



**Timau Agro Industries Limited v Bayshore Limited (Civil Suit
76 of 2022) [2023] KEELC 21411 (KLR) (1 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21411 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 76 OF 2022
LL NAIKUNI, J
NOVEMBER 1, 2023**

BETWEEN

TIMAU AGRO INDUSTRIES LIMITED PLAINTIFF

AND

BAYSHORE LIMITED DEFENDANT

RULING

I. Introduction

1. This ruling is in respect to two Notice of Motion applications dated 8th July, 2022 and another dated 14th November, 2022 both by the Plaintiff/Applicant herein, Timau Agro Industries Limited. brought against the Defendant/Respondent herein, Bayshore Limited. The Plaintiff/Applicant moved this Honourable Court for the hearing and determination of the said applications.
2. Upon service of the applications to the Defendant/Respondent tendered their responses in form of Replying affidavit which the Court will deal with herein below. For good order, the Honourable Court has handled both the applications simultaneously though separately from this Ruling.

II. The Notice of Motion application dated 8th July, 2022

3. This application was brought under the provision of Article 40 of *the Constitution* of Kenya 2010, Sections 25 and 26 of the *Land Registration Act* No. 3 of 2012, Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act* Cap 21 of the Laws of Kenya, Order 40 Rule 1 & 2 and Order 51 Rule 1 Civil Procedure Rules, 2010. The Plaintiff/Applicant herein sought for the following orders:-
 - a. Spent.
 - b. That this Honourable Court be pleased to issue an Ex - Parte temporary injunction directing the Defendant/Respondent to deposit the Original Title for Land Reference Number 3713/



VI/MN (Miritini, Mombasa County) in Court, within 7 days of making of this Order, for safe custody pending the hearing and determination of the Originating Summons filed herewith.

- c. That this Honourable Court be pleased to issue a restriction/ prohibitory order restraining the Defendant/Respondent, its servants and/or agents from transferring, leasing or in any way alienating Land Reference Number 3713/VI/MN (Miritini, Mombasa County) pending the hearing and determination of the Originating Summons filed herewith.
 - d. That this Honourable Court be pleased to issue directions on the hearing and disposal of the Originating Summons filed herewith.
 - e. That the Costs of this Application be in the cause.
4. The application by the Plaintiff/Applicant herein was premised on the grounds, testimonial facts and averments made out under the 24th Paragraphed Supporting Affidavit of Lawrence Muriithi Mbabu, an Advocate of the High Court of Kenya and the Managing Director of the Plaintiff/Applicant's Company sworn and dated 8th April, 2022 together with ten (10) annexures marked as "LMM - 1 to 10" annexed thereto. He averred That:
- i. The Plaintiff/Applicant and the Defendant/Respondent herein entered into an Agreement for the sale and purchase of Land Reference Number 3713/VI/MN (Miritini, the County of Mombasa) (Herein after "The Suit Property") for a consideration of a sum of Kenya Shillings Two Thirty One Million Six Sixty Eight Thousand Six hundred and Five (Kshs. 231,668,605/-).
 - ii. The directors of both the Plaintiff/Applicant and the Defendant/Respondent herein duly executed the Sale Agreement dated 8th June, 2017 (Hereinafter referred to "The Agreement") in the presence of their respective Advocates.
 - iii. Under Clause 3 of the Agreement, the parties agreed That the suit property would be transferred to the Defendant/Respondent after the Defendant/Respondent made part payment of the Purchase Price as follows:
 - a. 10% of the Purchase Price being a sum of Kenya Shillings Twenty Three Million One Sixty Six Thousand Eight Sixty Hundred and Fifty cents (Kshs. 23,166,860.50/-) upon the execution of the Agreement;
 - b. A further 20% of the Purchase Price being a sum of Kenya Shillings Fourty Six Million Three Thirty Three Thousand Seven Twenty One Hundred (Kshs. 46,333,721/-) was payable within 30 days of signing the Agreement; and
 - c. The balance of the Purchase Price being a sum of Kenya Shillings One Sixty Two Million One Sixty Eight and Thousand twenty three hundred and fifty cents (Kshs. 162,168,023.50/-) less the total costs of settling the squatters who were occupying part of the suit property as at the date of the Agreement for Sale as indicated at Clause 4.4 of the Agreement, was payable on or before the Completion Date.
 - iv. Under Clause 4 of the Agreement for Sale, Completion Date was within 90 days from the date of the Agreement.
 - v. As at the date of the Agreement, there were a number of squatters on the suit property and it was a term of the Agreement under Clause 6.2 That the Vendor, through the Purchaser's Advocates office, shall be responsible for the removal of all the squatters currently residing on the suit property at the Vendor's own cost pending completion and in the event That the



Vendor shall not have removed all the squatters from the suit property by Completion Date, the Purchaser shall deduct the costs for such removal in terms of Clause 4.4 of the Agreement and immediately pay the balance of the Purchase Price to the Vendor.

