



**Mikaal Limited v Land Registrar Kilifi County & 2 others (Petition  
38 of 2021) [2023] KEELC 17333 (KLR) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17333 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**

**PETITION 38 OF 2021**

**EK MAKORI, J**

**MAY 3, 2023**

**IN THE MATTER OF: ARTICLES 10, 22, 23, 40,  
AND 47 OF THE CONSTITUTION OF KENYA, 2010**

**-AND-**

**IN THE MATER OF: VIOLATION OF SECTION 79, 80,  
87 OF THE LAND REGISTRATION ACT NO. 3 OF 2010**

**-AND-**

**IN THE MATTER OF: PURPORTED CANCELLATION OF LEASEHOLD TITLE NO.  
CHEMBE/KIBAMBAMCHE/376 REGISTERED UNDER THE NAME OF MIKAAL LIMITED**

**-AND-**

**IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS  
AND FREEDOM UNDER ARTICLE 40 OF THE CONSTITUTION  
OF KENYA 2010 REGARDING THE PROTECTION OF RIGHT TO  
PROPERTY IN RELATION TO PLOT NO. CHEMBE/KIBABAMCHE/376.**

**-AND-**

**IN THE MATTER OF: UNPROCEDURAL DISPOSSESSION OF  
MIKAAL LIMITED OF PLOT NO. CHEMBE/KIBABAMCHE/376.**

**-AND-**

**IN THE MATTER OF: UNLAWFUL REGISTRATION OF DAWAGI NVESTMENTS AS  
THE PROPRIATOR OF PROPERTY NAMED PLOT NO. CHEMBE/KIBABAMCHE/376**

**BETWEEN**

**MIKAAL LIMITED ..... PETITIONER**

**AND**

**LAND REGISTRAR KILIFI COUNTY ..... 1<sup>ST</sup> RESPONDENT**



## RULING

1. The Petitioner's application seeks the following reliefs;
  - a. An order restraining the respondents from alienation or dealing in any way with the property known as Plot No Chmbe/Kibabamshe/376 situated at Watamu within Kilifi County pending hearing and determination of the Petition.
  - b. An order staying the proceedings in Malindi ELC No 42 of 2021 -Mikaal Limited v Dawagi Investments Limited pending hearing and determination of the Petition.
  - c. Costs of the application.
2. The 3<sup>rd</sup> Respondent opposes the application and relies on the replying affidavit sworn on February 7, 2022 by Antony Safari Kitsao a Director of the 3<sup>rd</sup> respondent and submits that the application lacks merit for the reasons that the application is an abuse of court process and amounts to forum shopping in that the petitioner had prior to the institution of this petition filed Malindi ELC Case No 42 of 2021 between the petitioner and the 3<sup>rd</sup> respondent and obtained interim orders of injunction pending delivery of a ruling in an application for an injunction. The pleadings in the said suit are exhibited in the respondents replying affidavit in a bundle as exhibit No 2.
3. The court directed parties to file written submissions in the matter. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants represented by the Attorney General did not participate in canvassing the application.
4. The Petitioner submits that it is the registered owner of the suit property having acquired a lease over the said property from the Government for a period of 99 years starting from December 13, 1996 as witnessed by a certificate of lease annexed in the Petitioner's affidavit in support of this petition. The Petition has been in an open and uninterrupted occupation of the suit property over the years. This was evidenced by a servant's quarter constructed by the Petitioner on the property where the Petitioner's caretaker resides. Further, the petitioner planted casuarina trees on the suit properties as evidenced by pictures annexed in the Supporting Affidavit.
5. However, on May 3, 2018 the 3<sup>rd</sup> Respondent unceremoniously invaded the Petitioner's property claiming ownership and evicted the Petitioner's caretaker from the suit property. The 3<sup>rd</sup> Respondent's said action caused the Petitioner to seek for more information from Kilifi Lands Registry where the Petitioner discovered that the 1<sup>st</sup> Respondent on March 6, 2015 made an entry in the register cancelling the titles previously issued in favour of the Petitioner's successor Pekiwa Investment Company Limited with respect the suit property without consulting or notifying the Petitioner. Consequently, the 3<sup>rd</sup> Respondent was registered as the owner of the suit property on March 10, 2015.
6. The Petitioner further contend that it has given clear evidence as to how it acquired the suit property. However, the 3<sup>rd</sup> Respondent relies on documents that clearly demonstrate that the 3<sup>rd</sup> Respondent has cunningly doctored documents so as to fraudulently acquire the property. In this regard, the 3<sup>rd</sup> Respondent alleges that the property was allocated to one Rollingstone Jefwa Mranzi in 2008. The 3<sup>rd</sup>



