**Kimani & 5 others v Kanyi & another (Environment & Land Case 175 of 2021) [2023] KEELC 21617 (KLR) (6 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21617 (KLR)

**REPUBLIC OF KENYA**

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

**ENVIRONMENT & LAND CASE 175 OF 2021**

**LL NAIKUNI, J**

**NOVEMBER 6, 2023**

**BETWEEN**

**JAMES MBURU KIMANI ..... 1ST PLAINTIFF**

**MATHEW MASINDE EGESA ..... 2ND PLAINTIFF**

**CATHERINE MONG'INA NYARINDO ..... 3RD PLAINTIFF**

**SWABRA ALI ABDU ..... 4TH PLAINTIFF**

**MUNIRA MAAMUN ABUBAKAR ..... 5TH PLAINTIFF**

**EDGAR MURENGI THANDE ..... 6TH PLAINTIFF**

**AND**

**DAVID MUREITHI KANYI ..... 1ST DEFENDANT**

**STANBIC BANK KENYA LIMITED ..... 2ND DEFENDANT**

**RULING**

## I. Introduction

1. The application before this Honorable Court for hearing and determination are the Notice of Motion application dated 25th August, 2021 brought under a certificate of urgency. It was brought by the Plaintiff/Applicants herein – James Kimani Mburu & 6 Others' under the provisions of Sections 30, 54 (5), 56 and 57 of the *Land Registration Act*, 2012, Sections 1A and 3A of the *Civil Procedure Act*, Cap. 21 and Order 40 Rule 1 of the Civil Procedure Rules, 2010.

2. Upon effecting service, while 2nd Defendant/Respondent herein filed their replies through a Replying Affidavit dated 15th October, 2021, in opposition of the application herein by the Plaintiffs/Applicants dated, the 1st Defendant/Respondent never filed any replies. The Hononorable Court shall be dealing with the replies in more indepth later on.

**II. The Plaintiffs/Applicants' case**

3. The Plaintiffs/Applicants sought for the following orders:-

   a. Spent.

   b. Spent.

   c. Pending hearing and determination of this suit there be and is hereby issued an order of injunction to restrain the Defendants either by themselves, officers, agents, employees, assigns or any person acting on their behalf disposing of, leasing, renting, or in any manner whatsoever dealing with or interfering with the plaintiffs' use, ownership and occupation of all the property known as sub-division number 9613 section iii/ mainland north.

   d. Costs of this application be borne by the Defendants jointly and severally.

4. The application was premised on the grounds, testimonial facts and the averments made out under the 18 Paragraphed annexed Supporting Affidavit of James Mburu KimanI the 1st Plaintiff/Applicant herein and six (6) annexures marked as "JMK 1 to 6" annexed hereto. The 1st Plaintiff/Applicant posited that:

   i. The 1st to the 6th Plaintiffs/Applicants herein and the 1st Defendant/Respondent entered into respective Sale Agreements pursuant to which the Plaintiffs/Applicants purchased from the 1st Defendant/Respondent marionettes erected on the property known as Sub-Division Number 9613 Section III Mainland North ("The Suit Property") for valuable consideration.

   ii. It was a term of the respective Sale Agreements that the 1st Defendant/Respondent would issue the Plaintiffs/Applicants with duly registered Leases/Certificates of Lease respectively upon completion of payment of the purchase price and all requisite costs by the Plaintiffs/Applicants.

   iii. The respective maisonettes purchased by the Plaintiffs/Applicants were as hereunder:

      a. Maisonette Number 1 in the name of the 1st Plaintiff/Applicant vide the Agreement dated 1st August 2017;

      b. Maisonette Number 7 in the joint names of the 2nd and 3rd Plaintiffs/Applicants vide an Agreement dated 17th December 2016;

      c. Maisonette Number 19 in the name of the 4th Plaintiff/Applicant vide an Agreementdated 14th June 2017;

      d. Maisonette Number 5 in the name of the 5th Plaintiff/Applicant vide an Agreement dated 11th May 2016;

      e. Maisonette Number 2 in the name of the 6th Plaintiff/Applicant vide an Agreement dated 6th February 2016;

   iv. The Plaintiffs/Applicants paid the full purchase price and the requisite costs which included registration costs, valuation, disbursements and stamp duty but the 1st Defendant/Respondent had adamantly refused and declined to issue the Plaintiffs/Applicants with their duly registered leases/certificates of lease.

v. Instead of issuing the Plaintiffs/Applicants with their respective registered leases/certificates of lease, the 1st Defendant/Respondent proceeded and charged the suit property to the 2nd Defendant on 1st August 2018 to secure loans of a sum of Kenya Shillings Thirty Eight Million Four Hundred Thousand (Kshs. 38,400,000/-).

vi. The 1st Defendant/Respondent charged the suit property to the 2nd Defendant/Respondent without notifying the Plaintiffs/Applicants and without seeking the Plaintiffs/Applicants' consent.

vii. Having sold the leasehold interest of the suit property to the Plaintiffs/Applicant, the 1st Defendant/Respondent no longer had interest therein capable of securing the charge in favour of the 2nd Defendant/Respondent while the leases to the Plaintiffs/Applicants were subsisting and are in force.

viii. The Plaintiffs/Applicants were now apprehensive that the 1st Defendant/Respondent set them up and deliberately charged the suit property to the 2nd Defendant/Respondent so that the 2nd Defendant/Respondent could sell the suit property and injure/defeat the Plaintiffs/Applicants' interest therein.

ix. If the orders sought were not granted, there was a high possibility and likelihood that the Plaintiffs/Applicants' interest in the suit property may be defeated should the 2nd Defendant/Respondent move to enforce the charge and realize the security by selling the suit property and doing so will render the case filed herewith nugatory.

x. The Plaintiffs/Applicants and their families presently resided on the suit property and if the same was disposed of, the Plaintiffs/Applicants would be rendered homeless and destitute.

xi. It was in the interest of justice that this Honourable Court intervened to avert the possible loss that the Plaintiffs/Applicants were likely to suffer should the suit property be sold. Thus, this application should be allowed.