- vi. Clause 4.4 of the Agreement stipulates the costs of removing the squatters as follows:
- Clause 4.4: The deductible costs in respect of removal of the squatters as per the valuation report done in the year 2016 was estimated to be Kenya Shillings Fifteen Million (Kshs. 15,000,000/-) (as Squatter Costs) Provided However;
- Clause 4.4.1: On or before the Completion, the Vendor shall cause a re-valuation of the Squatter Costs to be undertaken by a Qualified Valuer.
- Clause 4.4.2: The Squatter Costs provided for in Clause 4.4 shall be deemed reviewed in terms of the Valuation Report.
- Clause 4.4.3: The Squatter Costs shall be subject to the rendering of accounts by the Purchaser's Advocates and any surplus shall be paid to the Vendor.
- vii. As at the Completion Date, the Plaintiff/Applicant had not removed the Squatters from the suit property because the Defendant/Respondent, who was supposed to facilitate the removal of the squatters through availing the money stated at paragraph (f) above, had not availed the said money. Instead, the Defendant/Respondent, through its Advocates, A. A. Said and Company Advocates, elected to deal with the issue of removing the squatters without involving the Plaintiff/Applicant at all by doing the following:
- a. Paying sums of money for the removal of the Squatters through the Defendant/Respondent's Advocates, agents and/or servants without accounting to the Plaintiff/Applicant as is required under Clause 4.4.3 of the Agreement.
 - b. Adopting strategies for the removal of the squatters by for example purchasing alternative land for the squatters without involving the Plaintiff/Applicant herein.
 - c. Expending money for the removal of the squatters through the Defendant/Respondent's Advocates, agents and/or servants without involving the Plaintiff.
 - d. Constructing houses for the squatters without consulting with the Plaintiff/Applicant.
 - e. Compromising with the squatters and guaranteeing them of continued stay on the suit property without consulting with the Plaintiff/Applicant.
 - f. Consulting and entering into arrangements with the Local Administration, the elected leaders and Administrators of the Sub-County where the property is situated without consulting with the Plaintiff/Applicant herein.
- viii. Through letters dated 28th September, 2018 and 15th April, 2020 from the Plaintiff herein to the Defendant/Respondent's Advocates, A.A. Said and Company Advocates, the Plaintiff/Applicant raised concerns on the Defendant's decision to deal with the issue of removing the squatters to the total exclusion of the Plaintiff/Applicant contrary to the provisions of the Agreement, which letters never elicited any response from the Defendant/Respondent or its said Advocates
- ix. The Plaintiff/Applicant, through the Law Firm of Messrs. Githara & Associates Advocates, wrote to the Defendant/Respondent vide the letter dated 14th October, 2020 demanding



immediate payment of the balance of the Purchase Price. The Defendant/Respondent's then Advocates, A. A Said and Company Advocates, responded to this letter through the letter dated 30th October, 2020 through which they invited the Plaintiff's Managing Director, Lawrence Mbabu, for a meeting to discuss the issue of removal of the squatters.

