Omar (Suing on his behalf and as legal representative of the Estates of Sakinabal Ali Mohamed (Deceased) v Intergra Auctioneers (K) Company & 3 others (Environment & Land Case 231 of 2021) [2023] KEELC 21060 (KLR) (9 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21060 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 231 OF 2021

LL NAIKUNI, J

OCTOBER 9, 2023

BETWEEN

SHOKAT EBRAHIM ALI OMAR (SUING ON HIS BEHALF AND AS LEGAL REPRESENTATIVE OF THE ESTATES OF SAKINABAL ALI MOHAMED (DECEASED) ..... PLAINTIFF

AND

INTERGRA AUCTIONEERS (K) COMPANY ..... 1ST DEFENDANT

KENYA FINANCE BANK LIMITED (IL) ..... 2ND DEFENDANT

THE LAND REGISTRAR MOMBASA ..... 3RD DEFENDANT

THE HON ATTORNEY GENERAL ..... 4TH DEFENDANT

RULING

I. Introduction

1. What is before this Honorable Court for determination are two Notices of Motion applications dated 18th November, 2021 amended on 24th January, 2022 by the Plaintiff/Applicant and the other dated 22nd August, 2022 by the 2nd Defendant/Respondent. The Honourable Court will deal with these applications simultaneously herein.

2. Upon service, the 2nd Defendant/Respondent herein and subsequently the Plaintiff filed their responses in opposition of the application herein.

II. The Plaintiff/Applicant's case

3. The Plaintiff/Applicant sought for the following orders:

a. Spent.

b. Spent.

c. That a temporary order of injunction be issued restraining the 1st and 2nd Defendants jointly and severally whether by themselves, their representatives, agents, employees, servants, proxies and or assigns from selling, transferring, disposing of or dealing in or conducting sale by public auction to be held on the 23rd November 2021 or on any other date of all That parcel of land known as Mombasa/Block XLI/156 situate in Old Town Mombasa together with its fixtures and improvements pending the hearing of this Suit.

d. That cost of the application be provided for.

4. The Application was brought under the provision of Sections 56 (2) of the *Kenya Deposit Insurance Act*, Order 40 Rules 1, 2, 3 (3) and 4 of the Civil Procedure Rules , 2010 Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Rules Act, Cap 21 Laws of Kenya.

5. The Application is grounded on the face of it and of the 19th Paragraphed affidavit in support of the application sworn by the Plaintiff/Applicant dated 24th January, 2022. He averred That:-

a. Sakinabai Ali Mohamed died intestate on 30th day of November, 2010 at Old Town, Mombasa in Kenya and the Plaintiff/Applicant are the duly appointed Legal Administrator of the estate of the deceased having been issued with a Grant of Letter of Administration in "MSA CMC No. 408 of 2018 to administer the estate and collect and preserve its assets.

b. The deceased and AbsallaHaji Sameja (who died on 20th January, 1998) were absolute proprietors of land title No. Mombasa/Block XLI/156 Old Town on which was developed a three-storey building comprising of shops and residential premises. They held That the title in trust for the Plaintiff/Applicant and eight others who were his siblings, That were:-

i. Shokat Ebrahim Ali Mohamed Omar.

ii. Zeitun Ibrahim Ali Mohamed.

iii. Yasmin Ibrahim Ali Mohamed J.

iv. Sherali Ibrahim Ali Mohamed.

v. Rehmat Ibrahim Ali.

vi. Roshan Ibrahim Ali.

vii. Hamadi Ibrahim Ali.

viii. Fatima Ibrahim Ali.

ix. Shebanu Ibrahim Ali.

c. The land parcel was the property of the Plaintiff/Applicant's father who caused it to be registered in the names of the two deceased.

d. The beneficiaries of the trust including the Plaintiff/Applicant with their other home.

e. The said land parcel was the only known asset of the deceased persons.

f. The two having held the title in trust as above - stated the property in the land parcel was at all times during the lifetime of the deceased and even after their death property of the beneficiaries of the trust and vests in the said beneficiaries.

g. The Plaintiff/Applicant had received a letter dated 12th October, 2018 from Integra Auctioneering (K) Company claiming That they had been instructed to recover from the Plaintiff/Applicant loan amounting to a sum of Kenya Shillings Sixteen Million Three Ten Thousand Seven Ninety Seven Hundred (Kshs.16,310,797.00) plus interest which they claimed the one SHOKAT IBRAHIM JUNEJA owed the 2nd Defendant.

h. The person named in the notices as Shokat Ibrahim Juneja was not the Plaintiff/Applicant and he had never taken a loan or any amount or a sum of Kenya Shillings Sixteen Million Three Ten Thousand Seven Ninety Seven Hundred (Kshs.16,319,797.00/=) above stated from the 2nd Defendant or used the deceased land title as collateral for the purported loan.

i. When the Plaintiff/Applicant received the letter way back in the year 2018, he made enquiries at the Central Bank of Kenya where he paid a physical visit to them at their Mombasa Branch and also by the Registrar of Companies and by internet searches, the entity 'Kenya Finance Bank Limited" on whose behalf the auctioneer purport to act does not exist.

j. The Defendants action was fraudulent, illegal and were adverse to the Plaintiff/Applicant's proprietary rights.

k. The Defendant/Respondent's action was fraudulent and unlawful.

l. The Plaintiff/Applicant stood to suffer irreparable loss if an Order was not given stopping the Defendants from continuing with their illegal public auction.

III. The 2nd Defendant's application & case

6. The 2nd Defendant in its Notice of Motion application dated 22nd August, 2022 sought for the following orders:

   a. SPENT.

   b. The Honourable court be so pleased as to review the order of the court of 18th July, 2022 dismissing the 2nd Defendant's preliminary Objection dated 2nd February, 2022.

   c. The Costs of this application to be borne by the Plaintiff.

7. The Application is brought under the provision of Section 80 of the *Civil Procedure Act*, Cap. 21, Order 45 Rules 1, 2 and 3, Order 51 Rule 1 of the Civil Procedure Rules, Section 3A of the *Civil Procedure Act*, Cap. 21. It was premised on the grounds, testimonial facts and averments made out under the 9 Paragraphed Supporting Affidavit by Dorcas N. Wanjala sworn and dated on 22nd August, 2022 and the annextures. She averred That:

   a. She was aResolution Manager with Deposit Insurance Corporation herein, the Liquidator of the 2nd Defendant herein, duly authorized, well versed with the facts leading up to this matter and competent to swear this Affidavit.

   b. The 2nd Defendant/ Applicant filed a preliminary objection dated 18th July,2022 with the court delivering a Ruling on the Preliminary objection on the 18th July, 2022.

   c. The ruling of 18th July, 2022 dismissed the 2nd Defendant's preliminary objection.

d. They had perused the ruling of the Honourable Court and believe That there was a glaring error and/or omission on the face of the record.

e. The Honourable Court:-

i. At Paragraphs 38 and 39 rightfully delved into the issue of whether or not leave must be obtained before the commencement of the suit;

ii. The Honourable court then adduces an authority confirming That leave must be obtained before commencement of the suit;

iii. The Honourable court then confirmed That leave was not obtained before the institution of this particular suit;

iv. The Honourable Court then omits to conclude That since leave was not instituted before the commencement of the suit, then the suit did not comply to the law.

v. The Honourable Court however then erroneously omitted a conclusion on this issue and moved on to the next issue;

vi. The Honourable court then erroneously failed to find That this ground was merited and the Preliminary Objection should succeed.

f. The error was one That was obvious on the face of it and did not need any further or complicated explanation.

g. It was in the interest of justice That the application be determined before the matter could proceed any further.

h. The court had issued an order for the expeditious disposal of this suit and this application should thus be determined expeditiously in order to have the matter determined within the timelines given.

IV. Response to the Notice of Motion Application dated 18th November, 2021(amended on 24th January, 2022) by the Plaintiff

8. The 2nd Defendant through its Resolution Manager, Dorcas N. Wanjala opposed the application dated 18th November, 2021 through a 26th Paragraphed Replying Affidavit who deponed That:

a. The Corporation was a statutory body established under Section 4 of the *Kenya Deposit Insurance Act* No. 10 of 2012 and a successor to the Deposit Protection Fund Board.

b. The 2nd Defendant herein was placed in liquidation with the Deposit Protection Fund Board being appointed as the official liquidator videgazette notice No. 6269 of 8th November, 1996. (Annexed herein at page 1 of the Annexure marked as "DNW" was a copy of the Gazette Notice No. 6269).

c. It was thus a blatant misrepresentation for the Plaintiff to claim That the 2nd Defendant was a non - existent entity and a look at the company's registry would confirm That the 2nd Defendant was duly registered and further the gazette notice confirms the existence of the 2nd Defendant. (Annexed herein at page 2 of the Annexure marked as "DNW" was a copy of an extract from the company's registry).

d. Having overused the application filed by the Plaintiff, she pointed out That no evidence whatsoever had been tendered by the Plaintiff to show That he had any legal right whatsoever to the subject property.

e. The Plaintiff admitted in his application That both the registered owners of the property namely Sakinabal Ali Mohamed and Abdalla Haji Mohamed Sameja are deceased and even went further to indicated That administration of their estate had not commenced.