**III. The 2nd Defendant/Respondent's case**

5. On 15th October, 2021, the 2nd Defendant/Respondent filed a 24 Paragraphed Replying Affidavit sworn on the same day by Simon Mwangi, the Legal Counsel of the 2nd Defendant/Respondent in opposition of the application and annextures marked as "SM". He indicated that: -

a. The 1st Defendant/Respondent obtained financing from the 2nd Defendant/Respondent for the total sum of Kenya Shillings Sixty Three Million Four Hundred Thousand (Kshs. 63,400,000.00) vide the Facility Letter and Letter of Amendment dated 5th June, 2018 and 27th July. 2018 respectively.

b. Part of the amount advanced by the aforesaid facility letter in the sum of Kenya Shillings Thirty Eight Million Four Hundred Thousand (Kshs. 38,400,000/-) was secured by a first ranking legal charge created by the 1st Defendant/Respondent in favour of the Bank over several properties including Sub - division Number 9613 of Section III Mainland North (hereinafter "the Suit Property"). The balance of the loan amount was secured by other properties offered by the 1st Defendant/Respondent as could be seen at Clause 7.2 of the facility letter. The purpose of the charge was to secure repayment of the said principal amount and all other monies accruing thereon pending payment in the prescribed manner.

c. Before the facility was advanced to the 1st Defendant/Respondent, the 2nd Defendant/ Respondent had undertaken a robust and scrupulous due diligence exercise to confirm the ownership of the Suit Property and the existence of any encumbrances attached on it. The Property was registered in the names of the 1st Defendant/Respondent and there was no encumbrance(s) noted on the title document.

d. Further to the foregoing paragraph, the Bank as a further due diligence exercise engaged Axis Real Estate Limited (hereinafter "the Valuers") to undertake a valuation of the Suit Property which exercise culminated in the preparation of a valuation report dated 29th June, 2018 which has been annexed herein as "SM - 4".

e. At page 9 of the valuation report, David Mureithi Kanyi (the 2nd Defendant/Respondent herein) was indicated to be the registered owner of the suit property as the absolute proprietor. The valuation report also noted that at the time of the inspection there were no restrictions or caveats registered against the title. There were also no encumbrances registered against the title.

f. It was also the finding of the valuers at page 10 of the valuation report that the suit property was developed when they inspected it on 17th June, 2018. That there was a block of semi-detached maisonettes comprising of One (1) three bedroomed maisonette (Masionette No. A1) and Three (3) two bedroomed maisonettes (Maisonettes No.s A2, A3 and A4).

g. The valuers also noted at page 11 of the valuation report, that at the time of their inspection of the Suit Property on 17th June, 2018 the maisonettes were not occupied.

h. In response to the contents of Paragraphs 3.4,5,6,7 of the Supporting Affidavit, the Bank was a stranger to the Six (6) Plaintiffs/ Applicants herein and the alleged dealings between the said Plaintiffs/Applicants and the 1st Defendant/Respondent herein. In any case the Bank was never a party to any of those alleged transactions. The Bank was therefore erroneously enjoined as a party in this suit and shall at the earliest opportunity crave the leave of this Honourable Court to be struck out as a party.

i. In further response to the averments of Paragraph 7 of the Supporting Affidavit, the Plaintiffs/ Applicants ought to have safe guarded their interests in the Suit Property by registering restrictions or caveats against the title of the suit property to safeguard and to warn Third Parties of their interests. They did not.

j. In response to paragraph 8, 9 and 10 of the Supporting affidavit, as already indicated in the preceding paragraphs, the suit property was offered to the Bank as a security for the loan facility that was advanced to the 1st Respondent who due diligence undertaken by the Bank confirmed was the registered owner of the suit property.

k. The Bank was a stranger to the averments at paragraphs 11 of the supporting affidavit and reiterated the averments at paragraphs 5,6,7,8,9,10 and 11 here up.

l. In response to paragraphs 12,13 and 17 of the supporting affidavit, it was the Bank that risked suffering immeasurable loss and damage if the present application was allowed for the reason that it had advanced a loan facility on the security of the Suit Property that was yet to be fully repaid. The Bank's interest in the Suit Property was duly registered and noted in the Certificate of Title.

m. The Plaintiffs/Applicants had the onerous burden of presenting credible evidence to this Court demonstrating that there had been an infringement of their right. The Plaintiffs/Applicants must satisfy this Court that they had a prima facie case.

n. In further response to paragraphs 11, 12 of the Supporting Affidavit, the averments therein were speculative, illusory and fanciful. It had not been demonstrated that the 1st Defendant/Respondent had defaulted on his loan repayments to the Bank or that the Bank had commenced it statutory power of sale of the Suit Property in which case there would then have been a real and imminent threat.

o. Under the land laws, before a charged property was disposed of in the exercise of a Chargee's statutory power of sale there were numerous mandatory processes that had to be undertaken and several statutory notices issued to the defaulting party namely the 90 days' notice to redeem, the 45 days' notice to sell and an additional 45 days' Auctioneers notice to redeem. The Plaintiffs/Applicants had not established that the aforesaid notices had been issued to the 2nd Defendant/Respondent. Therefore, there was no imminent threat to warrant the grant of the orders sought.

p. The Bank was a stranger to the averments at made out under the contents of Paragraphs 14,15 and 16 of the Supporting Affidavit but notes that the several alleged agreements of sale annexed to the Supporting Affidavit had completion dates of 30th August, 2018, 30th October, 2017, 30th July, 2018, 20th June, 2017 and 20th October, 2016 respectively. Hence, one wondered why they waited for all these years to attempt to enforce their alleged ownership claim over Subdivision Number 9613 of Section III Mainland North.

q. A reasonable person would have placed a caveat, caution or any other recognized encumbrances against the Certificate of title which had been due notice to 3rd Parties dealing with the registered proprietor.

r. He prayed for the above reasons that this Honourable Court find that the application had no merit and proceed to dismiss it with costs to enable the Court proceed to exercise its rights which had crystalized.

s. The affidavit was sworn in opposition to the application.