- x. Thereafter, the Defendant/Respondent's said Advocates, A. A Said and Company Advocates, wrote to the Plaintiff/Applicant vide the letter dated 8th June, 2021 informing the Plaintiff/Applicant That the Defendant/Respondent had identified an auctioneer's firm trading in the names an style of Five Eleven Traders and Auctioneers to carry out the exercise of removing the squatters from the suit property and further requesting the Plaintiff/Applicant to approve the quotation dated 17th May, 2021 of a sum of Kenya Shillings Ten Million Two Hundred and Ten Thousand (Kshs. 10,210,000/-) given by the said Auctioneers.
- xi. The Plaintiff/Applicant approved the aforesaid Auctioneer's quotation and vide the Plaintiff/Applicant's letter dated 8th October, 2021, the Plaintiff/Applicant appointed Five Eleven Traders and Auctioneers to undertake the exercise of removing the squatters who were currently occupying part of the suit property at the cost of a sum of Kenya Shillings Ten Million Two Ten Thousand (Kshs.10,210,000/-). In That letter, the Plaintiff/Applicant clearly stated That the payment of the aforesaid Auctioneer's charges would be made through the Law Firm of Messrs. A.A. Said and Company Advocates.
- xii. Immediately thereafter, on 12th October, 2021, the Auctioneers obtained a Court Order granting the Auctioneers police assistance from the sub county police commander Jomvu Police Station during the exercise of removing the squatters who were currently occupying the suit property and identified as: Mariam Mwinyi, Hassan Mbaruku, William Murumba, Ali Pereto, Matano Abdalla, Said Tope, Hamisi Ruwa, Dzivo Ruwa, Fatuma Mwinyi, Nasibu Mwinyi, Ngoro Chaka, Sadi Bohora, Mauridi Bohora, Bohora Ziro, Ali Muhora, Dama Ziro, Hija Mbaruk and Rajab Pereto.
- xiii. Despite the Plaintiff/Applicant and the aforesaid Auctioneers being ready to carry out the exercise of removing the squatters, the Defendant/Respondent refused to release the agreedsum of Kenya Shillings Million (Kshs. 15,000,000/-) as per Clause 4.4 of the Agreement to the Plaintiff/Applicant to facilitate the process of removing the aforesaid squatters.
- xiv. As a result of the Defendant/Respondent's failure to facilitate the process of removing the squatters from the suit property over the past 6 years when this transaction had been pending completion, and the Defendant/Respondent's direct and exclusive exercise of removing he squatters without involving the Plaintiff/Applicant, the number of squatters on the suit property had tripled and as such, it had become impossible for the Plaintiff/Applicant to remove the said squatters.
- xv. Through a demand letter dated 14th April, 2022, the Plaintiff/Applicant wrote to the Defendant/Respondent informing the Defendant/Respondent of the following pertinent issues arising from both the Agreement and the Defendant/Respondent's continued breach of the terms of the Agreement:
 - i. The fact That after the execution of the Agreement, the Defendant/Respondent transferred the suit property to itself. Therefore, the Plaintiff/Applicant's understanding was That the Property now belonged to the Defendant/Respondent absolutely under the provisions of Sections 25 and 26 of the [Land Registration Act No.3 of 2012](#).



- ii. That the Defendant/Respondent's strategy of removing the squatters from the suit property without involving the Plaintiff/Applicant had delayed the entire exercise and the number of squatters on the suit property had drastically increased (Infact the number has tripled). The Plaintiff/Applicant clearly indicated That the Defendant/Respondent was solely liable for the increase in the number of the squatters on the suit property since the date of the Agreement being 8th June, 2017.
- iii. That in view of the fact That the suit property had already been transferred to the Defendant/Respondent and That the Defendant/Respondent had demonstrated its preference to have the issue of the removal of the squatters handled by its Advocates, A. A. Said and Company Advocates instead of the Plaintiff/Applicant; and the fact That the Defendant/Respondent had refused to facilitate the removal of the squatters despite the Plaintiff/Applicant having instructed Five Eleven Traders and Auctioneers upon the advice of the Defendant/Respondent's said advocates, the Plaintiff/Applicant considers itself no longer bound by the terms of Clause 4.3 of the Agreement, which clause required the Plaintiff/Applicant to hand over vacant possession of the suit property on the Completion date.
- iv. Consequently, the Plaintiff/Applicant demanded for full payment of the balance of the Purchase Price together with the interest thereon.
- v. That in fact, the Defendant/Respondent's failure and delay in complying with Clause 4.3 of the Agreement had rendered it impossible to undertake the removal of the squatters without incurring a huge cost, far above the anticipated amount of a sum of Kenya Shillings Fifteen Million (Kshs. 15,000,000/-).
- vi. The Plaintiff/Applicant then informed the Defendant/Respondent That in the event That the Defendant/Respondent was willing to pay the balance of the purchase price together with the interest thereon, the Plaintiff/Applicant was prepared to meet with the Defendant/Respondent's accountants so That they could ascertain the amount That was due and payable to the Plaintiff/Applicant.
- xvi. The aforesaid demand letter was sent to both the Plaintiff/Applicant and its Advocates, A. A. Said and Company Advocates but none of them has responded to the same.
- xvii. The Defendant/Respondent took possession of the suit property immediately after paying the 10% deposit of the purchase price and had since transferred the title to the suit property to itself but refused to honour the terms of the Agreement by paying the balance of the purchase price, less the agreed sum of Kenya Shillings Fifteen Million (Kshs. 15,000,000/-) for removing the identified squatters who were in occupation of the suit property as at the date of the Agreement, to the Plaintiff/Applicant to date.
- xviii. That the continued refusal by the Defendant/Respondent to pay the balance of the Purchase Price to the Plaintiff/Applicant less the agreed costs of removing the squatters which was assessed at a sum of Kenya Shillings Fifteen Million (Kshs. 15,000,000/-) as per Clause 4.4 of the Agreement, while citing the Plaintiff/Applicant for having failed to remove the squatters, went against the intention of the parties as reflected at Clause 6.2 of the Agreement as follows:

“...If the Vendor shall not have removed all the squatters on the property by Completion Date, the Purchaser shall deduct the costs for such removal in terms of



Clause 4.4 above, and immediately pay the balance of the Purchase Price in terms of Clause 3.4 above...”