f. The Plaintiff relied on a Grant of Letters of Administration Ad Colligenda bona dated 7th December, 2018 which letters do not give the Plaintiff legal authority to institute a suit with regard to the said property.

g. No document had been produced with regard to any of the estates of the Deceased to show That the Plaintiff was a beneficiary or an administrator capable of instituting this suit.

h. The Plaintiff's relationship to the Deceased registered proprietors is tenuous at best, he indicated in the Plaint That one of the Deceased was afriend to his father whilst the other was a paternal aunt, all descriptions which did not grant him to any rights under the property.

i. The Plaintiff further claimed That the property was owned by his father, yet suspiciously enough no details were given of the said father not even a name and no document or any evidence whatsoever was adduced in support of this.

j. The Plaintiff further claimed a beneficial interest in the property, yet no evidence whatsoever was tendered in support of this claim.

k. This Honorable Court could not administer the estates of the Deceased and proceeded to determine whether the Plaintiff had a beneficial interest in the property as the issue of the administration of the estate should be dealt with under Succession law.

l. In the circumstances, the Plaintiff had not laid out any legal right over the subject property whatsoever and the application was thus mischievous and an abuse of court process.

m. Vide an application dated 5th September, 1991, Shokat Ebrahim Juneja (Hereinafter referred to as "the borrower") applied for a credit facility being a short-term loan for a sum of Kenya Shillings Eight Hundred Thousand (Kshs. 800,000.00/=) to enable the Borrower to purchase a running printing press. (Annexed herein at pages 3 to 4 of the Annexure marked as "DNW" was a copy of the short-term loan application form).

n. The Bank evaluated the application on 11th September, 1991 and recommended the grant of the credit facility with the facility being granted vide a letter of offer dated 2nd October, 1991.

o. The credit facility was secured by a legal charge over the subject property namely Title number MOMBASA BLOCK XLI/156 Old Town with the charge dated 16th October, 1991 being duly registered.

p. The Borrower defaulted in repayment of the loan and the account is now in arrears of a sum of Kenya Shillings Sixteen Million, Two Hundred and Ninety-One thousand, Seven Hundred and Ninety-Seven (Kshs. 16,291,797.00/=) as at 9th September, 2016. They had severally tried to sell the property and have thus incurred auctioneer's fees, valuation fees and the Plaintiff had severally filed cases in court with legal fees accruing to the amount as well.

q. They had issued all the requisite statutory notices under the law with the notices being dispatched to the postal address issued by the Borrower, as such, the Bank should be allowed to proceed in exercising its statutory power of sale.

r. The Plaintiff claimed That the Deceased Shokat Ebrahim Ali Mohamed Omar never took a loan on the premises and That the Deceased's name never appeared on the notices.

s. It was clear from a case filed by the Deceased namely: "Mombasa High Court Civil Suit No.66 of 1994: Sakinabai Ali Mohamed VS Kenya Finance Corporation Limited That the Deceased was aware of the existence of the charge dated 16th October, 1991 and even confirmed having received the loan amount.

t. In any event, the charge need not have been registered in the name of the Deceased as the charge was a third-party charge with the Borrower being one Shokrat Ebrahim Juneja.

u. The Deceased in the suit filed and referred to above, mentions the Borrower and referred to him as his nephew and first beneficiary under the charge.

v. She further confirmed That a current valuation was carried out before the property was advertised for action which a copy of was annexed in the affidavit.

V. Response by the Plaintiff to the Notice of Motion application dated 22nd August, 2022 by the 2nd Defendant

9. In opposition to the Notice of Motion application dated 22nd August, 2022 the Plaintiff raised grounds of Opposition dated 7th September, 2022 on the following grounds:-

a. That the Application was frivolous and was intended to delay proceeding.

b. That the Application sought to have this Court sit on Appeal over its decision.

c. That the Application disclosed no grounds capable of having a reason for review but dwells on what is perceived to be errors only curable on Appeal.

d. That the Ruling was very clear and orders given were lawful and causes no prejudice to the 2nd Defendant.

e. That the 2nd Defendant had failed or refused to comply with the orders of the 18th July,2022.

VI. Further Affidavit in Support of the Notice of Motion Application dated 22nd August, 2022

10. The 2nd Defendant through its Advocate in support of the application dated 22nd August, 2022 filed a further affidavit sworn on 9th November, 2022 where she deposed That:

a. The said application was supported by the Affidavit of Dorcas N. Wanjala and at Paragraph 4 thereof. It was indicated That a copy of the court order under review was attached.

b. She had upon perusal of the annexure realized That the order is erroneously not attached and she attached a copy of the said order herein.

c. That the oversight was wholly one by her officer and should not be visited on the client.

VII. Submissions

11. In the presence of all parties herein, the Honourable Court directed That the two applications be canvassed by way of written submissions. Pursuant to which both parties complied. Thereafter, the Court reserved a day for delivering the ruling on notice.

A. The Written Submissions by the Plaintiff/Applicant's

Application dated 18th November, 2021 That was amended on 24th January, 2022

12. On 15th February, 2023 the Plaintiff/Applicant through the Law firm of Messrs. J.O. Magolo & Company Advocates filed their written submissions dated the same day. Mr. Magolo Paul Advocate submitted as follows. That before the Honourable Court was the Plaintiff/Applicant's amended application dated 24th January 2022 which sought the following orders:-

    a. SPENT.

    b. That a temporary order of injunction be issued restraining the 1st Defendant and 2nd Defendant jointly and severally whether by themselves, their representatives, agents, employees, servants, proxies and/or assigns from selling, transferring, disposing of or dealing on or conducting sale by public auction to be held on the 23rd November 2021 or any other date of all That parcel of land known as MOMBASA/BLOCK XLI/ 156 situate in Old Town Mombasa together with its fixtures and improvements pending the inter partes hearing of this Application.

    c. That a temporary order of injunction be issued restraining the 1st Defendant and 2nd Defendant jointly and severally whether by themselves, their representatives, agents, employees, servants, proxies and/or assigns from selling, transferring, disposing of or dealing on or conducting sale by public auction to be held on the 23rd November 2021 or any other date of all That parcel of land known as MOMBASA/BLOCK XLI/ 156 situate in Old Town Mombasa together with its fixtures and improvements pending hearing and determination of this suit.

    d. That Costs of this application be in the cause.

13. The Learned Counsel submitted That the background of the application was That Sakinabai Ali Mohamed died intestate on 30th day of November, 2010 at Old Town, Mombasa in Kenya.The Plaintiff/Applicant was the duly appointed Legal Administrator of the estate of the deceased having been issued with a Grant of Letter of Administration in MSA SMC No. 408 of 2018 to administer the estate and collect and preserve its assets. Sakinabai Ali Mohamed was the Applicant's aunt and was not survived by any issues.The deceased and Absalla Haji Sameja (who died on 20th January, 1998) were the absolute proprietors of land title No. Mombasa/Block XLI/156 Old Town on which was developed a three-storey building comprising of shops and residential premises. They held the old title in trust for the Applicant and eight others who was the applicant's siblings.

14. The Learned Counsel submitted That the land parcel was property of the Applicant's father who caused it to be registered in the names of the two deceased and the beneficiaries of the trust including the applicant with their families of about 28 people live on the said premises and have no other home.The said land parcel is the only known asset registered in the names of the deceased persons.The two having held the title in trust as above - stated the property in the land.

15. The Learned Counsel submitted That the Applicant received a letter dated 12th October, 2018 from Integra Auctioneering (K) Company claiming That they had been instructed to recover claimed the one Shokat Ibrahim Juneja owed the 2nd Defendant. The person named in the notices as Shokat

Ibrahim Juneja was not him and he had the 2nd Defendant or used the deceased land title as collateral for the purported loan. The Applicant received a letter way back in the year 2018. He made enquiries at the Central Bank of Kenya where he paid a physical visit to them at their Mombasa 'Kenya Finance Bank Ltd' on whose behalf the auctioneer purport to act never existed.

16. The Applicant had never taken a loan or any amount of a sum of Kenya Shillings Sixteen Million Three Nineteen Thousand Seven Ninety Seven Hundred (Kshs. 16,319,797.00/=) above stated from the entity 'Kenya Finance Bank Ltd' or used the deceased land title as collateral for the purported loan.

17. On the Law regarding granting of injunctive orders, the Learned Counsel submitted That the provisions of Order 40 1(a) of the *Civil Procedure Act* Cap 21 was pertinent herein. The law states That; where in any suit it was proved by Affidavit or otherwise That any property in dispute in a suit was in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a Decree, 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.

18. In addition, Section 63 (e) of the Act gave the Court inherent powers to make such other interlocutory orders as may appear to the Court to be just and convenient in order to prevent the ends of justice from being defeated.

19. The Learned Counsel further argued That there was nowhere in the application and/or submission has the Applicant shown how the premises in question was in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a Decree. The Defendant had been solely operating the business for a period of 15 years now.

20. On whether the Plaintiff had fulfilled the conditions precedent for the granting of the injunctive orders as sought, the Learned Counsel submitted That the law regarding the condition's precedent to the granting of injunctive orders is well settled. In the now infamous case of "Giella – Versus - Cassman Brown & Company Limited (1973) E.A 358", the guiding principles in the granting of injunctive orders were enunciated to be That:-

> " An applicant must show a prima facie case with a probability of success;
>
> An Application will not normally be granted unless the Applicant shall otherwise suffer irreparable injury not compensable by way of damages; and That
>
> When in doubt the Court will decide the Application on the balance of convenience.