**IV. The Supplementary Affidavit of Plaintiffs/Applicants**

6. On 3rd March, 2022, with leave of Court, the 1st Plaintiff/Applicant filed a 14 Paragraphed Supplementary Affidavit sworn on 2nd March, 2022. He averred that:

a. The 1st Defendant/Respondent the vendor of the suit property did oppose the Plaintiffs/Applicants' Application dated 25th August 2021.

b. In response to the averments made under the Paragraph 4 of the Replying Affidavit, he reiterated the contents of Paragraphs 5 to 17 of his Supporting Affidavit and state that the Plaintiffs/Applicants were at risk of suffering irreparable harm should the orders sought not be granted.

c. In response to contents made under the Paragraph 11 of the Replying Affidavit, the 2nd Defendant/Respondent had sworn that at the time the valuation report dated 29th June 2018 the maisonettes were not occupied yet the photograph at page 90 of the Replying Affidavit

showed 6th Plaintiff/Applicant's white motorvehicle parked in his semi-open garage parking spot. A clear contradiction.

d. In response to contents made under the Paragraph 12 of the Replying Affidavit, he reiterated the contents of Paragraphs 9 to 13 of his Supporting Affidavit.

e. In response to the contents made under the Paragraphs 13, 20 and 21 of the Replying Affidavit the 2nd Defendant/Respondent could not fault the Plaintiffs/Applicants for not safeguarding their interest when securing their interest in the suit property was the entire premise of the suit; and furthermore the Plaintiffs/Applicants purchased the maisonettes erected on the suit property before the charge was registered in favour of the 2nd Defendant/Respondent.

f. In addition to the above, the Plaintiffs/Applicants were following up with the 1st Defendant/Respondent for the issuance of their leases and it was the failure by the 1st Defendant/Respondent to honor those efforts that February 2019 and 18th July 2019 demanding title documents.

g. In response to contents made under the Paragraphs 19 of the 2nd Defendant/Respondent's Replying Affidavit, Clause 9.7 of the Charge at Pages 36 - 37 of the Replying Affidavit it was evident that it was not only in instances of non-payment that the 1st Defendant/Respondent could be declared to be in default. Where there was breach of the covenants, the 1st Defendant/Respondent was in fact in default of the charge.

h. Clause 6.20 of the Charge at page 34 clearly stated that the 1st Defendant/Respondent committed a breach of the covenants if he allowed "any person" to become entitled to "any proprietary rights" thereby affecting the value of the charged property or a part thereof.

    i. It was not in dispute that the Plaintiffs/Applicants purchased the maisonettes erected on the suit property and therefore their claim to part of the suit property affected the value of the Charge registered in the 2nd Defendant/Respondent's favour.

j. In response to paragraph 17 of the 2nd Defendant/Respondent's Replying Affidavit the Plaintiffs/Applicants had demonstrated "a prima facie case.

**V. Submissions**

7. On 3rd March, 2022 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 25th August, 2021 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and a ruling date was reserved on Notice by Court accordingly on notice.

**A. The Written Submission by the Plaintiffs/Applicants**

8. On 3rd March, 2022 the Plaintiffs/Applicants herein through the firm of Messrs. Oluga & Company Advocates filed their written submissions dated 2nd March, 2022. Mr. Oluga Advocate, commenced by providing a brief facts of the case. He stated that the submissions were in respect of the Plaintiffs/Applicants' application dated 25th August 2021 seeking for the following orders:

    i. Spent.

    ii. Spent.

    iii. Pending hearing and determination of this suit there be and is hereby issued an order of injunction to restrain the Defendants either by themselves, officers, agents, employees, assigns

or any person acting on their behalf disposing of, leasing, renting, or in any manner whatsoever dealing with or interfering with the Plaintiffs' use, ownership and occupation of all the property known as Sub-Division Number 9613 Section III/Mainland North.

iv. Costs of this application be borne by the Defendants jointly and severally.

9. The Learned Counsel informed Court that despite of proper service, the 1st Defendant/Respondent never opposed the Application. However, the 2nd Defendant/Respondent opposed it through the Replying Affidavit sworn on 15th October, 2021 by SIMON MWANGI, the 2nd Defendant/Respondent's Legal Counsel.

10. As indicated, the Learned Counsel provided brief facts. He informed Court that it was a case whereby the Plaintiffs/Applicants entered into respective Sale Agreements with the 1st Defendant/Respondent herein for purchase of leasehold interest of various maisonettes erected on the property known as Sub Division Number 9613 Section Iii/ Mainland North (hereinafter referred to as the "Suit Property") for valuable consideration. Under the respective Agreements for Sale, the 1st Defendant/Respondent was to furnish the Plaintiffs/Applicants with their respective certificates of lease but the 1st Defendant/Respondent had declined, refused and adamantly neglected to do so to date. It was while the Plaintiffs/Applicants were following up on the issuance of their respective certificates of leases, that the Plaintiffs/Applicants became aware of the fact that the 1st Defendant/Respondent had charged the suit property to the 2nd Defendant/Respondent to secure a loan facility of a sum of Kenya Shillings Thirty Eight Million Four Hundred Thousand (Kshs. 38,400,000.00/=) without notifying the Plaintiffs/Applicants herein or seeking their consent.

11. On the issues to be determined the Learned Counsel submitted that being an application for interlocutory injunction the Court should be guided by the principles in "Giella – Versus - Cassman Brown & Company Ltd (1973) EA 358" which are:

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

12. The Counsel sated that these Principles were reiterated by the Court of Appeal in "Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others [2014] eKLR" as follows:

> " Since those principles are already codified by authoritative pronouncements in the precedents they may be conveniently noted in brief as follows:
>
> In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
>
> a. Establish his case only at a prima facie level;
>
> b. demonstrate irreparable injury if a temporary injunction is not granted, and
>
> c. ally any doubts as to (b) by showing that the balance of convenience is in his favour."

13. Therefore the main issue that this Honourable Court had to determine was whether the Plaintiffs/Applicants had established a case for granting of injunctive orders pending the hearing and determination of the suit.