- xix. Both the Plaintiff/Applicant and the Defendant/Respondent were bound by the terms of the Agreement and since the Plaintiff/Applicant formerly communicated the fact That it was unable to remove the squatters from the suit property through its letter dated 14th October,2020 and the recent Demand Letter of 14th April, 2022, the Defendant/Respondent was under an obligation to pay to the Plaintiff/Applicant the balance of the Purchase Price less the agreed costs for removing the squatters pursuant to the provisions of Clause 6.2 of the Agreement.
- xx. The Defendant/Respondent's continued refusal to pay the agreed full purchase price to the Plaintiff/Applicant constituted a deprivation of private property rights contrary to the provision of Article 40 of *the Constitution* of Kenya, 2010 without full compensation. The said Defendant/Respondent's acts also infringes on the Plaintiff/Applicant's right to own property.
- xxi. The Plaintiff/Applicant as the originally registered owner of the suit property was at the verge of losing its property to the Defendant/Respondent who had not paid the agreed full purchase price for the suit property. Therefore, the Plaintiff/Applicant was deserving of the orders sought in these summons.
- xxii. The transaction in question was conducted in Mombasa, the suit property was located at Mombasa and the Defendant/Respondent Company was also based in Mombasa. Therefore, this Honourable Court has jurisdiction to hear and determine this suit.

III. Response By The Defendant To The Notice Of Motion Application Dated 8th July, 2022

5. The Defendant/Respondent through its Chief Legal Officer, Joseph Mwela, opposed the Notice of Motion application dated 8th July, 2022 through a 25th Paragraphed Replying Affidavit sworn on 4th November, 2022 together with two (2) annexures marked as “JM – 1 and 2” annexed thereto. He deposed That:-
 - i. The Notice of Motion, Originating Summons and Supporting Affidavit were incompetent, fatally defective and bad in law because the Advocate on record for the Plaintiff/Applicant was conflicted with relation to the brief and the material facts connected to Mr. Lawrence Muriithi Mbabu; who swore the Supporting Affidavits the Managing Director of the Plaintiff/Applicant's Company and therefore had direct and indirect interest of this matter having executed document in relation to the transfer of the suit property.
 - ii. Similarly the defect in the Application was That the same was time barred and no such application had been tabled before this court with the view of seeking leave to file out of time.
 - iii. The said Applicant's motion was supported by annexures which offended the provisions of the *Evidence Act*, with regards to the production of documents herein considered to be in conflict.
 - iv. On 8th June, 2017 the Plaintiff and Defendant herein entered into Agreement for the Sale of Land Reference Number 3713/VI/MN(Miritini, Mombasa County) for a consideration of Kenya Shillings Two Hundred and Thirty-one Million, Six Hundred and Sixty-Eight Thousand, Six Hundred and Five (Kshs 231,668,605.00/-).