Respondent has annexed a letter of offer issued by the Director of Land Adjudication and Settlement which required the said Rollingsstone Jefwa Mranzi to pay a deposit of 10% within 90 days for the plot to be documented accordingly in his name. However, the said Rollingsstone did not pay the money due to the Government until sometimes in 2014. There is therefore an unexplained delay of six (6) years between the points of the alleged allotment to the point of payment of the required revenue. This means that the said Rollingsstone Jefwa Mranzi did not make payment within the stipulated 90 days. Moreover, it is instructive to note that the agreement for sale between the said Rollingsstone and the 3<sup>rd</sup> Respondent was signed on June 30, 2014. Clearly, by the time the said Rollingsstone signed the agreement for sale, he had not acquired the ownership of the suit property in that the agreement for sale is dated June 30, 2014 while the payment to the Government was made on August 28, 2014. It is therefore clear that the agreement for sale is older the date of the payment of Government revenue by Rollingsstone Jefwa for the said allotment made in 2008.

7. The Petitioner proceeds to state the doctrine of *nemo dat quod non habet* applies in this case as one can only properly alienate that which the person owns. As such, the Respondent's claim on the suit property lacks proper foundation since at the time the Respondent and Rollingsstone purportedly signed a sale agreement the latter had not acquired ownership of the suit property. In other words, Rollingsstone Jefwa Mranzi, could not alienate to the 3<sup>rd</sup> Respondent that which he did not own by June, 2008.
8. The Petitioner states that 3<sup>rd</sup> Respondent's journey to this property started in 2008, when purportedly the Ministry of Lands and Settlement allocated the property to Rollingsstone Jefwa Mranzi. However, by 1991, the property in question had already been registered and a title thereof surrendered. Subsequently, the property was allocated in 1992 to the Petitioner who paid the Government the appropriate dues and was later issued with a title deed for the same. It is therefore clear that by 2008, the same property was not available for allotment to any person. In other words, the Government having allocated the suit property to the Plaintiff in 1992 and the same Government having received the premium from the Petitioner, the Government did not have the capacity in law to allocate the very same property to Rollingsstone Jefwa Mranzi or to any other person. One cannot allocate a property that has already been allocated to another person. This what the principle known as *nemo dat quod non habet* is all about.
9. The Petitioner concludes by submitting that the Government did not have the capacity in the law to allocate the suit property to Rollingsstone Jefwa Mranzi in 2008 as the property had already been registered in the favour of Pekiwa Investment Company Limited in 1997. Previously the property had been registered in the name of Pekiwa Investments Company Limited who surrendered the same to the Government. Thereafter, the property was allocated and registered in the name of the Petitioner. That even if it is assumed, that the 3<sup>rd</sup> Respondent has genuine title, then the 3<sup>rd</sup> Respondent's title is later in time to that of the Petitioner. Furthermore, the Petitioner has already shown that it is in occupation of the suit property. In *Elizabeth Wambui Kiragu v Ndirangu Machari* (2017) eKLR the court held:

“ ... Further, there are two competing titles herein over Ruiru Kiu block 2/2820, which parcel of land lie on Index Map Sheet No 4. The Plaintiff obtained her title deed over Sheet No 4 on September 7, 2010, and the Defendant obtained his in the year 2011. Therefore, this court finds that the Plaintiff's title is the first in time and should therefore prevail. The court will rely on the maxim of equity which states; “when two equities are equal, the first in time prevails”. See the case of *Gitwani investment ltd & 3 others v commissioner of lands, HCCC No 1114 of 2002*, where the Court held that:-



“The first in time prevails so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently are and on the face of them issued regularly and procedurally without fraud save for the mistake, then the first time must prevail”.

Having found that the Plaintiff’s title deed is the first in time and that it should prevail, then the Court further finds as a holder of Certificate of registration, she is deemed to be the absolute and indefeasible owner.”