14. On whether the Plaintiffs/Applicants had established a Prima Facie case, the Learned Counsel submitted that the Court in "Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai [2018] eKLR" stated:

> " The existence of a prima facie case in favor of the plaintiff is necessary before a temporary injunction can be granted. Prima Facie case has been explained to mean that a serious question is to be tried in the suit..."

15. It was also held in the older case of MRAO Ltd – Versus - First American Bank of Kenya Ltd & 2 others[2003] eKLR that prima facie is:

> " .....a case which, on the material presented to the court, a tribunal properly directing itself will concluded 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."

16. The Learned Counsel submitted that it had already been established that the Plaintiffs/Applicants bought various marionettes from the 1st Defendant/Respondent for valuable consideration and despite paying the agreed purchase price and all requisite costs, the 1st Defendant/Respondent failed, refused or neglected to issue them with the title documents. He instead proceeded to charge the suit property in favour of the 2nd Defendant/Respondent without the consent and knowledge of the Plaintiffs/Applicants, despite the fact that he had handed over possession to the Plaintiffs/Applicants who lived on the suit property with their families.

17. He reiterated that the 1st Defendant/Respondent had not opposed the present application. However, the 2nd Defendant/Respondent had opposed it on grounds that there was no encumbrance on the Suit Property at the time of registering the charge.The 1st Defendant/Respondent who was the one who sold the properties to the Plaintiffs/Applicants never filed any document to deny that he knowingly charged the suit property after selling the same to the Plaintiffs/Applicants.

18. The Learned Counsel submitted that it was evident that the Plaintiffs/Applicants' right to property was at risk of egregious infringement due to the deliberate and malicious actions of the 1st Defendant/Respondent, who had not provided any justification or explanation or defended the present Application at all.The extent to which these actions had jeopardized the ownership and quiet enjoyment and possession of the suit property by the Plaintiffs/Applicants and their families due to the charge registered in favour of the 2nd Defendant/Respondent could only be determined when the matter proceeded to full hearing.

19. The Learned Counsel averred that the Plaintiffs/Applicants would suffer irreparable injury which could not adequately be compensated by an award of damages. On this aspect, he referred Court to the case of:- "Banis Africa Ventures Limited – Versus - National Land Commission [2021] eKLR" the Court also associated itself with the following definition of irreparable injury:

> " By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question."

20. The same Court also held that what qualified as irreparable injury must be considered on a case by case basis when it agreed with the following statement made by Robert Sharpe that:

> " ...irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."

21. In this instance, after the 1st Defendant/Respondent sold the marionettes erected on the suit property to the Plaintiffs/Applicants. He delivered possession to them. Indeed, the Plaintiffs/Applicants had since moved in with their families and made them their matrimonial homes.

22. Furthermore, the 2nd Defendant/Respondent had provided sworn evidence that the 1st Defendant/Respondent was yet to satisfy their obligations under the Charge and Further Charge. Moreover, through Clause 6.20 of the annexed Charge marked as "SM – 2" of the Replying Affidavit, the 2nd Defendant/Respondent had revealed the 1st Defendant/Respondent had breached the covenants by allowing the Plaintiffs/Applicants to be entitled to proprietary rights that had affected the value of a part the charged property. There was therefore a high likelihood that the 2nd Defendant/Respondent may exercise its statutory power of sale at any time which warrants the intervention of this Honourable Court. Without the order of injunction pending the hearing and determination of the suit, the Plaintiffs/Applicants stood to lose their matrimonial home. To buttress his case, the Learned Counsel referred Court to the case of:- "Stanley Kipruto Bommet – Versus - National Bank of Kenya & another [2017] eKLR" the Court held that the potential loss of the applicant's matrimonial home before the determination of the suit, should the respondent be allowed to exercise their statutory power of sale amounted to irreparable injury. In the case of:- "Nguruman Limited (Supra)" the Court of Appeal elucidated on the scope of irreparable harm or injury. Without an order of interlocutory injunction the Plaintiffs/Applicants would suffer irreparable harm as their families stand to be rendered homeless and destitute should the 2nd Defendant/Respondent sought to exercise its right of statutory sale before determination of the suit.

23. On the issue of balance of convenience, the Learned Counsel submitted that they invite this Honourable Court to consider the Plaintiffs/Applicants' application on a balance of convenience. In "Peter Kasimba & 219 Others – Versus - Kwetu Savings & Credit Co-Operative Society Limited (Formerly Masaku Teachers Savings Co-Operative Society Ltd) & 11 others [2020] eKLR" the Court reiterated the position in "Giella – Versus - Cassman Brown & Co. Ltd (Supra)" holding:

> " If the Court is in doubt on the existence or otherwise of a prima facie case it will decide the application on the balance of convenience."

24. The Learned Counsel averred that it was not in dispute that the 1st Defendant/Respondent never denied that the Plaintiffs/Applicants were living on the suit property with their families. While the 2nd Defendant/Respondent's interest was limited to the loan recovery, the Plaintiffs/Applicants' interest was too huge as they called the suit property home. The monthly loan repayments were sufficient to protect the 2nd Defendant/Respondent's interest. However, the Plaintiffs/Applicants stood to suffer the most if they were evicted from their homes. The balance of convenience tilted in favour of granting the orders sought so that the Plaintiffs/Applicants could continue living in their homes while the 2nd Defendant/Respondent continued to receive the monthly loan repayments.

25. In conclusion, the Learned Counsel submitted that for the reasons stated above and in the interest of justice, they urged this Honourable Court to allow the Application.

**B. The Written Submissions by the 2nd Defendant/Respondent**

26. On 14th April, 2022, 2nd Defendant through the Law firm of Messrs. Mulanya & Maondo Advocates filed their written submissions dated 17th March, 2022. Mr. Mulanya Advocate submitted that theApplication before this Honourable Court was the one by the Plaintiffs/Applicants dated 25th August, 2021 brought under a Certificate of Urgency and pursuant to Sections 30, 54(5), 56 and 57 of the *Land Registration Act*,2012, Sections 1A and 3A of the *Civil Procedure Act*, Cap. 21 and Order 40 Rule 1 of the Civil Procedure Rules, 2010. The application inter alia' sought for the reliefs as set out from the filed Plaint.