- v. The Property sold had no vacant possession as the property was transacted on with squatters in occupation prior to, at the time of sale and continue to be in possession of the suit property up to date.
- vi. The Applicant herein had taken out an order dated 12th October, 2021 in Misc. Civil Application number 465 of 2021 requesting for an eviction order on persons illegally in occupation of suit property.
- vii. The Respondent herein being the Purchaser, was agreeable, and in fact disbursed to the Vendor's Advocates 25%- 30% of the purchase Price, with the view of initiating a process for the Vendors and their Advocates to initiate the eviction process.
- viii. Within ninety (90) days of the execution of the Sale Agreement the Vendor to hand over the Vacant Possession which condition has not been fulfilled to date and as such the completion is pending.
- ix. The content of paragraph (e) and (f) of the Application dated 8th July, 2022 was misleading to this Honorable Court for the following reasons;
 - a. That clause 4.3 of the 8th June, 2017 Sale Agreement provides That: "Completion on the part of the vendor means handing over vacant possession of the property to the purchaser or its representative. The vendors shall be legally responsible for removing the squatters who are currently occupying a portion of the property. Provided however, That the Purchaser shall through the purchasers Advocates office undertake to make the squatters' compensation costs for the removal of the squatters and the costs attendant thereto shall be deducted from the balance of the Purchase Price to be paid to the Vendor."
 - b. That clause 4.4 of the 8th June, 2017 Sale Agreement provides That; The deductible cost in respect of removal of the Squatters as per the valuation report done in year 2016 was estimated to be Kenya Shillings Fifteen Million (Kshs.15,000,000)[Squatter Costs] Provided However:
 - i. 4.4.1. On or before the Completion, the Vendor shall cause a re-valuation of the squatter Cost to be undertaken by a Qualified Valuer.
 - ii. 4.4.2. The Squatter Costs provided for in clause 4.4 shall be deemed reviewed in terms of the Valuation Report.
 - iii. 4.4.3. The Squatter Cost shall be subject to the rendering of accounts by the Purchaser's Advocate and any surplus shall be paid to the vendor.
- x. Reading of Clauses 4.3 and 4.4 of the Sale Agreement dated 8th June, 2017 is termed on concurrent conditions for both parties to fulfill an obligation to evict the squatters from the suit property.
- xi. Subject to the above conditions Clause number 4.3 states; "The vendors shall be legally responsible for removing the squatters who are currently occupying a portion of the property." That this particular condition was premised on the vendor to:
 - a. That on the 12th October, 2021 in "Misc. Civil Application number 465 of 2021 the vendor took out an eviction order in efforts to provide vacant possession to the purchaser.



- b. That subsequent to the above, the vendor ought to have caused a re-valuation of the cost of executing the 12th October, 2021 orders in compliance to clause 4.4.1. of the sale agreement That states That on or before the Completion, the Vendor shall cause a re-valuation of the squatter Cost to be undertaken by a Qualified Valuer.
- c. That upon conducting a re-evaluation as indicated above, the vendor and its advocate were to furnish the purchaser and/or its advocates a copy of the 12th October, 2021 served upon the court Bailiff Mombasa Law Courts for the purpose of initiating a security correspondence.
- d. That the vendor and/or its advocates ought to have given a notification to the purchaser and/or its Advocates, in pursuant to the 12th October, 2021 orders, of the clearances from:
 - i. Changamwe Police Station of their verification of the persons named as squatters in “Misc. Civil Application number 465 of 2021” giving details of the structures attached to the said suit property;
 - ii. A further correspondence from Changamwe Police Station confirming That clearance has been sought from the Coast Regional Police Headquarters;
 - iii. A further clearance from the Mombasa County Security Committee confirming That a meeting had been chaired and the eviction of the squatters within the suit property has been authorized by the committee;
 - iv. That a further notification from the Vendor on the tracking of a correspondence from the Coast Regional Police Headquarters to the National Police Service Headquarters at Nairobi giving security clearance for the eviction to be conducted.
 - v. That upon clearance by the National Police Service Headquarters Nairobi, the vendor to notify the purchasers of a further correspondence from the Changamwe Police Precinct giving a dated, and a security briefing on the cause of the eviction.
- xii. Within the meaning of Clause 4.3 above, the Defendant/Respondent herein holds the right to consider the sale agreement voidable on the failure by the Applicants/Vendor to deliver vacant possession.
- xiii. The Vendor has not discharged its duties disclosed in Clause 4.3 of the sale agreement dated 8th June, 2017 with effect to give notice to the Purchaser and/or its advocates with regards to the process contained in paragraph 11 (d) above towards evicting the squatters.
- xiv. The Plaintiff/Seller herein had failed to deliver Vacant Possession as the squatters was continuing encroaching the property and refusing to evict unless they are fully compensated.
- xv. The Plaintiff had earlier agreed upon terms stipulated in Agreement for sale That the Defendant contents That the issue of squatters was at the heart of the Agreement and most pertinent to the conclusion of the Agreement.
- xvi. The Purchaser/Defendant’s was still not in possession of the said Property despite the fact That the Defendant had gone ahead to come up with investment plans for the anticipated project which ab initio was the reason for the purchase of the property.



