus;

> "....the Plaintiff could not properly seek to restrain the chargee from selling the charged property as the intended sale was to be carried out pursuant to the exercise of the contractual and statutory power of the chargee contained in a charge which the Plaintiff is not a party. The only person who could legitimately challenge the exercise of the power of sale was the charger...".

17. The Learned Counsel submitted that further it was common ground that the Plaintiff's alleged interest in the unit of suit property identified above was not noted on the register for the property. The Plaintiff's claim for an injunction was therefore entirely predicated on an alleged interest that was not registered. They humbly submitted that in these circumstances and by virtue of the provisions of Section 36 (1) of the *Land Registration Act*, 2012, the Plaintiff's claim of interest over the said unit in the suit property enjoyed no legal protection as would entitle her to an order of injunction as against parties, like the 1st Defendant, whose interest thereon was duly registered. In any case, by virtue of the express provisions of Section 36 (5) of the *Land Registration Act*, 2012, the Plaintiff's claim of interest over the unit of the suit property being unregistered cannot rank in the priority over the 1st Defendant's registered interest thereon as a charge. They humbly urged the Court to so find and apply the reasoning of the Court in Omogo Handson Nyambeki vs Fredrick Maeba Kebuse & Another [2018] eKLR thus;

> "The registered charge in favour of the 2nd defendant would take precedence over any unregistered interest the plaintiff may have had over the suit property and the 2nd defendant would in my view be properly entitled to seek to enforce the terms of the charge if there was default by the 1st Defendant. The 2nd Defendant has submitted that at the time of the registration of the charge there was no encumbrance registered against the property and thus the charge was validly taken. The Plaintiff has no valid interest over the property and there can be no basis to injunct the 2nd Defendant from enforcing the contract it had with the 1st Defendant in the nature of the charge."

18. The Learned Counsel argue that from the annexure 3 to the 1st Defendant's Replying Affidavit that the High Court had already affirmed the 1st Defendant's right to proceed as against the suit property in exercise of its chargee's statutory power of sale. The said decision arose from a challenge mounted by the 2nd Defendant who was the registered owner of the suit property who failed in its attempt to have the 1st Defendant restrained in the same manner sought in the application under consideration.

19. The Learned Counsel concluded by stating that the reiterated the foregoing submissions and urge that the Plaintiff's application be rejected with costs.

V. Analysis and Determination

20. 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 five (5) framed the following issues for determination.

    a. Whether the Notice of Motion application dated 18th March, 2022 meets threshold required of a temporary injunction under Order 40 Rules 1 Civil Procedures Rules, 2010.

    b. Whether the Applicant has the legal capacity ("Locus Standi") to prosecute this suit.

    c. Whether the Notice of Motion application dated 18th March, 2022 and the suit herein offends the doctrines of Res Judicata and Sub – Judice".

    d. Whether the instant application and suit is sub judice

    e. Who will bear the Costs of Notice of Motion application 22nd February 2022.

Issue a). Whether the Notice of Motion application dated 18th March, 2022 meets threshold required of a temporary injunction under Order 40 Rules 1 Civil Procedures Rules, 2010.

21. Essentially, the Notice of Motion application herein is premised under the provision of 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.

22. As it now well established, the principles applicable in an application for an injunction were laid out in the celebrated, locus Classicus 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."

23. The three (3) conditions set out in Giella, 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 v 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".

24. In dealing with the first condition of "prima facie case", the Honorable Court 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"

25. On whether the Plaintiff/Applicant has a "Prima facie" case, the major difficulties the Court faces in these proceedings is the manner in which the pleadings have been drafted by the Plaintiff/Applicant. Under Honestly, at this very juncture of the proceedings, the Court finds it extremely to decipher whether the cause of action in this suit concerns the whole of the suit property or merely a single within the suit property. The contents of Paragraph 4 of the Plaint, the application and the relief sought under Prayer number (d) state "inter alia:-

> " The Plaintiff (sic) the beneficial owner of Apartment 8A erected on Title No. Mombasa/ Block XXVI/658.....She was gifted that house by her father the late Tahir Sheikh Said who was the majority shareholder of the 2nd Defendant."
>
> "There be a Permanent injunction restraining the 1st and 2nd Defendants, their agents, servants or employees from further advertising for sale, selling whether by public auction private treaty, transferring, disposing or in any other way interfering with title No. Mombasa/Block XXVI/658.

Definitely, there will be need for the Plaintiff/Applicant to make up her mind what is this particular property she is concerned about – is it the whole suit property or a single unit within the suit property. This is "pari materia" issue for this Court while considering the issues for determination of the case. From the very onset, the Plaintiff/Applicant has continued to claim being the beneficial owner of a unit - Apartment Number 8A erected on the suit land known as Title No. Mombasa/ Block XXVI/658. She has held that the said apartment had been gifted to her by her father, the late Tahir Sheikh Said who was the majority shareholder of the 2nd Defendant. She averred that she lived, in tenancy occupation in

the said apartment within the suit property with her family. Unfortunately, she had not been able to effect the transfer of the same apartment since the passing on of her late father.