21. He cited the case of: "Waithaka – Versus - Industrial and Commercial Development Corporation (2001) KLR 374" reiterated the above position and further went on to add That:-

> " It is not an exorable rule That where damages may be appropriate remedy, an interlocutory injunction should never issue if the adversary has been shown to be high handed or oppressive in its dealings with the Applicant. This may move a Court of equity to hold That one cannot violate another citizen's rights only at the pain of damages".

22. In the case of:- Waithaka Case, (Supra) Ringera J. at Page 38 opined in the dicta thereof That 'doubt' in the third condition referred to the existence or otherwise of "a prima facie case". This denoted a scenario where the Court had inherent jurisdiction to grant an interlocutory injunction even where the Judge was less than convinced of the existence of a prima facie case in the proceedings.

23. On the existence of a prima facie, the Learned Counsel submitted That the Plaintiff in this case had "a prima facie case for the reasons:-

a. The Duplum Rule

The Replying Affidavit claimed That on 5th September, 1991, Shokat Ebrahim Juneja applied for a loan for a sum of Kenya Shillings Eight Hundred Thousand (Kshs. 800,000/=).

At page 15 in the annextures, they had attached a letter 11th August 2016 from a sum of Kenya Shillings Sixty-One Million, Two Hundred and Eighty-Eight Thousand, Nine Hundred and Seventy-Seven (Kshs. 61, 288, 977.00/=).

The Deponent in her Replying Affidavit at Paragraph 18 states That the borrower received a sum of One Million, Two Hundred and Ninety-One Thousand, Seven Hundred and Ninety-Seven (Kshs. 1,00, 291, 797.00/=) as at 9th September 2016.

The provisions of Section 44 (A) of the *Banking Act* are pertinent herein. The law states as follows:

44A. Limit on interest recovered on defaulted loans

(1) An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2).

(2) The maximum amount referred to in subsection (1) is the sum of the following-

(a) the principal owing when the loan becomes non-performing;

(b) interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and

(c) expenses incurred in the recovery of any amounts owed by the debtor."

24. The Learned Counsel relied on the case of "Francis Mbaria Wambugu – Versus - Jijenge Credit Limited [2020] eKLR where Justice C. Meoli when considering a similar application forinjunction stated as follows:-

> " 26. Concerning the In duplum rule imported via the enactment of Section 44A of the *Banking Act* in 2007, the Court of Appeal stated in Kenya Hotels Ltd v Oriental Commercial Bank Ltd (Formerly known as Delphis Bank Limited) [2019]e KLR That:
>
> > "In duplum" is a Latin phrase derived from the word "in duplo" which loosely translates to "in double". Simply stated, the rule is to the effect That interest equals the amount of loan advanced. Since the introduction of this principle on consistency. See Lee G. Muthoga – Versus - Habib Zurich Finance (K) Limited & Kenya National Capital Corporation [2019] eKLR, along a host of many others decision by this Court in the following passage.
> >
> > The in duplum rule is concerned with public interest and its key aim was to protect borrowers from exploitation by lenders who permit

interest to accumulate to astronomical figures. It was also meant to safeguard the equity of redemption and safeguard against banks making it impossible to redeem a charged property. In essence, a clear understanding and appreciation of the in duplum rule is meant to protect both sides".

25. It was the Learned Counsel's submission That the Defendant as per her allegation was in breach of the provision of Section 44A of the *Banking Act* which is the Duplum Rule for attempting to recover mote than 20% the amount of the loan.

26. On the issue of irreparable injury incapable of reparation by way of damages, the Learned Counsel submitted That the Plaintiff herein had demonstrated That if the interlocutory orders sought, were not granted, the injury That he shall suffer was incapable of being compensated by way of damages. The Learned Counsel relied on the case of: "Muiruri – Versus - Ban of Baroda (K) Limited (2001) KLR 183", where the Court, "inter alia", held That:-

> " Disputes over land in Kenya evoke a lot of emotion and except in very clear cases, it cannot be said That damages will adequately compensate a party for its loss.

27. They similarly reiterated the Court's sentiments in the "Waithaka Case (Supra)" where the Court emphasized That;

> " Money is not everything at all times and in all circumstances and do not think you can violate another citizen's rights only at the pain of damages...."

28. Further, in the "Waithaka Case, (Supra)" Ringera J. at Page 38 opined in the dicta thereof facie case. This denoted a scenario where the Court has inherent jurisdiction to grant an interlocutory injunction even where the Judge was less than convinced of the existence of a prima facie case in the proceedings. The Applicant had deponed That he made enquiries at the Central Bank of Kenya Registrar of Companies and by internet searches, the entity 'Kenya Finance Bank Ltd' on whose behalf the auctioneer purport to act did not exist. The Respondent in her Replying Affidavit had attached an excerpt showing That she company and the results of the application had not been revealed to them.

29. It went without saying That the details of the company could not be established. Further, it was not in dispute That the 2nd Defendant was in liquidation. If the orders sought were not granted, the Applicant would suffer irreparable loss as the 2nd Defendant could not be found or established and further was in liquidation making it difficult or impossible to seek redress in form of damages.

30. The Learned Counsel on the issue of whom the balance of convenience lied. He submitted That the balance of convenience herein tilted in favour of the Plaintiff. The Plaintiff/Applicant had shown evidence of payment of the goods in question. It was not in dispute That the property the bank sought to sale was registered in the names of ABDALLA HAJI MOHAMED SEMEJA and SAKINABAI ALI MOHAMED who were both deceased.As confirmed in the Replying Affidavit, the statutory notices were not served on the estate of the deceased as is required by Law before seeking to exercise Statutory Power of Sale.

31. They were guided by the case of "Marteve Guest House Limited – Versus - Nienga & 3 others (Civil Appeal 400 of 2018) |2022] KECA 539 (KLR)" (attached herewith where the Court of Appeal stated as follows:-

> " 25. Having charged the suit property to the bank, the deceased was competent to dispose it during her lifetime subject to the bank's consent, or her paying off the debt. Although her right of disposal was encumbered by the charge, her death did not automatically terminate her interest in the suit property. The property remained part of her estate subject to the debt. It was therefore free property That could be inherited by the beneficiaries of the estate of the deceased subject to the encumbrance.
>
> 26. As chargee, the bank had the option under section 66 of LSA to apply for letters of administration for the estate of the deceased to enable it exercise its statutory power of sale. Nevertheless, in light of the bank's interest in the suit property, and the rights of the deceased's beneficiaries, the bank could only exercise That option by applying to have a person or persons entitled to a grant of letters of administration for the estate of the deceased chargor appointed as such by the court. That would have enabled the bank to serve the estate of the deceased with the necessary notices through the appointed administrators, to give an opportunity for the estate to pay the debt failing which the bank would be able to pursue its statutory right of sale, the administrators stepping into the shoes of the deceased chargor. The bank did not follow That avenue and the estate of the deceased was not given an opportunity to redeem the suit property before the sale. To That extent the bank's statutory power of sale had not accrued.

32. It was the Learned Counsel's submission That the bank failed to serve the estate of the deceased registered owners of the property and as such, failure to grant the orders sought will be tantamount to allowing the 2nd Defendant to proceed with an illegality.

33. On whether, the Replying Affidavit in opposition of this application should be expunged from the record. The Learned Counsel submitted That the Application was also directed to the Defendants but had been opposed by an Replying Affidavit of one Dorcas N. Wanjala, a party who was unknown to this suit. The said Dorcas N. Wanjala claimed to be responding as the 2nd Defendant's Resolution Manager.

34. Further, the Counsel referred to the The provision of Order 9 Rule (2) (c) of the Civil Procedure Rules states as follows;

> '2. The recognized agents of parties by whom such appearances, applications and acts may be made or done are-
>
> (c) in respect of a corporation, an officer of the corporation duly authorized under the corporate seal.'

35. In the absence of a board resolution with the company seal authorizing the said, company, it was their humble submission That Dorcas N. Wanjala was not a recognized application was therefore incompetent and ought to be expunged from the record. The Learned Counsel urged the Honourable Court to expunge the said affidavit, find That their application was unopposed and allow it as prayed.

36. In conclusion, the Learned Counsel submitted That an order of injunction serves the purpose of maintaining the status quo and preservation of the suit property. They urged the Honourable Court to allow the Plaintiff's Application dated 18th November 2021 in order maintain the status quo and preserve of the suit property pending the hearing and determination of this suit.

Application dated the 22nd August, 2022 by the 2nd Defendant

37. On 15th February, 2023, the Plaintiff through the Law firm of Messrs. J.O. Magolo & Company Advocates filed their written submissions dated the same day to the application dated 22nd August, 2022. Mr. Magolo Paul Advocate submitted That before the Honourable Court was the 2nd Defendant's Notice of Motion application dated 22nd August 2022 sought for the following orders: -

    a. Spent.

    b. This Honourable Court be so pleased as to review the order of the court of 18th July 2022 dismissing the 2nd Defendant's preliminary Objection dated 2nd February 2022.

    c. The costs of this application be borne by the Plaintiff.