10. It is submitted by the petitioner that this is a strong decision for the proposition that the title that is later in time cannot prevail over the title that is earlier in time. The Petitioner’s title herein was registered many years before the 3<sup>rd</sup> Respondent’s title came into the picture and therefore the Petitioner’s title cannot be defeated by the 3<sup>rd</sup> Respondent’s title.
11. The Petitioner contend that the above circumstances confirm that the Petitioner’s has properly proved a strong prima facie case which has a good probability of succeeding. This is concerning the ownership and possession of the suit property.
12. Accordingly, the first requirement of *prima facie* case as set out in *Giella v Cassman Brown & Co Ltd* [1973] EA 358 has been achieved. The Petitioner has shown that the 3<sup>rd</sup> Respondent violently moved into the suit property on May 8, 2021 and evicted the Petitioner from the suit property without any valid claim. The 3<sup>rd</sup> Respondent’s has further placed several building materials on the suit property ready to commence construction thereon. In the circumstances, the Petitioner shall suffer irreparable damages if the 3<sup>rd</sup> Respondent’s illegal actions are allowed to continue.
13. The Petitioner contend when the 3<sup>rd</sup> Respondent invaded the suit property on May 8, 2021, the 3<sup>rd</sup> Respondent was not armed with any order of the court. The 3<sup>rd</sup> Respondent’s said action was a case of violent invasion of the Petitioner’s quiet and peaceful enjoyment of the property by use of unorthodox means to gain temporary possession of the suit property. In the circumstances, we rely on the principle of law expressed in the maxim *ex turpi causa non oritur actio* (an act of illegality begets nothing) which is so well captured in *Mistry Amar Singh v Serwano Wofunira Kulubya* UCA No 74 of 1960 where the Court held:

“*Ex Turpi Causa Non Oritio* Action. This old and well known legal maxim is founded in good sense and expresses clear and well organized legal principle which is not confined to indictable offences. No court ought to enforce an illegal contract, or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is brought to the attention of the court and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the Plaintiff has pleaded the illegality or whether he has not. If the evidence adduced by the Plaintiff proves the illegality the court not to assist him”.

14. In the case of *Thomson Smith Aikman, Alan Malloy & others v Muchoki & others* [1982] eKLR the court stated:

“..... the court ought never to condone and allow to continue flouting of the law. Those who flout the law by infringing the rightful title of others, and brazenly admit it, ought to be restrained by injunction. If I am adding a new dimension for the grant of an interlocutory injunction, be it so. Equity will not assist law-breakers.



15. Further, the petitioner we relied on the case of *[Sharok Kber Mohamed Ali & Another v Southern Credit Banking Corporation Limited](#)* [2008] eKLR where the court clearly frowned upon any acts of non-compliance with the law and thereby issued the appropriate injunction orders.
16. That it is well known that time and again, people have held certificates whereby they claim to be who they are not, or whereby they claim to own titles to properties which they genuinely do not own. Therefore, the act of waiving some documents here and there does not render one to be the genuine owner of the property in question. In this regard, the petitioner relied on the decision made by the Court of Appeal in *[Munyu Maina v Hiram Gathiba Maina](#)* [2013] eKLR where the Court of Appeal clearly stated that the holder of a title could not just wave it to the court but has a duty to explain the root of that title.
17. Accordingly, because of irreparability of damages and because of the outright act of illegality, it is submitted by the Petitioner that the law does not allow a person to derive a benefit of or continue holding to any advantage that was unlawfully acquired; *ex turpi causa non oritur action*.
18. On the balance of convenience, the Petitioner submit that the *status quo* that existed prior to May 8, 2021 ought to be allowed to prevail pending the determination of the dispute herein.
19. 3<sup>rd</sup> Respondent submit that the application is an abuse of court process and amounts to forum shopping in that the petitioner had prior to the institution of this petition filed Malindi ELC Case No 42 of 2021 between the petitioner and the 3<sup>rd</sup> respondent and obtained interim orders of injunction pending delivery of a ruling in an application for an injunction. The pleadings in the said suit are exhibited in the respondents replying affidavit in a bundle as exhibit No 2.
20. The 3<sup>rd</sup> respondent also submits that the claim for an injunction as sought in prayer No 2 and 3 of the Motion is sub-judice the prayers in the petitioners Notice of Motion dated May 11, 2021 filed in ELC Case No 42 of 2021 which is pending ruling and proceeding to entertain and grant the relief sought in the instant application will offend the provision of Section 6 of the *[Civil Procedure Act](#)* Chapter 21 of the law of Kenya and as such the application amounts to an abuse of court process and should be dismissed. Section 6 of the *[Civil Procedure Act](#)* Chapter 21 of the Laws of Kenya provides as follows:

“No Court shall proceed with the trial of any suit or proceeding 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 proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.”
21. The matters raised in the Petitioner’s instant application for an injunction as sought in prayer No 2 and 3 of the Motion are directly and substantially in issue in the Petitioner’s Notice of Motion dated May 11, 2021 filed in ELC Case No 42 of 2021 in which the parties had already prosecuted the application by way of written submissions and the ruling is pending.
22. For this reason, the Court should not proceed to hear the instant application. The 3<sup>rd</sup> respondent relies in the decision made in *[Daniel Kipkemoi Bett & another v Joseph Rono](#)* [2022] eKLR where in a similar matter the court held that it had no jurisdiction as the matter was sub-judice and proceeded to strike out the suit.
23. The petitioner has also pleaded in paragraph 8,9 & 10 of the petition that it had filed Malindi ELC Petition No 17 of 2015 formerly Mombasa HC Petition No,12, 13 & 14 of 2011 to challenge the failure to lift an embargo placed over the suit property by the 1<sup>st</sup> respondent and for payment of compensation



- due to its inability to use the suit property on account of the existence of the embargo. The petition was dismissed prompting it to lodge an appeal to the Court of Appeal.
24. The 3<sup>rd</sup> Respondent submits that had Petition No 17 of 2015 succeeded the petitioner would not have instituted the present petition or even Malindi ELC Case No 42 of 2021 and the 3<sup>rd</sup> Respondent submits that this is a clear case of forum shopping, an attempt by the Petitioner to look for a favourable outcome by instituting several suits over the same suit property in different fora and in each suit chose one cause of action and reserve another cause of action for subsequent litigation. The Petitioner has now come to this court to seek more or less the same reliefs. The 3<sup>rd</sup> Respondent submits that this amounts to abuse of court process and should be dismissed.
  25. That prayer No 2 and 3 in the Petitioner's Notice of Motion is an application for an injunction. The 3<sup>rd</sup> respondent submits that the petitioner has failed to satisfy the conditions for grant of an injunction for the following reasons. It is trite law that a party seeking an interlocutory injunction pending hearing of the main suit must satisfy three conditions before a court can grant the order. First, an applicant must establish a prima facie case with 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 an application on the balance of convenience. For this proposition of the law, the Respondent relies on the case of *Giela v Cassman Brown Company Limited* [1973] EA 359. The 3<sup>rd</sup> respondent submits that the petitioner has not established a prima facie case with any probability of success. A *prima facie* case was defined in the case of *Mrao Limited v First American Bank Of Kenya Limited & 2 Others*, Civil Appeal No 39 of 2002 as a case where based on the evidence presented before it, the Court can conclude that there exists a right which has apparently been infringed by the opposite party so as to call for an explanation or rebuttal from the latter. The petitioner must show by material evidence the existence of a right over the suit property which has apparently been infringed or is about to be infringed by the 3<sup>rd</sup> respondent. The petitioner must show a clear and unmistakable right which is directly threatened by the respondent's act that is sought to be restrained.
  26. In the present case, the petitioner has pleaded that it is the registered owner as lessee of the suit property from the Government of Kenya and in support thereof, it has availed a copy of the certificate of lease dated December 30, 1996 (exhibit No MJK-2). Section 26 (1) of the *Land Registration Act* No 3 of 2012 provides that a Certificate of Title issued by the Registrar upon registration or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate.
  27. The 3<sup>rd</sup> respondent submits that the petitioner is obligated to show by material evidence that the Certificate of Lease was issued to it either upon registration or upon a transfer or transmission before the court can receive the same as *prima facie* evidence of ownership of the suit property. The 3<sup>rd</sup> respondent submits that the petitioner has not discharged this burden.
  28. Although the certificate of lease indicates that the petitioner was registered as lessee on December 30, 1996 no evidence of the fact of registration by either the production of a certificate of official search or a white card to show it being a lease or any other documentary evidence showing the fact of registration from the Land Registry has been availed.
  29. In paragraph 7 of the petition the petitioner has pleaded that it acquired the suit property from Pekiwa Investments Company Limited whom it claims was the original allottee and owner of the suit land. If the petitioners registration as lessee of the suit property was upon a transfer from Pekiwa Investments



Company Limited then the petitioner ought to have furnished evidence of the registration of the transfer from the said company.