26. By and large the facts of this case are rather curious and intriguing. I will need to state a few observations herein although I am privy to the findings made in the case of:- "Mbuthia Versus - Jimba credit Corporation Limited 988 KLR 1, where the Court provided this guidelines:

> "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."

27. Undoubtedly, the pith and substance of this matter is between the 1st and the 2nd Defendants. Interestingly, it is the 2nd Defendant who is the registered owners of the suit property and that its him who ideally entered into a contractual arrangement by charging to the 1st Defendant. Indeed, in exercising its statutory power of sale under Sections 90 and 96 of the *Land Act*, No. 6 of 2012 and Rules 11 & 15 of the Auctioneers Rules. It is evident that the Plaintiff/Applicant was only a beneficial owner of apartment Number 8 of the suit property. I have noted that she was never served with any notice of sale as she only found out about this matter from an advertisement from a notice published in the local newspaper – "The Daily Nation" newspaper of 4t March, 2022 for a sale to occur through public auction on 4th April, 2022. Indeed, the 1st Defendant have annexed the notices having been served upon the 2nd Defendant and not the Plaintiff/Applicant marked as "MMM – 5" and a bulk of Statements for the 2nd Defendant marked as "MMM – 6". It is my personal view that there will be need to have this matter proceed for full trial in order to attain the actual position of the matters filed by the Plaintiff/Applicant. Indeed, in saying so the Honorable Court has been guided by the case of "Edwin Kamau Muniu – Versus - Barclays Bank of Kenya Limited" where the Court graphically 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."

28. In the present case, it is evident that the Plaintiff/Applicant has the beneficial interests over part of the suit property. It is anchored on the fact of her staying with her family on the said suit property for 10 years and had been gifted the apartment in the suit property by the deceased who was her father and the majority shareholder in the 2nd Defendant's company. There was 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.

29. Regarding this first condition though, the facts of the case are fairly clear. The Deceased borrowed some monies from the 1st Defendant/Respondent against the security of the suit property and the 2nd Defendant company. The Deceased fell into arrears with the repayment of the monies due to the 1st Defendant/Respondent whereupon the latter issued a Statutory Notice through the daily nation on 14th March, 2022 indicating that the suit property would be sold by public auction on 4th April 2022.

30. Between the Plaintiff/Applicant and the 1st Defendant/Respondent it is clear that the 1st Respondent has legal rights over the suit property as it was a security that was offered to them by the Deceased and the 2nd Defendant/Respondent. The Applicant has not disputed that the said apartment which is within the suit property has not been registered in her name and still remains under the ownership of the 2nd Respondent who offered the suit property as a security for a loan facility. On the facts of the case, the Plaintiff/Applicant has not at any level disputed that the suit property may have been offered as security and that the deceased and the 2nd Respondent did not default in the payment of the loan

facility. Without wanting to appear to be descending into the arena of litigation, and taking this to be an adversarial process, from the face value, the Court sees the 1st Defendant playing a rather lukewarm and passive role in this matter. It is not in dispute that there was a loan facility and the suit property. But in the given circumstances, the Court keeps on wondering loudly why, from the time they were served with Summons to Enter Appearance by the Plaintiff/Applicant on 18th March, 2022, the 1st Defendant had never considered filing a Counter Claim under Order 7 Rules 3 of the Civil Procedure Rules, 2010 or under initiating a Third Party Proceedings against the 1st Defendant as provided for under Order 1 Rule 15 of the Civil Procedure Rules, 2010 to hold him liable for the cause of action being leveled against them by the Plaintiff/Applicant. Nonetheless, I leave that to them. Certainly, this would only be possible through a full trial where all empirical evidence will be adduced. From the facts it will be difficult to make any determination from facts adduced in affidavit.

31. All facts remaining constant, the Court fully empathizes with the Plaintiff/Applicant for the plight she finds herself. My understanding is that, her main cause of action is purely to preserve a property she has lived in with her family for the past ten (10) years. She fully pre -occupied and apprehensive should the 1st Defendant exercise their Statutory Power of Sale and have the Suit property sold off in a Public Auction she will suffer irreparable and substantial loss. Clearly, the suit property was a security offered to the 1st Defendant/Respondent against a loan facility and the law is very clear on the statutory power of sale. In the circumstances, and pure on the principle of natural Justice, Equity and Conscience for the time in force and on interim basis pending the hearing and final determination of the suit, the Court holds that the Plaintiff/Applicant has established that she has a "prima facie" case with some slight probability of success after the hearing of the case during the trial.

32. 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."