38. The Application was opposed by way of Grounds of Opposition filed on the 7th September 2022. The Learned Counsel submitted That the law regarding granting of review orders was provided under provisions of Section 80 of the *Civil Procedure Act* Cap 21 are pertinent herein. In addition, the provision of the Civil Procedure Rules Order 45.

39. The applicable law as far as review jurisdiction is concerned is drawn from Section 80 of the *Civil Procedure Act* as well as Order 45 Rule 1 of the *Civil Procedure Act*. The law is That, any person who considered himself aggrieved by a Decree or Order from which an Appeal was allowed under the Act, but from which no Appeal had been preferred, or by a Decree or Order from which no Appeal was allowed by the Act may apply for review of judgment to the Court which passed the Decree or Order, and the Court may make such order thereon as it thinks fit.

40. An Applicant in an Application for review must demonstrate the following ingredients That:-

    a. He has discovered new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the Decree was passed or order made

    b. There is some mistake or error apparent on the face of the record; or

    c. For any sufficient reason.

41. The Learned Counsel submitted That the Applicant herein seeks to review this Honourable Court's Ruling and Orders made on the 18th July 2022 on the grounds That there was an error apparent on the face of the record. The Respondent disputed the Applicant's position and maintained That the Honourable Judge's orders were reasonable and rational findings in exercise of his judicial discretion under inherent powers of the Court in the circumstances of the case.

42. On the error on the face of the record the Learned Counsel relied on the case of "Nyamogo & Nyamogo Advocates -Versus - Moses Kogo Civil Appeal No. 322 of 2000 (2001) I EA 173", the Court opined thus at Page 174;

> " An error on the face of the record can only be determined on the facts of each case. For an error of law on the face of the record to form a ground for review, it must be of a kind That

stares one in the face and on which there could reasonably be no two opinions. If a Court's original view was a possible one, it cannot be a ground for review even though it may be one for Appeal……."

43. At Page 175, the Court further observed That;

> " A point which may be good ground of appeal may not be a ground for an application for review though it may be a good ground for an appeal."

44. Moreover, in the case of :"Abasi Balinda – Versus - Frederick Kangwamu and Another (1963) E.A 557", the Court held, "inter-alia, That a point which may be a good ground of appeal may not be a ground for an Application for Review and an erroneous view of evidence or of law was not a ground for review though it may be a good ground for an Appeal.

45. In the case of:- "Nyamogo Case (Supra)", the Court drew a distinction between a mere error and an error apparent on the face of the record. In case of:- "National Bank of Kenya Limited – Versus - Ndungu Njau [1997] eKLR", the Court of Appeal stated as follows:-

> " A review may be granted whenever the court considers That it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review That another Judge could have taken a different view of the matter. Nor can it be a ground for review That the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."

46. The application stipulated That the Honourable Court confirmed That leave was not obtained before institution of this particular suit and omitted to conclude That since leave was not instituted by before the commencement of the suit, then the suit did not comply to the law.

47. The Learned Counsel submitted That the Applicant was raising was not an error or omission on the part of the court. According to him, it was an issue That required an elaborate argument to establish and could only be raised on an appeal and not a review. There was no error some mistake or error apparent on the face of the record and the court was very clear in its mind when dismissing the 2nd Defendant's Preliminary Objection dated 2nd February 2022 and That was why the court in its ruling went further to conclude as follows as from Paragraph 51:-

> " 51. Taking into account the above findings of the court, this Court finds That since the Plaintiff's suit is based on beneficial interest over the suit property, making a determination as to whether or not they hold such interest over the suit property at this stage will be draconian as the Plaintiff's suit would have been determined via a Preliminary Objection and it would mean That the Court would not have had an opportunity to ventilate on the issues That would have been raised by the Plaintiff. Further it is the Court's holding That the instant issue while it goes to the Jurisdiction of this Court, certain facts must be ascertained and therefore the issue at hand cannot be determined via a Preliminary Objection, as the Court will have to take evidence to determine the same. I am guided by jurisprudence to the case of "Wilmot Mwadilo, Edwin Mwakaya, Amos Nyatta & "Patrick Mbinga - Versus -Eliud Timothy

Mwamunga & Sagalla Ranchers Limited [2017] eKLR", where the Court held That:-

> "Upholding the said Preliminary Objection at this stage would be draconian as there appeared to be substantive issues That had emerged That needed to be heard and determined at the time of the hearing of the said Notice of Motion application.
>
> Indeed, the question of whether they have a cause of action against the Defendant and if they can sustain the same against him ought to be considered during the hearing of their Notice of Motion application when this court will consider whether or not leave should be granted for them to continue with the derivative action against him. The said question cannot be considered at this stage as there is potential of the court inadvertently delving into the merits or otherwise of their said application".

52. Consequently, the Court finds and holds That at this juncture, it would be imprudent to dismiss the Plaintiff's suit as the suit ought to be heard and facts ascertained to arrive at a just determination. I am guided and persuaded by the case of "Nicholas Kiptoo Arap Salat (supra)" in reaching at my determination on this Preliminary objection application."

48. The Learned Counsel submitted That the basis of the Applicant's Application for review could be discerned from the plain reading of the grounds on the face of the Application and the Affidavit in support thereof. The Applicant further contended That the Honourable Court confirmed That leave was not obtained before institution of this particular suit and omitted to conclude That since leave was not instituted by before the commencement of the suit, then the suit did not comply to the law.

49. The Respondent's position was That the ruling and orders issued by this Honourable on the 18th July 2022 were not issued erroneously. Based on the circumstances of the case, as the record can establish, the Court exercised its inherent powers to prevent the ends of justice from being defeated.

50. In the case of:- "Nyamogo Case (Supra)" the Court held That:- "an error which has to be established by a long drawn process of reasoning or on points where there may be conceivably be two opinions can hardly be said to be an error apparent on the face of the record and neither can a view which is adopted by face of the record even though another view is also possible, mere error or wrong on erroneous view of evidence or of law is certainly no grounds of a review although it may be a good ground for Appeal".

51. The Respondents submitted That there could be more than one opinion about the reasoning behind the Learned Judge issuing the orders subject matter of the instant Application for Review.

52. The Learned Counsel submitted That there could be more than one opinion about the reasoning behind the Learned Judge issuing the orders subject matter of the instant Application for Review.It could not therefore be said That the Judge issued the orders erroneously. In a nutshell, the Learned Counsel averred That the Applicant's Application never met the test for review. In the premises, the Learned Counsel prayed That the Applicant's Notice of Motion 2nd Defendant's Notice of Motion dated 22nd August 2022 be dismissed with costs.

B. The 2nd Defendant's written submissions

Application dated 18th November, 2021 by the Plaintiff

53. On 25th January, 2023, the 2nd Defendant through the Law firm of Messrs. Maitai Nyawira & Associates Advocates filed written submissions dated 24th January, 2023. The Learned Counsel submitted That the submissions were made with regard to the Plaintiff's application dated 18th November, 2021 which seeks:-

    a.) That leave be granted to the Plaintiff to commence proceedings and get obtain orders against the 2nd Defendant which is in liquidation.

    b. Spent

    c. That a temporary order of injunction be issued restraining the 1st and 2nd Defendants jointly and severally whether by themselves, their agents, employees, servants, proxies and or assigns from selling, transferring, disposing of or dealing in or conducting sale by public auction to be held on 23rd November, 2021 or any other date of all That parcel of land known as MOMBASA/BLOCK XLI/156 situate in old town Mombasa together with its fixtures and improvements pending the hearing and determination of the suit.

    d. That the cost of the application be provided for.

54. The 2nd Defendant had in response filed a Replying affidavit dated 9th November, 2022.

55. On the brief facts the Learned Counsel argued That the Plaintiff in his application seeks to stop the 2nd Defendant in liquidation from selling the subject property by public auction. The Plaintiff indicated That the registered owners of the property are Sakinabai Ali Mohamend and Abdalla Haji Semeja both of whom were Deceased and died intestate. The Plaintiff alleged That he was the administrator of the estate of Sakinabai Ali Mohamned by virtue of a Limited Grant of Letters of Administration Ad colligenda bona dated 7th December, 2018.

56. The Plaintiff further claimed That the registered proprietors hold the property in trust on his behalf and 8 others. No documents had been adduced in support of this allegation. No documents had been adduced from succession proceedings of any of the Deceased's estates showing That the Plaintiff was an administrator or beneficiary of the subject property. The Plaintiff also claimed That the property belonged to his father who caused it to be registered in the names of the 2 registered owners. No evidence was tendered in support of this as well and interestingly, even the father's name was not provided.The Plaintiff then went on to claim That he had never taken a loan over the property or used the property as collateral, an interesting claim given That the Plaintiff was not the owner of the property and had not adduced any evidence to show a legal interest in the property.The Plaintiff further alleged That the 2nd Defendant was a non-existent entity, which he had somehow sued as a legal entity and even sought leave to sue indicating That the 2nd Defendant was under liquidation.

57. The Plaintiff then concluded That the actions of the 2nd Defendant was adverse to his proprietary rights. Had the Plaintiff established any such proprietary rights? The Learned Counsel diverged into the crucial issue at a larger stage in these submissions.