30. The 3<sup>rd</sup> respondent submits that the petitioner has not availed any evidence of the registration of the transfer of the lease to itself and accordingly the certificate of lease should not be taken by the Court as prima facie evidence of ownership because it has not been shown by material evidence that it was issued to it as a purchaser upon a transfer from Pekiwa Investments Company Limited as provided in Section 26 (1) of the [Land Registration Act](#). The petitioner's mere act of waving some certificate of Lease whose origin is unknown does not qualify it as the genuine owner of the suit property.
31. The 3<sup>rd</sup> respondent submits further to the foregoing that in ELC Petition No 14 of 2011, ELC Petition No 12 of 2011 & ELC Petition No 13 of 2011 the gravamen of the petitioner was that the 1<sup>st</sup> respondent had imposed an embargo over the suit property prohibiting the registration of any party as owner of the suit property pending investigation on the propriety of any prior registration and it sought payment of compensation from the Government of Kenya on that account. In the premise it is not open for the petitioner to now plead that it is legally registered as the absolute owner of a lease of the suit property when even after the dismissal of its Petitions it lodged an appeal which is yet to be determined.
32. Further to the foregoing if, the petitioner's averment in paragraph 4 of its supporting affidavit is true then the petitioner appears to have irregularly obtained the certificate of lease of the suit property during an ongoing investigation concerning the allocation of land in an area affected by an embargo, Article 40(6) of [the Constitution](#) does not extend to property that is found to have been unlawfully acquired. For this proposition of the law the 3<sup>rd</sup> respondent also relies on the case of [Multiple Hauliers East Africa Ltd v The Attorney General & 10 others](#) [2013] eKLR and the case of [Isaac Gathungu Wanjobi & Another v Attorney General & 6 others](#), Petition No 154 of 2011 [2012] eKLR, where the court held follows:

“ Article 40 must be read as a whole so that the protection afforded by Article 40 which protects the right to property must be read to exclude property found to be unlawfully acquired under Article 40 (6). This requirement is an extension of the fact that [the Constitution](#) protects high values, which have to be found in the preamble to [the Constitution](#) and Article 10. Values such as human rights and social justice cannot countenance a situation where [the Constitution](#) is used to rubber stamp what is in effect unlawful.”
33. The 3<sup>rd</sup> respondent submits that it has not only availed a copy of a Title Deed dated 10<sup>th</sup> March 2015 but has also availed a copy of the Transfer of Land in a Settlement Scheme, copies of receipts for payment of requisite fees and charges, copy of discharge of charge of the Settlement Fund Trustee charge. Copy of letter of offer, copy of agreement for sale, copy of the application for consent of the Land Control Board and a copy of the Letter of Consent of the Land Control Board. (Exhibit No 3, 4, 5,6,7,8 & 9). The foregoing exhibits are prima facie evidence of the fact of registration of the Transfer and the fact of the registration of the 3<sup>rd</sup> respondent as owner of the suit property.
34. The 3<sup>rd</sup> respondent submits that having availed evidence of its registration and transfer then its title deed should pursuant to the provisions of Section 26(1) of the [Land Registration Act](#) be taken as *prima facie* evidence that it is the absolute and indefeasible owner of the suit property and not the petitioner.
35. That It is also trite law that possession is *prima facie* evidence of ownership. The petitioner has availed a photograph in its supporting affidavit (exhibit MJK-4) as evidence that it is in physical possession of the suit property. However, there is no accompanying evidence showing that the photographs were taken at the suit property. Further to the foregoing, the petitioner's allegation that it is in possession of



the suit property contradicts its own pleadings filed in ELC Petition No 12 of 2011, ELC Petition 13 of 201 and also amounts to prevaricating in that in the said Petitions the petitioner had sought recovery of orders to be availed the suit property on the ground that it had been unable to take possession and carry out developments because of an alleged embargo placed against the suit property by the government of Kenya. In the alternative the petitioner had sought recovery of compensation for the loss of use of the suit property. The petitioner has now changed tack and contends that it is in possession of the suit property after all.