33. On the issue whether the Plaintiff/Applicant will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Court makes a finding that the Plaintiff/Applicant will have demonstrate that she will incur a harm that cannot be quantified in monetary terms or cannot be cured. It is not hidden that the Plaintiff/Applicant's family and life has been spent of this particular apartment No. 8 in the suit property. She was gifted the same apartment in the suit property by her father the deceased who was a shareholder of the 2nd Defendant/Respondent and has lived in the apartment for 10 years. She also does not dispute that she did not effect the transfer of the title of the apartment to herself from the 2nd Defendant's name. In the given circumstances, the Court keeps on wondering loudly why, from the time they were served with Summons to Enter Appearance by the Plaintiff/Applicant on 18th March, 2022 the 1st Defendant had never considered filing a Counter Claim under Order 7 Rules 3 of the Civil Procedure Rules, 2010 or under initiating a Third Party Proceedings against the 1st Defendant as provided for under Order 1 Rule 15 of the Civil Procedure Rules, 2010 to hold him liable for the cause of action being leveled against them by the Plaintiff/Applicant. Nonetheless, I leave that to them.

Certainly, this would only be possible through a full trial where all empirical evidence will be adduced. From the facts it will be difficult to make any determination from facts adduced in affidavit.

34. Quite clearly, the Plaintiff/Applicant would not be able to be compensated through damages as she has showed this Court her rights to the suit property and the apartment was gifted to her by the deceased. However, these are some of the facts that would be required to be proved by the Plaintiff/ Applicant during the trial. Out of curiosity, the Court has taken judicial notice that the Plaintiff/ Applicant moved this Court seeking for order to restrain the 1st and 2nd Defendants from exercising their statutory power of Sale founded under Sections 90 and 96 of the *Land Act* and based on the advertisement notice published in the local newspapers. The sale was intended to take place on 4th April, 2022, which to me has already been overtaken by time unless a fresh notice is issued. For these reasons, she has demonstrated and satisfied the second condition as laid down in Giella's case. Finally, as indicated above, the balance of convenience is tilted in favour of the Plaintiff/Applicant herein.

Issue b). Whether the Applicant has Legal Capacity ("Locus Standi") to prosecute the suit.

35. The 1st Respondent averred that the Plaintiff/Applicant lacked "The Locus Standi" and that the suit should be dismissed. The Court will deal with the two issues simultaneously. It is the 1st Respondent's submission that the Plaintiff does not purport to assert any interest in the entire of the suit property. The 1st Respondent referred to Paragraphs 2 and 3 of the Supporting Affidavit which confirms that the Plaintiff/Applicant only claimed interest in only one unit of the suit property identified as Apartment No. 8A. It was evident from the Affidavit that the Plaintiff's predicates the said claim and interest on the basis of an alleged gift from a person who is clearly not a registered proprietor of the suit property.

36. I am compelled to refer to the case of Nairobi Mamba Village – Versus - National Bank of Kenya (supra) in which this principle was upheld with the Court holding thus:-

> "....the Plaintiff could not properly seek to restrain the charge from selling the charged property as the intended sale was to be carried out pursuant to the existence of the contractual and statutory power of the charge contained in a charge to which the Plaintiff was not a party. The only person who could legitimately challenge the exercise of the power of sale was the charger..."

37. In the case of "Rajesh Pranjivan Chundasama – Versus - Sailesh Pranjivan Chudasama [2014] eKLR, the Court of Appeal had the following to say on the issue of "locus standi" in a case that deals with issues of inheritance of a deceased person's estate: -

> "..... In our view the position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or full grant of letters of administration in cases of intestate succession. In Otieno vs Ougo & Another [1986-1989] EALR 468, this court differently constituted rendered itself thus: -
>
> > "..... An administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception."

38. On the same issue, the Court of Appeal in the case of: Trovisk Union International – Versus – Mrs. Jane Mbevu, Civil Appeal No. 145 of 1990, held that: -

> " where a party seeks to file a suit on behalf of the estate of a deceased person, he must of necessity obtain letters of administration".

39. As argued by the 1st Respondent's advocate, as of now is has not been ascertained whether the Plaintiff/ Applicant was or not the legal and beneficial owner of the charged properties. The burden of proof as to whether she was a duly appointed Legal Administratix or Legal representative of the deceased's estate matters of fact to be demonstrated during the full trial. We are guided here by the provision of Section 107 of the *Evidence Act*, Cap. To the effect that "He who alleges has to prove.....". She is also not an executor of the deceased's will. Consequently, the actions that are being undertaken by the Applicant are not in line with the law. It is therefore the finding of this Court that whether the Plaintiff/Applicant has nor -lacks the locus standi to institute the case against the Defendants, is an issue to be fully determined at the hearing stage and not at inter locutory stage.