58. The Learned Counsel submitted That the 2nd Defendant's case raised issue with whether the Plaintiff had any right to institute this suit. The 2nd Defendant indicated That it was not a non-existent entity as claimed and attached the gazette notice confirming its existence and the fact That it was placed under liquidation.The 2nd Defendant clarified That a loan was taken out by one Shokat Ebrahim Juneja

(Hereby referred to as "the borrower") with the property being used as collateral for the loan. The charge in question was thus a third-party charge.

59. The 2nd Defendant averred That the Deceased registered owner, Sakinabai Ali Mohamed expressly confirmed the existence of a charge in his court documents filed in "Mombasa High Court Civil Suit No. 66 of 1994: Sakinabai Ali Mohamed – Versus - Kenya Finance Corporation Limited. A confirmation That the Deceased was aware of the existence of the charge dated 16th October, 1991. The 2nd Defendant then confirmed That indeed a loan was taken by the Borrower with the property being used as collateral and the loan was yet to be settled as evidenced by the statement of account attached.The 2nd Defendant was thus legally exercising its statutory power of sale having issued the requisite notices under law.

60. On whether the Plaintiff had met the threshold for the grant of a temporary injunction, the Learned Counsel relied on the three considerations for the grant of a temporary injunction as laid out in the case:- "Giella – Versus - Cassman Brown (supra)".

61. On whether they have "a prima facie case" with a probability of success the Learned Counsel relied on the Court of Appeal case of "MRAO Limited – Versus - First American Bank of Kenya Ltd & 2 others[2003] eKLR" in which the Court defined "a prima facie case' as follows:-

> " a prima facie case includes a genuine and arguable case, one which, on the material presented to the court, a tribunal properly directing itself will conclude That there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."
>
> But as I earlier endeavored to show, and I cited ample authority for it, a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."

62. The Learned Counsel submitted That from the above, the Plaintiff must thus show an infringement of a right. The crucial question now arises and which must be answered. Had the Plaintiff established any legal rights to the subject property? Had the Plaintiff exhibited an infringement of any of his legal rights?

63. It was the Learned Counsel's submissions Thatno legal right to the subject property had been established. The Plaintiff relied on:-

64. On the issue of a limited grant, they wished to reproduce submissions made with regard to this issue when addressing the preliminary objection.The Plaintiff at Paragraph 1 of the Plaint as well as in the application indicated That he brought this suit on his own behalf as well as on behalf of the Estate of SAKINABAL ALI MOHAMED (DECEASED). The Plaintiff had annexed a Limited Grant of Letters of Administration Ad colligenda bona dated 7th December, 2018. The limited grant was indicated as being limited for:-

> " the purpose of collecting, getting in and receiving the estate and doing such acts as may be necessary for the purpose of preservation of the same until further representation be granted by this court."

65. It was clear from the above wording That the grant did not grant the power to institute or defend suits. Having confirmed That the grant itself never granted the Plaintiff power to institute suit on behalf

of the estate. He further submitted That under law, a limited Grant of Letters of Administration Ad colligenda bona never granted the Plaintiff the legal right to institute suit on behalf of the estate.

66. In the case of "Re the Matter of the Estate of Morarji Bhanji Dhanak (Deceased) [2000] eKLR", the Court went into great lengths to define all the limited grants provided for under law as well as the procedure for filing each of the grants. The court found That limited grants ad colligenda bona could not be used to institute suit.

67. They relied on the case of: "Elijah Nderitu Gachaga – Versus - Francis Gakuu Gachaga & 2 others [2019] eKLR", in which the court similarly analyzed the issue of a limitedgrant ad colligenda bona with regard to the institution of suits. The court also agreed That such a grant could not be used for the institution of a suit and dismissed the suit for That reason. The court had this to say:-

> " 43. I have looked at the decisions of the Court of Appeal in Morjaria and Peter Owade Ogwang and with tremendous respect to the Plaintiff's Counsel I do not find any conflict in the two decisions to warrant me to elect which one to be bound by and which one I should reject as suggested by the Counsel. The appellate judges in both benches were in agreement That the purpose of a grant ad coligenda is not the appropriate one to file suit. In Morjaria they allowed the substitution of the parties nevertheless after the death of a party in an ongoing case. In any event the ad colligenda in this case specifically stated That it was for purposes of filing an appeal. Similarly, in the case of Peter Owade Ogwang the Court was of the view That an application had been granted by the High Court judge and therefore another judge of concurrent jurisdiction could not overturn the decision. These two decisions are distinguishable to the extent of the circumstances That were allowed. That notwithstanding it is my considered view That both decisions reiterated the point of law which is That ad colligenda is not the appropriate grant to clothe a party with locus to file a suit unless it is specifically stated in the grant."

68. The Learned Counsel contention That they had already established That the grant never specifically give the Plaintiff the power to institute suit on behalf of the estate. He submitted therefore That the Plaintiff had no locus to institute the suit on behalf of the estate as claimed in the suit.The Plaintiff had no documentation whatsoever from any of the registered owners' estate giving him the right to institute this suit or even indicating That he was an administrator or beneficiary of any of the Deceased's estate.

69. On the issue of alleged beneficial interest, the Learned Counsel submitted That the Plaintiff claimed That the property was held in trust on his behalf and eight others yet no evidence whatsoever had been placed before the court. He averred That the Plaintiff could only institute a suit of this nature once his right over the subject property had been legally established and declared.

70. The determination of who the beneficiaries to the subject property was only be done in the succession matters where the court had the power to determine who was the beneficiaries of the estate. This Honourable Court could not delve into this issue as this must be determined amongst the dependants and beneficiaries of the estates of the Deceased registered owners.As it stood, the Plaintiff did not have any proprietary interest in the property.

71. On the issue of an allegation That the property belonged to his father, the Learned Counsel argued That this allegation was quite in contrast with the allegations in (i) and (ii) above. Nonetheless, the allegation was scanty as best as even the name of the Plaintiff's father was not given and in any event, a title document was prima facie proof of ownership of property. The two Deceased persons were

protected under law as the registered owners of the property. This was another claim That would had to be determined in a different court with the right parties before the Plaintiff could then approach the court indicating That he had proprietary rights over the property.

72. The Plaintiff had thus not established any rights to the property. Having failed to establish the same, the Learned Counsel submitted That the Plaintiff had not laid out 'a prima facie case" which must include a right That had been infringed upon. The Plaintiff had completely failed to establish any legal rights over the property and as such, there could be no infringement to be garnered in the circumstances. They submitted That this first requirement had not been met but they would nonetheless submit on the other requirements as well.

73. On the issue as to whether the Plaintiff shall suffer irreparable injury which cannot be compensated by damages, the Learned Counsel submitted That the Plaintiff had not pleaded any injury at all in its application. However, the Learned Counsel submitted That the injury suffered by the Plaintiff would be the loss of the property which property could be assessed in monetary terms. He rely on the case of:- "Florence Khayanga Musanga – Versus - Transnational Bank Ltd & another [2020] eKLR" in which the Court cited the following:-

> " 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."

74. The Learned Counsel submitted That in this case, the injury suffered would be the loss of the property. The value of the property being one That could be measured with reasonable accuracy, and further one That could be compensated with monetary compensation. The harm suffered would thus not be irreparable. The Plaintiff had thus not met this second required limb for the grant of the injunction sought.

75. The Learned Counsel submitted That if the court was in doubt, the Court would consider the application on a balance of convenience relied on the case of "Susan Adoyo – Versus - Equity Bank (K) Limited [2021] eKLR" in which the Court opined That:-

> " Going further, deep sentimental attachment to a security is also not a ground for granting of an injunction for the reason That once a chargor offers such property as security for a facility advanced to him or her, then he risked the same being put up for sale in case of default. In this respect, this court was not persuaded That the Appellant had demonstrated That she would suffer irreparable loss in the event the Respondent exercised its statutory power of sale.
>
> Having said so, the argument of damages not been adequate if an injunction is not granted would not be applicable where a breach can be remedied before action is taken against an applicant.
>
> Bearing in mind That there would be no triable issue for determination on appeal and the question of damages as adequate compensation did not arise once the omission was rectified, the balance of convenience titled in favour of the Respondent in not having an injunction granted herein."

76. The Learned Counsel submitted That the balance of convenience tilted in favour of the 2nd Defendant who was rightfully and legally exercising its statuary power of sale as there was no triable issue for trial involving the subject property.

77. On when could a Court stop a mortgagee from exercising its statutory power of sale, the Learned Counsel relied on the case of:- "MRAO Ltd Case (supra)", where in weighing on the issue the Court held That:

> " The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, That is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."

78. The Learned Counsel submitted That no amount had been paid by the Plaintiff or any other party with regard to the outstanding loan amounts and for this reason, the injunction orders as sought in the application should be set aside. They also relied on the case of "Nancy Wacici – Versus - Kenya Women Micro Finance Bank Limited [2017] eKLR" in which the court opined:-

> " Once a power of sale has arisen a mortgage has the right to exercise it. The Court has no power to prevent the exercise of That power if it is being properly exercised. It is a power parliament has granted a mortgagee and Courts cannot and ought not to interfere if it is being exercised."

79. The Learned Counsel averred That the statutory power of sale was being properly exercised in this case and the same ought not to be interfered with. The application herein should therefore be dismissed with costs.