36. The petitioner cannot on the one hand be in possession of the suit property and seek to restrain the 3<sup>rd</sup> respondent from dealing with the suit property and on the other hand claim to have been prevented from taking possession by the Government because of an embargo and seek payment of compensation from the Government of Kenya. The 3<sup>rd</sup> respondent submits that the previous pleadings of the petitioner is clear evidence that the petitioner is not in possession of the suit property.
37. For the foregoing reasons, the 3<sup>rd</sup> Respondent submits that the Petitioner has not established a right over the suit property that has been infringed or is about to be infringed by the respondents so as to call for a rebuttal from them and consequently the petitioner failed to establish a prima facie case with any probability of success.
38. The 3<sup>rd</sup> Respondent submits that the Petitioner has not established that it shall suffer irreparable loss or damage unless the order is made for the following reasons It is not enough for the petitioner to state that it is the owner of the suit property and leave it at that. The Petitioner must plead and show or disclose to the Court by evidence or otherwise the likely injury or damage that it is bound to suffer unless the order is made.
39. The 3<sup>rd</sup> respondent submits that the balance of convenience tilts in favour of dismissing the application for the reason that an interim order of injunction had already been granted by the court in Malindi ELC No 42 of 2021 and that granting any other injunction order in this petition may conflict with the order or ruling set to be delivered in the former suit. With regard to the prayer for stay of the proceedings in Malindi ELC No 42 of 2021.
40. The 3<sup>rd</sup> respondent submits that the petitioner has not given any reasons to justify stay of proceedings in the former suit. The parties in that suit have already filed their pleadings and submissions on an interlocutory application for an injunction brought by the petitioner. The application is pending ruling. Further to the foregoing other than the addition of the 1<sup>st</sup> and 2<sup>nd</sup> respondent, and the alleged complaint of violation of Constitutional rights to own property the issue in dispute in both cases is the ownership of the suit property as between the petitioner and the 3<sup>rd</sup> respondent.
41. The issue as to whom between the petitioner and the 3<sup>rd</sup> respondent is the lawful owner of the suit property is directly and substantially in issue in Malindi ELC No 42 of 2021 and in view of the provisions of Section 6 of the *Civil Procedure Act* Chapter 21 of the Laws of Kenya the 3<sup>rd</sup> respondent submits that it is this Petition which ought to be stayed rather than Malindi ELC Case No 42 of 2021. For this position the 3<sup>rd</sup> respondent relies on the decision in ELC Case No 17 of 2010-Daniel Kipkemoi Bett & another v Joseph Rono [2022] eKLR, supra, where the court stayed the suit before it pending determination of the prior suit.
42. For the foregoing reasons, the 3<sup>rd</sup> Respondent submits that the application lacks merit and should be dismissed with costs.
43. The issues which commend the court's decision to me is whether the current application is sub-judice and whether at this stage injunction orders can be issued.



The petitioner seeks stay of ELC 42 of 2021 – *Mikaal Limited v Dawagi Investment Limited*. It is reported as *Mikaal Limited v Dawagi Investments Limited* (Environment & Land Case 42 of 2021) [2022] KEELC 3385 (KLR) (28 July 2022) (Ruling) it has been submitted by the 3<sup>rd</sup> Respondent that a similar application for injunctive orders had been made. A further supplementary affidavit deposed by 3<sup>rd</sup> Respondent indicate that this court Olola J on 28<sup>th</sup> of July 2022 dismissed the same, it sought similar orders affecting the same subject matter in this manner:

“Again, while the Plaintiff contended that it had been in occupation and possession of the suit property since the 1990s, I was not persuaded that the Plaintiff was being candid with the Court. From the Defendant’s Replying Affidavit, it was apparent that the Plaintiff had filed ELC Petition Nos 12 of 2011; 13 of 2011; 14 of 2011 as well as ELC Petition No 17 of 2015, which Petitions were later consolidated. A perusal of the pleadings in the said Petitions reveal that the Plaintiff had sought recovery orders against the Government to be availed the suit property on the ground that it had been unable to take possession and carry out development thereon because of an embargo placed against the property by the Government. In the alternative, the Plaintiff had sought recovery for compensation for the loss of use of the suit property. 19. In its Supporting Affidavit sworn by its director Richard Karanja in Petition No 17 of 2015, the Plaintiff states at Paragraph 5 and 7 thereof as follows:

5. That it is apparent that the Interested party (one Daniel Runya Gamba) has apparently sold his interest in Plot No Chembe/Kibabamshe/376 to Changawa Mranai Mulila and Rollingstone Jefa Mrandzi who had apparently also sold their interest for a consideration of Kenya Shillings Fourteen Million Two Hundred Fifty Thousand (Kshs 14,250,000/-) to Dawagi Investments Limited. The said Parties’ transactions thereon is evidenced in an Agreement of Sale dated 30th June, 2014 between the said parties. I annex a copy of the said Agreement for Sale as annexure “MJK-2.”
7. That following the dismissal of the Petition herein, the Interested Party and his aforesaid agents have moved on to the suit property and have threatened that they will physically and forcefully remove the Petitioners therefrom with regard to Plot No Chembe/Kibabamshe/376.
20. Arising from the foregoing, it was apparent that the Plaintiff was aware that the Defendant had acquired an interest in the suit property as far back as the year 2014 and that it did not take any steps to restrain the Defendant from dealing with the suit property. 21. As the Court of Appeal stated in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* (2014) eKLR:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”

23. In the circumstances herein I was not persuaded that the Plaintiff had established a prima facie case and/or that it stood to suffer any loss irreparable or otherwise as a result of the Defendant’s alleged actions. It follows that I did not find any merit in the Motion dated May 11, 2021. It is dismissed with costs to the Defendants.”



44. In *Daniel Kipkemoi Bett & another v Joseph Rono* [2022] eKLR the court stated as follows on the concept of sub judice:

“The concept of sub judice is one that bars a Court from trying a matter that is in one way or other before another Court of competent jurisdiction by way of a previously instituted suit as long as it is between the same parties canvassing it under the same title. In essence, if both Courts were to proceed with the matters on merit and determine them, without deference to the former, they would arrive at similar or different results on the same rights claimed by the same parties and there would be a duplication of the reliefs or a conflict of them, which would be a recipe for confusion and chaos in the legal system. In the alternative of the scenario immediately above, where one of the Courts determined the matter before it the one still pending would be *res judicata*. Section 6 of the *Civil Procedure Act* bars any court from engaging in matters sub judice before them. It provides as follows:

“No court shall proceed with the trial of any suit or proceeding 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 proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

20. In a recent decision, my brother Justice Mativo discussed the concept sub judice. This was in *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR where he stated as follows: -

“...there exists the concept of sub judice which in Latin means “under Judgement.” It denotes that a matter is being considered by a court or judge. The concept of sub judice that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent court to stay the proceeding and such order can be made at any stage.”

21. The import of the concept is that as soon as the Court finds a matter sub judice it stays immediately the proceedings until the prior one is heard and determined. On this point, the Supreme Court of Kenya in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)*, stated therein as follows: -

“(67) The term ‘*sub-judice*’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject



matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

45. I have perused the ruling attached in Malindi ELC No 42 of 2021 the parties and the subject matter are the same. In the current suit, the petitioner has joined the Registrar of Lands Mombasa and the Attorney General. In the former suit, the petitioner had sought injunctive reliefs citing similar reasons as in this case. The judge Olola J’s ruling which I have quoted above declined to grant the orders sought and traced the root of the titles held by parties and quoted other matters between the parties. The former suit is still pending and active. I have not been told why it has been abandoned and the current one filed over the same subject matter and involving same parties.
46. To proceed further in this matter will be a total waste of time and abuse of the court proceed. It will be counter the sub judice rule. I need not consider whether to grant an injunction or not. It has already been decided in Malindi ELC No 42 of 2021. *Res judica* has cropped in. I will have to down tools and order that the application dated December 22, 2022 is hereby dismissed with costs.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 3<sup>RD</sup> DAY OF MAY 2023.**

**E. K. MAKORI**

**Judge**

In the Absence of: -

Parties

NB: Ruling sent to the parties via email addresses of their counsels on record.