Issue c). Whether the application and the suit are in breach of the Doctrine of Res judicata

40. On the issue of "Doctrine of Res Judicata", has been raised by the 1st Defendant herein. The Doctrine is governed on the provision of Section 7 of the *Civil Procedure Act*, Cap. 21 of the Laws of Kenya. It provides:

> " No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties or between parties under whom they or any of them claim, litigating under the same title, in court competent to try such subsequent suit or this suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court'.

41. Clearly, these are issues of facts to be demonstrated through empirical documentary evidence. All said and done, from the face value, as we await for more evidence, the Plaintiff in the Civil case of Mombasa HCCC Civil Suit Number 86 of 2016 is one "Tahir Sheikh Said Investment Limited while the Defendants are "The National Bank of Kenya Limited, KAAB Investment Limited and Ocean Group Traders. The Plaintiff/Applicant herein is not a party in that suit. The cause of action relates to loans advanced to the Plaintiff which were secured by charges executed against the suit property.

42. The Court of Appeal stated as follows with regard to the doctrine of Res Judicata, in the case of:Independent Electoral & Boundaries Commission – Versus - Maina Kiai & 5 Others [2017] eKLR: -

> " The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

43. The present suit was filed by a person who claims to the beneficiary of Tahir Sheikh Said (now deceased). Her intention as deposed to in the affidavit of the Plaintiff/Applicant that she is on the verge

of loosing a unit in the suit property that was gifted to her by the deceased who was her father. The court observes that the suit herein cannot be said to be Res Judicata under the provisions of Section 7 of the *Civil Procedure Act*. The issues that were put forth and determined in the application seeking injunctive orders in Mombasa HCCC No. 86 of 2016 are not similar to the issues that are deposed to in the said supporting affidavit. The averments in the Plaint are also different. Thus, the Court for the time being rules that the Doctrine of Res Judicata is not applicable in the instant case at all.

Issue d). Whether the instant application and suit is in breach of the doctrine of Sub Judice

44. On the issue of the present suit being in breach of the doctrine of Sub Judice, Section 6 of the *Civil Procedure Act* provides that:

> " No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceedings in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

45. For the doctrine of Sub Judice to apply the following principles need to be present:

i. There must exist two or more suits filed consecutively;

ii. The matter in issue in the suits or proceedings must be directly and substantially the same;

iii. The parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title; and

iv. The suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

45. Certainly, all these are matters of facts to be demonstrated and proved during a hearing and not affidavits. The 1st Respondent under Paragraph 14 of their Replying Affidavit avers that the application offends the Doctrine of "Res Judicata and Sub Judice" for violating the clear provision of the *Civil Procedure Act*, CAP 21 Laws of Kenya. In this instance, I am of the considered view that although the properties that form the subject matter of the two suits are the same and the prayers sought are for interim injunction pending the hearing of the suits, the causes of action are different. This court can therefore not hold that there are two parallel causes of action that have been filed. The present suit is therefore not sub judice.

Issue e). Who will bear the Costs of Notice of Motion application 18th March, 2022.

47. The issue of Costs is at the discretion of the Court. Costs mean the award that is granted to a party at the conclusion of a legal action, process and proceedings of any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event, it means the result of the legal action, process or proceedings thereof. (See the Supreme Court case of "Jasbir Singh Rai & 3 others – Versus – Tarlochan Singh (2014) eKLR and Rosemary Wairimu Munene – Versus – Ihururu Dairy Farmers Cooperative Society (2014) eKLR).

48. In this case, although as Court finds that the Plaintiff/Applicant has fulfilled the conditions set out for granting the injunction orders under the provision of Order 40 Rule 1 of the Civil Procedure Rules, 2010, the costs will be in the cause as the matter is still proceeding to full trial in due course.

VI. Conclusion & Disposition

49. Consequently, upon conducting an intensive analysis of the issues framed herein, the Honorable Court on preponderance of probability makes the following finds holds at this juncture, it would be imprudent to hear and determine the suit filed by the Plaintiff/Applicant herein. In the meantime, there will be need to preserve the suit land in the meantime.

    For avoidance of doubt, I grant the following orders:-

    a. THAT the Notice of Motion dated 18th March, 2022 be and is found to be meritorious and hence allowed.

    b. THAT for the sake of expediency, the suit be heard and determined within the next One Hundred and Eighty (180) days from the delivery of this Ruling commencing from 6th July, 2023. There be a mention on 10th May, 2023 for purposes of holding a Pre – Trial Conference session under the provision of Order 11 of the Civil Procedure Rules, 2010.

    c. THAT the costs of the Notice of Motion dated 18th March, 2022 to be in the cause.

    It is so ordered accordingly.

RULING DELIVERED THROUGH MICRO SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 13TH 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. No appearance for the Plaintiff/Applicant.

c. Mr. Mutua Advocates for the 1st Defendant/Respondent.

d. No appearance for the 2nd Respondent