Application dated 22nd August, 2022 by the 2nd Defendant

80. On 10th August, 2022, the 2nd Defendant through the firm of Messrs. Maitai Nyawira & Associates Advocates filed their written submissions dated 9th November, 2022. The Learned Counsel submitted That the submissions are made with regard to the 2nd Defendant's application dated 22nd August, 2022 which sought:-

    a. Spent

    b. The Honourable court be so pleased as to review the order of the court of 18th July, 2022 dismissing the 2nd Defendant's preliminary Objection dated 2nd February, 2022.

    c. The costs of this application be borne by the Plaintiff.

81. The Plaintiff had in response thereto filed grounds of opposition dated 7th September, 2022. The 2nd Defendant had also filed a further affidavit dated 9th November, 2022. The 2nd Defendant had adduced a copy of the Ruling as well as the order of the Court as Annexure.

82. The brief facts was That in a ruling of 18th July, 2022 this Honourable court proceeded to dismiss the 2nd Defendant's Preliminary objection. The 2nd Defendant/ Applicant humbly believed That there was a glaring error and/or omission on the face of the record. In its Ruling, The Honourable Court:-

i. At Paragraphs 38 and 39 rightfully delved into the issue of whether or not leave must be obtained before the commencement of the suit;

ii. The Honourable court then adduced an authority confirming That leave must be obtained before commencement of the suit;

iii. The Honourable court then confirmed That leave was not obtained before the institution of this particular suit;

iv. The Honourable court then omitted to conclude That since leave was not instituted before the commencement of the suit, then the suit never complied to the law;

v. The Honourable court however then erroneously omitted a conclusion on this issue and moves on to the next issue;

vi. The Honourable court then erroneously failed to find That this ground was merited and the Preliminary Objection should succeed.

83. The Learned Counsel submitted That the 2nd Defendant averred That the error was one That was obvious on the face of it and never needed any further or complicated explanation. The above thus constituted sufficient reason to have the prayer for review granted. In the grounds of opposition. The Plaintiff averred That:-

i. The application was frivolous:-

ii. The 2nd Defendant was asking the court to sit on appeal in its decision;

iii. The Ruling caused no prejudice to the 2nd Defendant

84. On the issues arising the Learned Counsel submitted That on the law That governs review, the provision of Section 80 of the *Civil Procedure Act*, Cap. The provision of Order 45 of the Civil Procedure Rules, 2010 then sets down the grounds for review.

85. The 2nd Defendant herein averred That there was an error on the face of the record and this error further constitutes sufficient reason to review the decision of the court. The 2nd Defendant held That the error in the Ruling of the Court was obvious and glaring and did not need much explanation. The 2nd Defendant reiterated the error one last time as follows:-

i. At Paragraphs 38 and 39 of the Ruling, the Honourable court rightfully delved into the issue of whether or not leave must be obtained before the commencement of the suit;

ii. The Honourable Court then adduced an authority confirming That leave must be obtained before commencement of the suit;

iii. The Honourable Court then confirmed That leave was not obtained before the institution of this particular suit;

iv. The Honourable Court then omitted to conclude That since leave was not instituted before the commencement of the suit, then the suit never complied to the requirements of the law;

v. The Honourable Court however then erroneously omitted a conclusion on this issue and moves on to the next issue;

vi. The Honourable Court then erroneously fails to find That this ground is merited and the Preliminary Objection should succeed.

86. The Learned Counsel relied on the case of "Kenya Orient Insurance – Versus - Zachary Nyambane Omwagwa [2021] eKLR", in which the court had this to say:-

> " 15. I have considered the submissions by the parties and I agree with the Applicant That there is an error apparent on the face of the record to warrant a review of this court.
>
> 16. The Supreme Court of Uganda in Edison Kanyabwera – Versus - Pastori Tumwebaze (2005) UGSC 1, provided for what constitutes an error apparent on the face of the record, it stated as follows;
>
> > "it is stated That in order That an error maybe a ground for review, it must be one apparent on the face of the record, i.e. an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear That no court would permit such an error to remain on the record. The error maybe one of fact, but it is not limited to matters of fact, and includes also error of law."
>
> 17. The court of appeal in National Bank of Kenya Limited – Versus - Ndungu Njau (1997) eKLR stated as follows; "A review may be granted whenever the court considers That it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established."

87. The Learned Counsel relied on the case of "Republic – Versus - Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR" in which the court delved in detail into the law on review. The Honourable Court held:-

> " 14. In Nyamogo & Nyamogo – Versus - Kogo [6] discussing what constitutes an error on the face of the record, the court rendered itself as follows:-
>
> > "An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal."

88. The Learned Counsel's contention was That the Court herein merely failed to conclude on the particular ground of the preliminary objection and there was no error on the law itself. This is thus a clear case of an error apparent on the face of the record. The relied on the excerpt from the above case:-

> " 21. The power of review is available only when there is an error apparent on the face of the record. I emphasize That review proceedings are not an appeal. The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible."

89. The Learned Counsel opined That the application herein never in any way seek to have the Court re-look the evidence before it and the entire application only related to the ruling itself and no reliance was placed on any evidence adduced when arriving at the ruling. The 2nd Defendant was thus not asking the Court to sit on appeal of its decision. The error was apparent on the record and did not require a lot of explanation. Further, there was also no other possible view upon reading the error itself. It was the Learned Counsel's submission That the grounds for review have been met by the 2nd Defendant and they prayed That the application be allowed.

90. On whether an error of law could form grounds for review, the Learned Counsel submitted That they found it fit to address this issue as the Plaintiff has in its grounds of opposition indicated That if the court allowed this application, it would be tantamount to sitting on appeal on its own decision.

91. The Learned Counsel submitted That the error herein could be construed as an error of law, though it could also be an error of fact as the law itself was not in contention and the court merely omitted to give its conclusion on That particular ground in the Preliminary Objection.Having said as much, an error of law could also form grounds for review as confirmed by the case of:- "Kenya Orient Insurance – Versus - Zachary Nyambane Omwagwa (supra)".

92. The Learned Counsel submitted That therefore That the application herein should be allowed with costs.

VIII. Analysis and Determination

93. I have read and considered the two (2) Notice of Motion applications dated 18th November, 2021 and 24th January, 2022 respectively, the replies, written submissions and cited myriad authorities by the parties, the relevant and appropriate provisions of *the Constitution* of Kenya, 2010 and the statures.

94. For the Honourable Court to arrive at an informed, just, fair and/or equitable has condensed the subject matter into the following three (3) issues for its determination. These are:-

    a. Whether the Plaintiff/ Applicant case has made out a case for the grant of interlocutory injunction under Order 40 Rule 1 in the Notice of Motion application dated 18th November, 2021?

    b. Whether the 2nd Defendant has made out grounds to warrant for the review of the order of the Court made on 18th July, 2022 dismissing the 2nd Defendant's preliminary objection dated 2nd February, 2022?

    c. Who bears the costs of the suit?

Issue No. a). Whether the Plaintiff/ Applicant case has made out a case for the grant of interlocutory injunction under Order 40 Rule 1 in the Notice of Motion application dated 18th November, 2021.

95. Under the sub – heading the main substratum of the application is on whether to grant or not the interim injunction orders. The legal principles That govern the provision of injunctions is founded under the premise 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.

96. The principles applicable in an application for an injunction were laid out in the celebrated case of "Giella - Versus - Cassman Brown & Co Ltd (supra)", 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."

97. The three 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 (supra)",

> " 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".

98. In dealing with the first condition of prima facie case, the Honorable Court guided by the definition melted down in "MRAO Limited (Supra),

> " 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"

99. The Applicant contended That Sakinabai Ali Mohamed died intestate on 30th day of November, 2010 at Old Town, Mombasa in Kenya and the Plaintiff is the administrator of the estate of the deceased having been issued with a grant of letter of administration in MSA SMC No. 408 of 2018 to administer the estate and collect and preserve its assets. The deceased and Absalla Haji Sameja (who died on 20th January, 1998) are absolute proprietors of land title No. MOMBASA/BLOCK XLI/156 Old Town on which is developed a three-storey building comprising of shops and residential premises.

100. The land parcel was property of the Plaintiff's father who caused it to be registered in the names of the two deceased. The beneficiaries of the trust including the Plaintiff with their other home. The said land parcel is the only known asset of the deceased persons. The two having held the title in trust as above - stated the property in the land parcel was at all times during the lifetime of the deceased and even after their death property of the beneficiaries of the trust and vests in the said beneficiaries.

101. The Applicant contended That he received a letter dated 12th October, 2018 from Integra Auctioneering (K) Company claiming That they had been instructed to recover from the Plaintiff loan amounting to a sum of Kenya Shillings Sixteen Million Three Ten Thousand Seven Ninety Seven Hundred (Kshs.16,310,797.00/=) plus interest which they claimed the one Shokat Ibrahim Juneja owed the 2nd Defendant. The person named in the notices as Shokat Ibrahim Juneja is not the Plaintiff and he has never taken a loan or any amount or a sum Kenya Shilling Sixteen Million Three Ninety Thousand Seven Ninety Seven (Kshs.16,319,797.00/=) above stated from the 2nd Defendant or used the deceased land title as collateral for the purported loan.

102. When he received the letter way back in the year 2018, he made enquiries at the Central Bank of Kenya where he paid a physical visit to them at their Mombasa Branch and also by the Registrar of Companies and by internet searches, the entity 'Kenya Finance Bank Limited' on whose behalf the auctioneer purport to act does not exist. The Defendants action is fraudulent, illegal and are adverse to the Plaintiff's proprietary rights.