27. The Learned Counsel stated that the application was strenuously opposed the 2nd Respondent through the Replying Affidavit dated 15th October, 2021 that was deponed by its Legal Counsel, Simon Mwangi.

28. The Learned Counsel also provided the Court with the brief facts of the case accordingly as stated out from the filed pleadings. He Court will need not repeat them once again. The Learned Counsel relied on the following two (2) broad issues for the Court's determination:-

    Firstly, was on whether the 1st Respondent/Respondent and the Bank were bound by the terms of the facility letters, letter of amendment and Charge. He argued that that the facility letter dated 5th June, 2018, the letter of amendment dated 27th July,2018, and Charge dated 1st August, 2018 which were duly executed by the 1st Defendant/Respondent and the Bank formed the basis of the contractual relationship between the latter and the former. The 1st Defendant/Respondent and the Bank therefore clearly expressed their legal intention to be bound by such terms of the facility letter, letter of amendment and the Charge. The facility letter, letter of amendment and the Charge had been annexed to the Bank's Replying Affidavit marked as "SM - 1A", "SM - 1B", and "SM - 2" of the pages 5 to 72 of the Bank's Replying Affidavit.

29. Noteworthy, before the facilities were advanced to the 1st Defendant/Respondent, the Bank had undertaken a robust and scrupulous due diligence exercise to confirm the ownership of the Suit Property and the existence of any encumbrances attached on it. The Property was registered in the names of the 1st Defendant/Respondent and there was no encumbrance(s) noted on the title document.The Bank had annexed copies of the Certificate of Title foraffidavit and marked as "SM - 3A" and "SM - 3B" as seen from Pages 73 to 75 of the Bank's Replying Affidavit.

30. Similarly, the Bank as a further due diligence exercise engaged Axis Real Estate Limited (hereinafter "the Valuers") to undertake a valuation of the Suit Property which exercise culminated in the preparation of a valuation report dated 29th June, 2018 which has been annexed to the Bank's Replying Affidavit marked as "SM - 4 ".

31. The Learned Counsel stated that at page 9 of the valuation report, David Mureithi Kanyi (the 1st Respondent herein) was indicated to be the registered owner of the Suit Property as the absolute proprietor. The valuation report also noted that at the time of the inspection there were no restrictions or caveats registered against the title. There were also no encumbrances registered against the title.

32. It was also the finding of the Valuers at page 10 of the valuation report that the Suit Property was developed when they inspected it on 17th June, 2018. That there was a block of semi-detached maisonettes comprising of One (1) three bedroomed maisonette (Masionette No.A1) and Three (3) two bedroomed maisonettes (Maisonettes No.s A2, A3 and A4). The Valuers also noted at page 11 of the valuation report, that at the time of their inspection of the Suit Property on 17th June, 2018 the maisonettes were not occupied.

33. The Learned Counsel submitted that it was trite law that parties were bound by their contracts and as a general rule courts would refrain from rewriting a contract for the parties. What it would do rather was to enforce the clear incontrovertible terms of the contract. To buttress his point, he cited the case of:- "Kundan Singh Construction Company International Limited – Versus - Bank of Africa Kenya Limited (Interested Party) HCCC No.71 of 2015", the Court amongst others, opined that:-

> " .....This was an Agreement entered into by the parties and indeed it is commonplace that this Court cannot rewrite or alter the same. The responsibility of the Courts is limited to only enforcing contracts within law..."

34. The Learned Counsel observed, noteworthy also, the Court of Appeal in the case of:- "National Bank of Kenya Ltd – Versus - Pipeplastic Samkolit (K) Ltd & another Civil Appeal No. 95 of 1999", found that:

> " Having directed himself so far quite properly, the Learned Judge proceeded to assume (when there was no basis for such an assumption) that the appellant bank would be willing to waive some of the interest charged. Stepping into the shoes of the appellant bank the learned judge decided that a large part of the interest would or could be waived. This, in our view, is a serious misdirection on the part parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved..."

35. He underscored that, in the instant case, the Bank financed the 1st gDefendant/Respondent. The financial advancement was secured by a Charge over the suit property which was duly registered in the names of the 1st Defendant/Respondent. At the time of the registration of the Charge there was no encumbrance registered on the Certificate of Title to the suit property. The Charge was therefore proper and without any blemish.

36. Secondly, on whether the Plaintiffs/Applicants were entitled to the temporary injunction sought, the Learned Counsel submitted that the leading authority on interlocutory injunctions was the celebrated case of "Giella – Versus - Cassman Brown & Co. Ltd (supra)". Spry VP in his judgement put forth three conditions to be satisfied before an interlocutory injunction could be granted.

37. The Learned Counsel averred that from the foregoing, for the prayers sought to issue, the Applicants had to sequentially satisfy the above triple conditions namely:

a. That there was 'a prima facie case with a probability of success; and

b. That the Applicants would suffer irreparable injury not atonable by way of damages;

c. The Applicants must prove their claim on a balance of probabilities.

38. The Learned Counsel referred Court to the case of:- "Nguruman Limited – Versus - Jan Bonde Nielsen & 2 Others (supra)",the Court of Appeal made it clear that in an interlocutory injunction application, the applicant must satisfy the aforementioned triple requirements. The Court proceeding to note that-

> " 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 which the applicant is expected to surmount sequentially. See Kenya Commercial respondent will suffer, in the event the injunction is not granted, will be 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."

39. On the issue of whether the Applicant had established a Prima facie case, the Learned Counsel submitted that the Court of Appeal in the case of

40. The Learned Counsel submitted that the provision of Section 71 of the *Land Registration Act*, No. 3 of 2012 mandated a person who claimed a right to obtain interest in any land, lease or charge to lodge a caution forbidding the registration of dispositions that would affect their interest. Section 71 is reproduced below for ease of reference:

71.Lodging of cautions

(1) A person who-

a. claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act;

b. is entitled to a licence; or

c. has presented a bankruptcy petition against the proprietor of any registered land, lease or charge,

may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the land lease or charge.

(2) A caution may either-

a. forbid the registration of dispositions and the making of entries; or

b. forbid the registration of dispositions and the making of entries to the extent expressed in the caution.