- xvii. The Plaintiff had refused to deal with the Squatters and the Purchaser/Defendant was incurring huge loss of user as he had already advanced more than 25% of the Purchase Price.
- xviii. The Defendant was willing to make payment of the Balance of the Purchase Price once the Plaintiff secured a full vacant possession to the said Property and compensation of loss of user to the Defendant for the loss he incurred since the execution of the Agreement of Sale.
- xix. Since the Plaintiff was indolent and did not make any effort to deal with Squatters as early as the when the Agreement of Sale was executed, now it had become impossible as the squatters have multiplied in the suit property and they were threatening not to be removed unless they were compensated handsomely, it was now over five (5) years hence Equity aids the Vigilant and not the indolent.
- xx. This application was purely made in bad faith and is clearly a misuse of precious judicial time aimed at frustrating the Defendant's rights as it never give justifiable reasons and grounds supporting this Application hence Applicant was not worthy of the orders sought be it at law or at equity.
- xxi. Consequently, the Plaintiff's Application and the entire suit should be dismissed with costs to the Defendant.

IV. The Notice of Motion application dated 14th November, 2022

- 6. The Plaintiff/ Applicant herein also, moved this Honorable Court for the hearing and determination of their Notice of Motion application dated 14th November, 2022. It was brought under a Certificate of urgency and the dint of the provisions of Sections 3A and 100 of the Civil Procedure Act Chapter 21 of the Laws of Kenya, Order 1 Rule 3, Order 8 Rules 3 and 4 and Oder 51 Rule 1 of the Civil Procedure Rules, 2010.
- 7. The Plaintiff/Applicant sought for the following orders:-
 - a. Spent
 - b. That this Honourable Court be pleased to join African Gas and Oil Company Limited (AGOL) as the 2nd Defendant/Respondent in this suit.
 - c. That upon granting Order (2) above, this Honourable Court be pleased to grant the Plaintiff/ Applicant leave to amend its Notice of Motion Application and Originating Summons both dated 8th July, 2022 accordingly.
 - d. That upon granting Order (3)above, this Honourable Court be pleased to deem the Draft Amended Plaintiff's Notice of Motion Application and Originating Summons annexed herewith to have been duly filed upon payment of the requisite court fees.
 - e. That this Honourable Court be pleased to order and direct That the Interim Orders issued on 12th October,2022 with respect to the Plaintiff's Notice of Motion Application dated 8th July, 2022 as against the Defendant herein equally applies to African Gas and Oil Company Limited(AGOL),the third-party Purchaser herein with immediate effect.
 - f. That the costs of the application be provided for.
- 8. The application was premised on the grounds, testimonial facts and averments made out under the 10 Paragraphed Supporting Affidavit of Lawrence Muriithi Mbabu sworn and dated 14th November,



2022 together with two (2) annexures marked as “LMM – 1 and 2” annexed thereto. The Advocate of the High Court of Kenya and the Managing Director for the Plaintiff averred That:

- a. The facts pleaded by way of the proposed amendments were necessary to enable this Honourable Court to wholesomely and conclusively determine the issues in dispute between the parties.
- b. The proposed amendments were intended to disclose as fully as possible all the relevant facts and matters pertaining thereto.
- c. The circumstances of this case have changed drastically since when this suit was filed on July 2022. A Postal Search That was conducted on 8th November, 2022 over the suit property reveals That the Defendant herein had since fraudulently transferred the suit property to African Gas and Oil Company Limited (AGOL), a third-party company That was not party to the Agreement for Sale as between the Plaintiff and the Defendant. Annexed in the application and marked as “LMM – 2” as a true copy of the certificate of postal search dated 8th November, 2022.
- d. Pursuant to the aforesaid change of circumstances of this case, the Plaintiff’s cause of action against the Defendant herein had changed. This was therefore an important fact That the Plaintiff wished to plead in its Notice of Motion and Originating Summons.
- e. The Plaintiff was desirous of pleading all the matters and issues for proper and just determination of the matter before this Honourable Court with finality.
- f. This Application was made in good faith and without inordinate delay and That no prejudice will be occasioned to the Plaintiffs if the proposed amendments was allowed.

V. Further Affidavit in support of the Notice of Motion application dated 14th November, 2022

9. The Plaintiff further supported its application through an 11 Paragraphed further affidavit sworn by Lawrence Muriithi Mbabu sworn on 26th June, 2023 together with two (2) annexures marked as “LMM – 3 and 4” annexed thereto. He averred That:-
 - a. The Plaintiff/Applicant was the Original Registered Owner of all That property known as L.R. No. 3713/VI/MN measuring 11.03 Hectares located at Miritini, Mombasa County (herein after “the suit property”).
 - b. Pursuant to the Agreement for Sale dated 8th July, 2017 executed between the Plaintiff/Applicant and the Defendant Respondent herein for the sale and purchase of the suit property, the Defendant (Purchaser) had so far paid the Plaintiff (Vendor) a sum of Kenya Shillings Thirty One Million One Sixty Six Thousand Eight Sixty Hundred and Fifty Cents (Kshs. 31,166,860.50) out of the agreed Purchase Price of a sum of Kenya Shillings Two Thirty One Million Six Sixty Eight Thousand Six and Five Hundred (Kshs. 231,668,605.00/=).
 - c. The balance of the Purchase Price of a sum of Kenya Shillings Two Hundred Million Five and One Thousand Seven Fourty Four Hundred and Fifty Cents (Kshs. 200,501,744.50/=) remained unpaid to date.
 - d. The Defendant/Respondent had fraudulently transferred the Plaintiff’s/Applicant’s said suit property to African Gas and Oil Company Limited (AGOL) without first paying the Plaintiff/Applicant the outstanding balance of the Purchase Price and without the knowledge and