103. According to the 2nd Defendant in their submission the Plaintiff at Paragraph 1 of the Plaint as well as in the application indicates That he brings this suit on his own behalf as well as on behalf of the Estate of Sakinabal Ali Mohamed (deceased). The Plaintiff has annexed a Limited Grant of Letters of Administration Ad colligenda bona dated 7th December, 2018. The limited grant is indicated as being limited for:-

> " the purpose of collecting, getting in and receiving the estate and doing such acts as may be necessary for the purpose of preservation of the same until further representation be granted by this court."

104. It was the 2nd Defendant's submission That there was no legal right to the subject property has been established.It is clear from the above wording That the grant does not grant the power to institute or

defend suits. Having confirmed That the grant itself does not grant the Plaintiff power to institute suit on behalf of the estate, they further submitted That under law, a limited Grant of Letters of Administration Ad colligenda bona does not under law grant the Plaintiff the legal right to institute suit on behalf of the estate. The Learned Counsel submitted That in the case of "Re the Matter of the Estate of Morarji Bhanji Dhanak (Deceased) (Supra)" the Honourable Court held That limited grants ad colligenda bona cannot be used to institute suit.

105. The Learned Counsel for the 2nd Defendant further submitted That the Plaintiff has no documentation whatsoever from any of the registered owners' estate giving him the right to institute this suit or even indicating That he is an administrator or beneficiary of any of the Deceased's estate.

106. 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."

107. Similarly, in the case of "Edwin Kamau Muniu – Versus - Barclays Bank of Kenya Ltd" 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."

108. Regarding this first condition by virtue of the fact That the parties are contesting the ownership of the land is enough to warrant the grant of an interlocutory order, I find That the Applicant has established That they have a prima facie case with a probability of success.

109. 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."

110. 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. The Learned Counsel for the Plaintiff contended That the Plaintiff herein has demonstrated That if the injunctory orders sought, are not granted, the injury That he shall suffer is incapable of being compensated by way of damages.

111. The Plaintiff relied on the case of "Muiruri – Versus - Ban of Baroda (K) Limited (Supra)" where the court held That:-

> 'Disputes over land in Kenya evoke a lot of emotion and except in very clear cases, it cannot be said That damages will adequately compensate a party for its loss'.

112. The Applicant has deponed That he made enquiries at the Central Bank of Kenya Registrar of Companies and by internet searches, the entity 'Kenya Finance Bank'. The Respondent on the other hand in her replying affidavit has attached an excerpt showing That she company and the results of the application has not been revealed to Plaintiff.

113. The Plaintiff contended That it goes without saying That the details of the company cannot be established and further, it is not in dispute That the 2nd Defendant is in liquidation and That the 2nd Defendant cannot be found or established and further is in liquidation making it difficult or impossible to seek redress in form of damages.

114. The judicial decision of "Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (supra)" provides an explanation for what is meant by irreparable injury and it states:-

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

115. From the evidence on record produced by both parties it is evident That the Applicant would not be able to be compensated through damages as he has shown the court That its rights to the suit property by the by the continuous occupation. He has therefore satisfied the second condition as laid down in "Giella's case".

116. Thirdly, the Plaintiff has to demonstrate That the balance of convenience tilts in his favour. In the case of "Pius Kipchirchir Kogo (supra)" which defined the concept of balance of convenience as:

> " The meaning of balance of convenience will favour of the Plaintiff' is That if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than That which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show That the inconvenience caused to them will be greater than That which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.
>
> In other words, the Plaintiff has to show That the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than That which is likely to arise from granting".

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

> " Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature

of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and That which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies."

118. The Plaintiff argued That the balance of Convenience lies with the Plaintiff and That he had shown evidence of payment of the goods in question. It is not in dispute That the property the bank seeks to sale is registered in the names of Abdalla Haji Mohamed Semeja and Sakinabai Ali Mohamed who are both deceased.As confirmed in the Replying Affidavit, the statutory notices were not served on the estate of the deceased as is required by Law before seeking to exercise Statutory Power of Sale. The bank failed to serve the estate of the deceased registered owners of the property and as such, failure to grant the orders sought will be tantamount to allowing the 2nd Defendant to proceed with an illegality.

119. The 2nd Defendant on the other hand argued That from the preceding paragraphs, it is evident That the present application is not merited and is an abuse of the court process as the Applicants having failed to safeguard their alleged interest in the Suit Property now seek to have the Court restrain the Bank, which has a registered interest in the Suit Property, from dealing with the Suit Property by way of an injunction. Further it has equally been demonstrated That present application is premised on unfounded fear and apprehension. Therefore, finding in favour of the Plaintiff would be the option That guarantee the lower risk of injustice. The balance of convenience therefore tilts in the Plaintiff's favour.

120. The decision of "Amir Suleiman – Versus - Amboseli Resort Limited [2004] eKLR" where the learned judge offered further elaboration on what is meant by "balance of convenience" and stated:-

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

121. Bearing this in mind, I am convinced That there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents That might be relevant in providing a history and/or chronology of events leading to the registration of title in the name of the Plaintiff/ Applicant.

122. In the case of:- "Robert Mugo Wa Karanja – Versus - Ecobank (Kenya) Limited & Another [2019) eKLR" where the court in deciding on an injunction application stated:-

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

123. I am convinced That if orders of temporary injunction are not granted in this suit, the properties in dispute might be in danger of being dealt in the manner set out in the application and apprehended

by the Plaintiff/Applicant. In view of the foregoing, I find That the Plaintiff/Applicant have met the criteria for grant of orders of temporary injunction.

Issue No. b). Whether the 2nd Defendant has made out grounds to warrant for the review of the order of the Court made on 18th July, 2022 dismissing the 2nd Defendant's preliminary objection dated 2nd February, 2022.

124. Under this Sub – heading, the provision of Section 80 of the *Civil Procedure Act* Cap 21 provides as follows: -

> " Any person who considers himself aggrieved—
>
> a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
>
> b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

125. Under the provision of Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows: -

> " 1.
>
> (1) Any person considering himself aggrieved—
>
> a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

126. In the case of:- "Republic – Versus - Public Procurement Administrative Review Board & 2 others [2018] eKLR" it was held:

> " Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds;
>
> (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;

(b) on account of some mistake or error apparent on the face of the record, or

(c) For any other sufficient reason and whatever the ground there is a requirement That the application has to be made without unreasonable delay."

127. In the case of "Sarder Mohamed – Versus - Charan Singh Nand Sing and Another (1959) EA 793" where the High Court held That Section 80 of the *Civil Procedure Act* conferred an unfettered discretion in the Court to make such order as it thinks fit on review and That the omission of any qualifying words in the Section was deliberate.

128. Discussing the scope of review, the Supreme Court of India in the case of "Ajit Kumar Rath – Versus - State of Orisa & Others, 9 Supreme Court Cases 596 at Page 608." had this to say:-

> " the power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, That is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out That the expression "any other sufficient reason" ..... means a reason sufficiently analogous to those specified in the rule"

129. In the case of:- "Tokesi Mambili and others – Versus - Simion Litsanga" the Court held as follows: -

i. In order to obtain a review an applicant has to show to the satisfaction of the court That there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show That there was a mistake or error apparent on the face of the record or for any other sufficient reason.

ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.

130. In the case of:- "Republic – Versus - Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR" High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018 John M. Mativo Judge culled out the following principles from a number of authorities: -

i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.

ii. The expression 'any other sufficient reason' appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.

iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.

iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/ judgment of a coordinate or larger Bench of the tribunal or of a superior court.

vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/ decision as vitiated by an error apparent.

vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show That such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.

viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.

131. In the case of "Evan Bwire – Versus - Andrew Aginda Civil Appeal No. 147 of 2006 cited fin the case of Stephen Githua Kimani – Versus -Nancy Wanjira Waruingi T/A Providence Auctioneers (2016) eKLR" the Court of Appeal held as follows:

> " An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh. In other words, I find no material before me to demonstrate That the applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence."

132. The 2nd Defendant who applied to this Honourable court to review the order of the court of 18th July, 2022 dismissing the 2nd Defendant's preliminary Objection dated 2nd February, 2022 told the court That it filed a Preliminary Objection dated 18th July, 2022 wit the court delivering a Ruling on the Preliminary objection on the 18th July, 2022.The Ruling of 18th July, 2022 dismissed the 2nd Defendant's Preliminary objection. The 2nd Defendant/ Applicant has perused the Ruling of the Honourable court and believes That there is a glaring error and/or omission on the face of the record.

133. According to the 2nd Defendant, in its Ruling, the Honourable Court:-

i. At Paragraphs 38 and 39 rightfully delves into the issue of whether or not leave must be obtained before the commencement of the suit;

ii. The Honourable court then adduces an authority confirming That leave must be obtained before commencement of the suit;

iii. The Honourable court then confirms That leave was not obtained before the institution of this particular suit;

iv. The Honourable court then omits to conclude That since leave was not instituted before the commencement of the suit, then the suit does not comply to the law;

v. The Honourable court however then erroneously omits a conclusion on this issue and moves on to the next issue;

vi. The Honourable court then erroneously fails to find That this ground is merited and the Preliminary Objection should succeed.