41. Under the provision of Section 72 (2) of the *Land Registration Act*, No. 3 of 2012 the effect of registering a caution was that a disposition that was inconsistent with the caution shall not be registered while the caution was still registered except with the consent of the cautioner or by the order of the court.Noteworthy also, under the provision of Sections 68, 69, 76 and 77 of the *Land Registration Act*, the restrictions respectively that would restrain registration transactions that were inconsistent with their alleged ownership of the Suit Property.

42. The Learned Counsel submitted that if the Plaintiffs/Applicants had a contractual right to obtain an interest in the Suit Property as alleged, they had an obligation of protecting the said interest by either lodging a caution, inhibition or restriction against the title to the Suit Property. They did not.

43. As already indicated above, the 1st Defendant/Respondent obtained financing from the Bank. The 1st Defendant/Respondent offered the Suit Property as a security for the loan. A charge was duly registered in favour of the Bank against the Certificate of Title to the Suit Property. The Bank had equally demonstrated in the preceding Paragraphs 7, 8, 9, and 10 that it conducted a robust due diligence exercise before creating a Legal Charge over the Suit Property. No encumbrance was registered against the Certificate of Title to the Suit Property by the Plaintiffs/Applicants. That would had been the most effective way of notifying the Bank and other Third Parties of the interests of the Plaintiffs/Applicants in the Suit Property. The Bank's interest on the Suit Property having been registered by way of a legal Charge ranks higher than any other alleged and unregistered interest by third parties.

44. The Learned Counsel argued that it was therefore clear that the Plaintiffs/Applicants slept on their rights, if any, and could not now abruptly wake up from their deep slumber and upset scrupulously valid transactions. They lacked the legal or moral basis to suggest that unless the orders sought in their application were allowed they risked losing the Suit Property. From the foregoing, the Plaintiffs/Applicants had not demonstrated satisfactorily that they had "a prima facie case. The Plaintiffs/Applicants had neither established any infringement of their rights by the Bank to warrant the grant of an injunction. In any case, the Plaintiffs/Applicants were the authors of the unfortunate position they found themselves in. Any damage or losses suffered by the Plaintiffs/Applicants was therefore voluntary and self-inflicted. They therefore urged that this application was unmerited. The Plaintiffs/Applicants' case had no probability of success as it was merely an abuse of the court process and should be dismissed.

45. The Learned Counsel submitted that on whether the Applicant stood to suffer irreparable harm not atonable in damages if the injunction was denied, the Learned Counsel submitted that the Court of Appeal in "Nguruman Limited – Versus - Jan Bonde Nielsen& 2 Others (supra)" stated that:-

> ...If prima facie case is not established, then irreparable injury and balance of convenience need no consideration...

46. Noteworthy also, the Learned Counsel cited the case of:- "Elijah Kipng'eno Arap Bii – Versus - Kenya Commercial Bank [2001] eKLR" where Justice Ringera held:-

> "...once property is offered as security it by that very fact becomes a commodity for sale. There is no commodity for sale whose loss cannot be compensated in damages....I am on a rational consideration of the matter impelled to conclude that the appellant's loss is perfectly compensable by an award of damages and that the bank is capable of meeting any such award of damages and that the bank is capable of meeting any such award. The Application fails on this ground too."

47. Further, the Learned Counsel once again referred Court to the case of:- "Nguruman Limited (Supra)" the Court of Appeal, inter alia, made it clear that:-

> ...if damages recoverable in law is an adequate remedy and the respondent is 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."

48. Having resolved the 1st condition of the "Giella case" in the negative (that the Applicants have failed to establish that they have a Prima facie case with a probability of success), venturing into the second condition will be inconsequential and a mere barren academic exercise. They urged this Honourable Court to save its limited precious judicial time.

49. Nonetheless, the Plaintiffs/Applicants had not demonstrated that they would suffer loss which was not compensable in damages if the injunctive reliefs sought was denied. They had also not indicated that the 1st Defendant/Respondent was unable to compensate if the need arises. Further to their cogent analysis in the preceding paragraphs, it would also be imperative to demonstrate to this Honourable Court that there is in fact no harm to be suffered by the Plaintiffs/Applicants.

50. On this point, the Counsel referred Court to the Court of Appeal case of "Nguruman Limited Case" further noted:-

> "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."

51. He observed that at paragraph 7 of the grounds of the application the Plaintiffs/Applicants claim that they were apprehensive that the 1st Defendant/Respondent deliberately charged the Suit Property to the Bank so that the Bank could sell the suit property and defeat the Plaintiffs/Applicants interest therein. This unfounded apprehension was equally captured at paragraphs 11 and 12 of the Plaintiffs/Applicants' supporting affidavit. Those averments appeared to suggest that the 1st Defendant/Respondent and the Bank had an evil scheme of some sought to defeat the Plaintiffs/Applicants' alleged interest in the Suit Property. No evidence in support of those preposterous allegations had been tendered to this Court.

52. Further, the Counsel noted that the Plaintiffs/Applicants had not furnished any evidence before this Court demonstrating that the 1st Defendant/Respondent had defaulted on his repayments of the loan to the Bank. The Plaintiffs/Applicants had also not tendered evidence that the Bank had commenced the exercise of its statutory power of sale that would culminate with the disposal of the Suit Property. The upshot was that the Plaintiffs/Applicants had failed to demonstrate that there was a real and imminent threat that the Bank would sell the Suit Property. The present application and suit were therefore premature, speculative, illusory and fanciful.Even assuming that there was default on the part of the 1st Defendant/Respondent and the Bank was desirous of exercising its statutory power of sale, which was not the case presently, disposing a charged property was a complicated and complex affair. It was not akin to selling ground nuts in the streets. The Bank would be required to serve upon the 1st Defendant/Respondent an initial Section 90 (1)(2)(a)3 90 days' notice to redeem. The Bank would thereafter be required to serve upon the 1st Defendant/Respondent a section96 (1) (2)4 40 days' notice to sell where after the Auctioneer would issue a further 45 days redemption notice. None of the above notices had been demonstrated as having been served upon the 1st Defendant/Respondent.