134. The 2nd Defendant averred That the error is one That is obvious on the face of it and does not need any further or complicated explanation. The Plaintiff on the other hand argued That the application was frivolous and intended to delay proceedings and That the Application sought to have the Honourable Court sit on appeal over its decision. The Application discloses no grounds capable of having a reason for review but dwells on what is perceived to be errors only curable on Appeal. The Ruling is very clear and orders given are lawful and causes no prejudice to the 2nd Defendant.

135. Paragraphs 38 and 39 of the Ruling dated 18th July, 2022 That the 2nd Defendant seek this Honourable Court to review, I held That:

> " 38. Section 56 (2) of the *Kenya Deposit Insurance Act* (No. 10 of 2012) provides as follows:-
>
> > "No injunction may be brought or any other action or civil proceedings may be commenced or continued against an institution or in respect of its assets without the sanction of the Court."
>
> Explaining the import of the said provision in "Andrew G. Muchai – Versus - Chase Bank Limited (2016) eKLR, Nzioka J observed and I concur as follows:-
>
> > "In my opinion to answer this question, one needs to appreciate what receivership is all about. In my opinion, receivership in legal terms entails an order/directive where all the property and affairs of an institution are placed in the dominion and control of an independent person known as a receiver. Thus receivership is a preservation process put in place to protect the assets, liabilities and business affairs of a bank with the aim of protecting the interests of its depositors, creditors and members of the public. In this case to preserve the bank's liquidity, assets, and to find the best way to return it into normal business."
>
> The essence of seeking leave to commence a suit, is to verify That the applicant has a valid claim, which they need to pursue against the institution and by extension the corporation. The main aim is thus to create orderliness, decency and avoid a floodgate of actions, which may involve some of the matters placed under supervision. This is informed by the fact That when Chase Bank Kenya (in receivership) was placed under receivership, the Kenya Deposit Insurance Corporation declared a moratorium to the Bank's business to be undertaken by all stakeholders of the bank; including limiting the Bank's services. A moratorium is a temporary delay or suspension of an activity. The same prohibits a Bank from inter alia, receiving deposits and making payments, unless it is partially or fully lifted by the Kenya Deposit Insurance Corporation. Thus suits cannot be commenced suo moto without the Court's leave and/or sanction. That will create anarchy. I hold That, for a company under receivership, a party suing it must seek the Court's leave before commencing

a suit against it. Therefore, institution of any proceedings will require the sanction of the Court.....

39. It is not in dispute in the matter before me That no leave was sought prior to the commencement of this suit. The suit therefore touches on property under liquidation."

136. This Honourable Court went further head at Paragraph 49 to render itself That:

> " However, this Court notes That the Plaintiff is claiming beneficial interest over the suit. That means therefore That the issue as to whether or not the Applicant has any proprietary interest over the suit property has to be ascertained through evidence. The Court would be required to interrogate evidence produced before it and ascertain the facts in order to come into That conclusion. In arriving at this conclusion, I am compelled to refer to the case of "Presbyterian Foundation & Another – Versus - East Africa Partnership Limited & Another[2012]eKLR to wit:-
>
> "The fourth issue is That the 2nd Plaintiff has no proprietary interests in the subject properties and is hence not entitled to the orders under Order 40 of the Civil Procedure Rules. That may be so. However, That determination can only be made at the hearing of the application as it goes to the merit of the application itself. Since I cannot make any conclusive findings with respect to the 2nd Plaintiff's position vis-à-vis the 1st Plaintiff, I cannot say That the 1st Plaintiff's suit is non-existent. It is further submitted That since the Church has registered officials and the 1st Defendant has directors, a suit on their behalf can only be brought by the said agents. That submission is largely correct since a suit which is brought without the blessing of the said entities is a non - starter. Whereas the Church is not a party to this suit and therefore the issue of its filing suit does not arise, with respect to the 1st Plaintiff, whether or not it sanctioned the filing of the suit is a matter of evidence. If the suit was filed without the 1st Plaintiff's authorization, That would be something else. However, That is not an issue That, properly speaking, can be the subject of a preliminary objection.
>
> Had this objection been raised by way of a formal application supported by an affidavit, That would have been a different story since the plaintiff would have had an opportunity to explain the discrepancies raised whose failure would have possibly led to a finding in favour of the Defendants. In the result it is my view and I so hold That the issues raised in the notice of preliminary objection dated 28th June 2012 do not meet the threshold for Preliminary Objections. The same are accordingly dismissed with costs to the Plaintiffs.."
>
> For these reasons, the Court strongly feels it imperative That the matter be allowed to proceed for full trial at which point all these matters may be re – evaluated once more but from a more informed position rather than at this preliminary stage.

137. This Honourable Court appreciated That fact That as much the suit touched on liquidation, the Plaintiff was claiming beneficial interest over the suit. That means therefore That the issue as to whether or not the Applicant has any proprietary interest over the suit property has to be ascertained through evidence. The Court would be required to interrogate evidence produced before it and ascertain the facts in order to come into That conclusion. It would have been premature to dismiss a suit where evidence has not been adduced especially being That this is a land matter.

138. This Honourable Court also expressed itself That being it found That since the Plaintiff's suit is based on beneficial interest over the suit property, making a determination as to whether or not they hold such interest over the suit property at this stage will be draconian as the Plaintiff's suit would have

been determined via a Preliminary Objection and it would mean That the Court would not have had an opportunity to ventilate on the issues That would have been raised by the Plaintiff. Further it is the Court's holding That the instant issue while it goes to the Jurisdiction of this Court, certain facts must be ascertained and therefore the issue at hand cannot be determined via a Preliminary Objection, as the Court will have to take evidence to determine the same. This Honourable Court opines That the ruling in question explained in length why the Preliminary objection was dismissed and That the matter at hand touched on a land issue which would be imprudent of the Honourable Court to dismiss the same in the preliminary stage.

139. Be That as it may, the current Application falls under the category described in the "Evan Bwire – Versus - Andrew Aginda Civil Appeal No. 147 of 2006 cited fin the case of Stephen Githua Kimani – Versus - Nancy Wanjira Waruingi T/A Providence Auctioneers(Supra)" case. The effect of allowing it would amount to re-opening the case afresh. Litigation must come to an end or must not be delayed where parties are well aware of the facts. For this reason I find That the grounds advanced by the 2nd Defendant/Applicant are not sufficient to review and vary the orders issued on the 18th July, 2022 herein.

Issue No. c). Who will bear the Costs of Notices of Motion applications 18th November, 2021 and 22nd August, 2022?

140. I have well stated in previous precedence and most especially in "Sagalla Lodge Limited – Versus - Samwuel Mazera Mwamunga & another (Suing as the Executors of Eliud Timothy Mwamunga – Deceased) [2022] eKLR", That:-

> " 58. The Black Law Dictionary defines "Cost" to means, "the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other".
>
> The provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds That Costs follow events. The issue of Costs is the discretion of Courts. From this provision of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in this case is That the Notice of Motion application dated 7th December, 2021 by the Plaintiff has succeeded and hence they are entitled to costs of the application and That of the Defendants dated 21st December, 2021."

141. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds That costs follow the events. In this case, as the Honourable Court has the discretion to award the costs, the Plaintiff/Applicant has fulfilled the conditions set out under Order 40 of the Civil Procedure Rules, 2010 and the 2nd Defendant has failed to show this Honourable Court why it should review its ruling rendered on 18th July, 2022, therefore the Plaintiff has the costs of the application as against the 2nd Defendant.

VIII. Conclusion and disposition

142. From the foregoing analysis, I do proceed to order as follows;

a. That the Notice of Motion application dated 18th November, 2021 which was amended on 24th January, 2022 is hereby found to have merit and is allowed in its entirety.

b. That the Notice of Motion application dated 22nd August, 2022 is hereby found to lack merit and is hereby dismissed.

c. That an order of Temporary Injunction do hereby issuerestraining the 1st and 2nd Defendants jointly and severally whether by themselves, theirrepresentatives, agents, employees, servants, proxies and or assigns from selling, transferring, disposing of or dealing in or conducting sale by public auction to be held on the 23rd November 2021 or on any other date of all That parcel of land known as MOMBASA/BLOCK XLI/156 situate in Old town Mombasa together with its fixtures and improvements pending the hearing and determination of this Suit.

d. That the matter to be heard expeditiously on 25th April, 2024. There be a mention on 31st January, 2024 for ascertainment and confirmation of the orders and compliance of Order 11 of Pre – Trial Conference under Order 11 of the Civil Procedure Rules, 2010.

e. That the Costs of the Notice of Motion application dated 18th November, 2021 and amended on 24th January, 2022 and the Notice of Motion application dated 22nd August, 2022 are awarded to the Plaintiff as against the 2nd Defendant.

It is so ordered accordingly.

RULING IS DELIEVERED THROUGH MICRO SOFT TEAMS VIRTUAL MEAN, SIGNED AND DELIVERED AT MOMBASA THIS 9TH DAY OF OCTOBER 2023.

HON. JUSTICE L. L. NAIKUNI (MR.)

ENVIRONMENT AND LAND COURT AT MOMBASA

Ruling delivered in the presence of: -

Mr. Magolo Paul Advocate for the Plaintiff/Applicant.

M/s. Maitai Advocate for the 2nd Defendant/Respondent