53. Therefore, the Learned Counsel submitted that from the totality of the pleadings filed, the injury to be suffered by the Plaintiffs/Applicants were speculative, illusory and surreal. The Plaintiffs/Applicants had failed to demonstrate any actual injury to be suffered. Their case largely rests on unfounded fear and apprehension. It must therefore fail.

54. As for whose favor the balance of convenience tilted, the Learned Counsel submitted that the third and final condition laid out in the "Giella vs. Cassman(supra)" case for grant of an interlocutory injunction was that if the Court was in doubt, it was to determine in whose favour the balance of convenience tilted. From the preceding paragraphs, it was evident that the present application was not merited and was an abuse of the court process as the Plaintiffs/Applicants having failed to safeguard their alleged interest in the Suit Property now sought to have the Court restrain the Bank, which has

registered interests in the Suit Property, from dealing with the Suit Property by way of an injunction. Further, it had equally been demonstrated that present application was premised on unfounded fear and apprehension. Therefore, a finding in favour of the Bank would be the option that guarantees the lower risk of injustice. The balance of convenience therefore tilted in the Bank's favour.

55. In conclusion, the Learned Counsel submitted that the Plaintiffs/Applicants had consequently not established any basis for the grant of the injunction as by law required. It was therefore the Bank's humble prayer that this application be dismissed with costs.

## VI. Analysis and Determination

56. I have carefully read and considered the pleadings herein with regard to the Notice of Motion application dated 25th August, 2021 by the Plaintiffs/Applicants, the responses, the comprehensive written submissions, several authorities to boot by parties, the appropriate and the relevant provisions of *the Constitution* of Kenya, 2010 and the statures.

57. In order to arrive at an informed, just, reasonable and Equitable decision, the Honorable Court has three framed three (3) salient issues for its determination. These are:-

    a. Whether the Notice of Motion application dated 25th August, 2021 by the Plaintiffs/ Applicants herein against the 1st and 2nd Defendants/Respondents herein meets threshold required for granting temporary injunction order under the provision of Order 40 Rules 1 of the Civil Procedures Rules, 2010.

    b. Whether the parries herein are entitled to the reliefs sought herein

    c. Who will bear the Costs of Notice of Motion application 25th August, 2021.

### Issue No. a). Whether The Notice Of Motion Application Dated 25Th August, 2021 By The Plaintiffs/ applicants Herein Against The 1St And 2Nd Defendants/respondents Herein Meets Threshold Required For Granting Temporary Injunction Order Under The Provision Of Order 40 Rules 1 Of The Civil Procedures Rules, 2010.

58. Under this Sub heading the Honourable Court holds that the main substratum in this matter is whether or not to grant temporary injunction orders as sought by arties. The application herein by the Plaintiffs/Applicants is premised under the provision of Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst other 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.

59. Ideally, the principles applicable in an application for an injunction were laid out in the celebrated case of "Giella vs 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."

60. The three (3) conditions set out in "Giella (supra)", need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of:- "Nguruman Limited v 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".

61. In dealing with the first condition of "prima facie case, the Honorable Court was by the definition melted down in "MRAO Limited – Versus - First American Bank of Kenya Ltd & 2 others (Supra)", thus:-

> " 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 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". Page 8
>
> That "...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." Page 9.

62. Undoubtedly, the Plaintiffs/Applicants and the 1st Defendant/Respondent entered into respective Sale Agreements terms and conditions stipulated thereof for the purchase from the 1st Defendant/Respondent's marionettes erected on the suit property for valuable consideration. In the course of time this transaction was successfully completed. The Plaintiffs paid the full purchase price and the requisite costs which included registration costs, valuation, disbursements and stamp duty. However, it was a term of the respective Sale Agreements that the 1st Defendant/Respondent would issue the Plaintiffs/Applicants with duly registered leases/certificates of lease respectively upon completion of payment of the purchase price and all requisite costs by the Plaintiffs/Applicants.For unclear reason, good

cause or justifiable reason, the 1st Defendant/Respondent has adamantly refused and declined to issue the Plaintiffs/Applicants with their duly registered leases/certificates of lease.Instead of issuing the Plaintiffs with their respective registered leases/certificates of lease. With the passage of time while the Plaintiffs/Applicants were conducting official search, it came to their attention that the 1st Defendant/ Respondent had already charged the suit property to the 2nd Defendant on 1st August 2018 to secure a loan facility for a some of Kenya Shillings Thirty Four Hundred Thousand (Kshs.38,400,000.00/=). They were shocked beyond measure as all this happened without their consent nor knowledge taking that they had an interest to the suit property.

63. The 1st Defendant/Respondent charged the suit property to the 2nd Defendant without notifying the Plaintiffs/Applicants and without seeking the Plaintiffs/Applicants' consent. Having sold the leasehold interest of the suit property to the Plaintiffs/Applicants, the 1st Defendant/Respondent no longer had interest therein capable of securing the charge in favour of the 2nd Defendant/Respondent while the leases to the Plaintiffs/Applicants was subsisting and were in force.

64. The 2nd Defendant/Respondent submitted that the 1st Defendant/Respondent obtained financing from the Bank. The 1st Defendant/Respondent offered the Suit Property as a security for the loan. A charge was duly registered in favour of the Bank against the Certificate of Title to the Suit Property. The Bank has equally demonstrated in the preceding paragraphs 7, 8, 9, and 10 that it conducted a robust due diligence exercise before creating a Legal Charge over the Suit Property. To the Counsel there was no encumbrance in form of registration of disposition under the provision of Section 71 of the *Land Registration Act*. No. 3 of 2012 such as caution, inhibition or caveat against the Certificate of Title to the Suit Property by the Plaintiffs/Applicants. That would have been the most effective way of notifying the Bank and other Third Parties of the interests of the Plaintiffs/Applicants in the Suit Property. The Bank's interest on the Suit Property having been registered by way of a legal Charge ranks higher than any other alleged and unregistered interest by third parties. According to the Learned Counsel, therefore, clearly the Plaintiffs/Applicants slept on their rights, if any, and can't now abruptly wake up from their deep slumber and upset scrupulously valid transactions. They lack the legal or moral basis to suggest that unless the orders sought in their application are allowed they risk losing the Suit Property. While the Learned Counsel may be legally sound, particularly when it comes to full trial, but as far as temporary injunction orders is concerned, I beg to differ with him here.

65. In saying so I rely on two cases below 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."

And similarly 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."

66. In a nutshell, the Court's concern at the moment is whether to grant temporary injunction orders or not and not dwell on the merits of the case as the Learned Counsel is clearly alluding to. That argument is still pre – mature. Let him hold his horses until the opportune moment arrives. We cross the river at the bridge. Patience pays. I dare say no more.

67. Regarding this first condition. The fact there was entered into a sale agreement terms and conditions entered between the Plaintiffs/Applicants and the 1st Defendant/Respondent for the purchase of the suit property and that the purchase prices was fully paid and also all other prerequisite obligations such as payment of stamp duty and hence the only pending obligation was that by the 1st Defendant/ Respondent of registering and issuing the Plaintiffs/Applicants with Certificate of leases. Clearly, they had acquired proprietary rights over their share of the suit property under the relevant provisions of the law including the *Land Registration Act*, No. 3 of 2012 and *Sectional Properties Act*. No doubt there was a sale though being that the vendor of their property went ahead to charge the property without their knowledge and their consent is enough to warrant the grant of an interlocutory order. Conventionally, in the Conveyancing practice and parlance, completion date should be 90 or at most 180 days. Certainly there appears to be a breach here. By this alone, I find that the Plaintiffs/Applicants have established that they have a prima facie case with a probability of success.

68. 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."

69. On the issue whether the Applicant will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. It is not hidden that the Plaintiffs/Applicants' property is at risk as the Applicants allege that the property has been charged in favor of the 2nd Defendant/Respondent by the 1st Defendant/Respondent without the permission or knowledge of the Plaintiffs/Applicants.The Plaintiffs/Applicants have to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of "Pius Kipchirchir Kogo vs 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."

70. In the instant case, after the 1st Defendant/Respondent sold the maisonettes erected on the suit property to the Plaintiffs/Applicants, he delivered possession to them. The Plaintiffs/Applicants have since moved in with their families and made them their matrimonial homes.

71. The 2nd Defendant/Respondent has strenuously contended that the 1st condition of the "Giella case" is on thenegative (that the Applicants have failed to establish that they have a Prima facie case with a probability of success), venturing into the second condition will be inconsequential and a mere barren

academic exercise. Further, that the Plaintiffs/Applicants have not demonstrated that they will suffer loss which is not compensable in damages if the injunctive reliefs sought are denied. They have also not indicated that the 1st Respondent is unable to compensate if the need arises. Quite clearly, this Honourable Court begs to differ with the 2nd Defendant/Respondents. The Plaintiffs/Applicants 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". Unfortunately, based on all the surrounding facts and inferences of this case, the Honourable Court is not persuaded by this argument at all.

72. Thirdly, the Plaintiffs/Applicant have to demonstrate that the balance of convenience tilts in their favour. In the case of "Pius Kipchirchir Kogo vs Frank Kimeli Tenai (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".

73. 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."

74. The Plaintiffs/Applicants contend that the balance of convenience tilts in his favour because they are innocent purchasers for value and it is not in dispute that the 1st Defendant/Respondent never denied that the Plaintiffs/Applicants are living on the suit property with their families. While the 2nd Defendant/Respondent's interest is limited to the loan recovery, the Plaintiffs/Applicants' interest is too huge as they call the suit property home. The monthly loan repayments are sufficient to protect the 2nd Defendant/Respondent's interest. However, the Plaintiffs/Applicants stand to suffer the most if they are evicted from their homes. The 2nd Defendant/Respondent 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 Plaintiffs/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, a finding in favour of the Bank would be the option that guarantees the lower risk of injustice. The balance of convenience therefore tilts in the Bank's favour.

75. 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."

76. 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 Plaintiffs/Applicants. This will take place during the full trial.

77. Further, I have relied 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..."

78. Based on all this, 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 Plaintiffs/Applicants. In view of the foregoing, I find that the Plaintiffs/Applicants have met the criteria for grant of orders of temporary injunction.

**Issue No. c). Who Will Bear The Costs Of Notice Of Motion Application 25Th August, 2021.**

79. Previously, I have well stated in my other precedents 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."

80. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. In this case, as Court finds that the Plaintiffs/Applicants have fulfilled the conditions set out under Order 40 Rule 1 of the Civil Procedure Rules, 2010, this application shall be deemed to have merit and is hereby allowed with costs to the Plaintiffs/Applicants as against the 1st and 2nd Defendant/ Respondents.

**Vii. Conclusion & Disposition**

81. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Clearly, the Applicant has a case against the Respondent.

82. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-

    a. That the Notice of Motion application dated 25th August, 2021 be and is hereby found to have merit hence it is allowed in its entirety.

    b. That an order of Temporary injunction do issue restraining the 1st and 2nd Defendants either by themselves, officers, agents, employees, assigns or any person acting on their behalf disposing of, leasing, renting, or in any manner whatsoever dealing with or interfering with the Plaintiffs' use, ownership and occupation of all the property known as Sub-Division Number 9613 Section III Mainland North.

    c. That for expediency sake this matter to be heard on 14th March, 2024. Prior to the scheduled hearing date hereof, parties are expected to have fully complied as provided for under Order 11 of the Civil Procedure Rules. 2010 on Pre - Trial requirements

    d. That the cost of this application is awarded to the Plaintiffs/Applicants to be borne by the 1st and 2nd Defendants.

It is so ordered accordingly.

**RULING DELIVERED THOUGH MICROSOFT TEAMS VIRTUAL MEANS SIGNED AND DATED AT MOMBASA THIS 6TH DAY OF NOVEMBER 2023.**

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

*Ruling delivered in the presence of:*

*a. M/s. Yumna, the Court Assistant;*

*b. M/s. Machogu Advocate holding brief for Mr. Oluga Advocate for the Plaintiffs/Applicants*

*c. No appearance for the 1st and 2nd Defendants/Respondents*