consent of the Plaintiff/Applicant(See Annexure and marked as “LMM - 2” to the Plaintiff’s Application dated 14th November,2022 for the Postal Search dated 8th November, 2022).

- e. It was therefore necessary That African Gas and Oil Company Limited (AGOL) be joined in these proceedings as the 2nd Defendant and the Plaintiff’s/Applicant’s Originating Summons dated 8th July, 2022 be amended accordingly as per the annexed Draft Amended Originating Summons.
- f. The Defendants therein would not be prejudiced in any way by the intended amendment of the Originating Summons as they will have corresponding leave to file their respective responses to the Amended Originating Summons.
- g. The affidavit was in further support of the Plaintiff’s Notice of Motion application dated 14th November, 2022.
- h. It was in the interest of justice and fairness That the Plaintiff’s Notice of Motion Application dated 14th November, 2022 and 8th July, 2022 (As amended) be allowed.

VI. Submissions

10. On 27th June, 2023 while all the parties were present in Court, they were directed to have the Notices of Motion applications dated 8th July, 2022 and 14th November, 2022 be disposed of by way of written submissions and all the parties complied. Pursuant to That all the parties obliged and on 25th July, 2023 a ruling date was reserved on Notice by Court accordingly.

A. The Written Submissions by the Plaintiff/Applicant

11. The Plaintiff through the Law firm of Messrs. Grace Ndinda Regina Advocate filed their submissions dated 26th June, 2023. The Learned Counsel for the Plaintiff commenced the submissions are in support of the following applications filed by the Plaintiff and pending determination in this suit:
 - i. Notice of Motion Application dated 8th July, 2022 seeking for injunctive orders against the Respondent: and
 - ii. Notice of Motion Application dated 14th November, 2022 seeking leave to amend the Plaintiff’s Notice of Motion Application and Originating Summons both dated 8th July,2022.
12. The Learned Counsel submitted That the Defendant/Respondent was duly served with the above applications. However, at the time of filing these submissions, the Respondent had only responded to the Application dated 8th July, 2022 vide the Replying Affidavit sworn by Joseph Mwela on 4th November, 2022 (Hereinafter “the Replying Affidavit”).The facts attendant to the 2 Applications are as captured in the Supporting Affidavits sworn by Lawrence Muriithi Mbabu on 8th July, 2022 and 14th November,2022, respectively in support of each of the Applications and filed together with each of the respective Application.
13. The brief facts to the suit were through an Agreement for Sale dated 8th June, 2017 (Hereinafter “the Agreement”), the Plaintiff and the Defendant herein entered into a sale and purchase of land transaction wherein, the Plaintiff agreed to sell all its property known as L. R. No. 3713/VI/MN located at Miritini, Mombasa County (herein Application dated 8th July,2022 for a copy of the said Agreement for Sale).
14. The Purchase Price as per the Agreement was a sum of Two Thirty One Million Six Sixty Eight Six Hundred and Five (Kshs. 231,668,605.00) payable as follows:



- a. 10% of the Purchase Price being a sum of Kenya Shillings Twenty Three Million One Sixty Six Thousand Eight Sixty Hundred and Fifty Cents (Kshs.23,166, 860.50/=) was payable on the execution of the Agreement;
 - b. A further 20% of the Purchase Price being a sum of Kenya Shillings Fourty Six Million Three Thirty Three Thousand Seven Twenty One Hundred (Kshs.46,333,721.00/=) within 30 days from the date of signing the Agreement; and
 - c. The balance of the Purchase Price of a sum of Kenya Shillings One Sixty Two Million One Sixty Eight Twenty Three Thousand and Fifty cents (Kshs. 162,168,023.50) within 90 days from the date of execution of the Agreement.
15. The Learned Counsel submitted That the Agreement was executed on 8th June,2017. However, the Defendant refused to pay the Purchase Price as per the terms of the Agreement. The Defendant only paid the deposit of a sum of Kenya Shillings Twenty Three Million One Sixty Six Thousand Eight Sixty Hundred and Fifty Cents (Kshs. 23,166,860.50/=) and an additional sum of Kenya Shillings Eight Million (Kshs. 8,000,000.00/=) making it a total of a sum of Kenya Shillings Thirty One Million One Six Six Thousand Eight Sixty Hundred and Fifty Cents (Kshs. 31,166,860.50/=). The rest of the Purchase Price of a sum of Kenya Shillings Two Hundred Million Five and One Thousand Seven Fourty Four and Fifty Cents (Kshs. 200,501,744.50) remained unpaid to date. Upon the Purchaser's payment of the deposit of a sum of Kenya Shillings Thirty One Million One Sixty Six Thousand Eight Sixty Hundred and Fifty Cents (Kshs. 31,166,860.50/=) of the purchase price, the Plaintiff handed over all the Completion Documents as enumerated under Clause 3.2 of the Agreement to the Purchaser's Advocates for the Advocates to hold the Completion Documents as Stakeholders until the Purchaser paid a further 20%. of the Purchase Price as per Clause 3.3 of the Agreement. The Plaintiff also granted the Defendant conditional possession of the suit property as per Clause 3.6 of the Agreement which states as follows:
- “Physical possession of the property will be given to the Purchaser by the Vendor on the receipt by the Vendor/Vendor's Advocates of the 20% deposit amount to enable the Purchaser construct a boundary perimeter fence on the property at the Purchaser's expense once the squatters' compensation issue has been dealt with. However, the possession of the property hereby given to the Purchaser is conditional and subject to the Purchaser not utilizing the said property for any commercial business purposes of whatsoever nature until the sale transaction contemplated in this Agreement is fully finalized.”
16. However, through a Postal Search conducted on the title to the suit property on 8th November, 2022,the Plaintiff discovered That the Defendant had secretly and fraudulently transferred the suit property to African Gas and Oil Company and without first having paid the full Purchase Price for the suit property to the Plaintiff. The Defendant's contention as can be discerned from the Replying Affidavit was That the Plaintiff had not fully discharged its duties under the Agreement since the Plaintiff failed to actualize the removal of squatters from a section of the suit property and as such, failed to deliver vacant possession of the suit property to the Defendant. What the Defendant was not telling this Honourable Court was That the Defendant fraudulently transferred the entire suit property to a third party namely African Gas and Oil Company Limited (AGOL) even before the Plaintiff could actualize the process of removing the squatters from the suit property, without the knowledge and consent of the Plaintiff and without having paid the full purchase price for the suit property to the Plaintiff.



17. The Learned Counsel further argued That the transfer of the suit property from the Defendant to African Gas and Oil Company Limited (AGOL) was in blatant breach of Clause 3.6 of the Agreement which bars the Defendant from utilizing the suit property for any commercial business purposes until the sale transaction is finalized. African Gas and Oil Company Limited (AGOL) was now the registered owner of the entire suit property with actual possession and occupation and currently utilizing the same for its expansive commercial business in the oil and gas industry. Therefore, the Plaintiff no longer considered itself bound by the terms of the Agreement and particularly the issue of removing squatters from the suit property since the terms of the Agreement were binding strictly as between the Plaintiff and the Defendant herein with no provision for any of the parties' Nominees or assignees.
18. Also, Clause 6.2 of the Agreement was instructive That in the event That the Plaintiff was unable to remove all the squatters from the suit property by Completion Date, which was 90 days from the date of the Agreement, the Defendant was to deduct the costs for such removal in terms of Clause 4.4 of the Agreement and immediately pay the balance of the Purchase Price to the Plaintiff herein. The costs of removing the squatters had been agreed at a sum of Kenya Shillings Fifteen Million (Kshs. 15,000,000.00/=). Therefore, the Defendant should just have deducted the said Kenya Shillings Fifteen Million (Kshs.15,000,000.00/=) from the balance of the Purchase Price and paid the Plaintiff the rest of the money instead of secretly transferring the suit property to a third party without the knowledge and consent of the original proprietor of the suit property.
19. The Learned Counsel beseeched the Honourable Court to first consider the Application dated 14th November, both dated 8th July,2022 and thereafter, consider the Application for injunctive orders after allowing the amendments as sought.
20. On the issues for determination the Learned Counsel identified the following:
 - a. Whether the Plaintiff's/Applicant's Notice of Motion Application dated 14th November, 2022 seeking for leave to amend the Plaintiff's Notice of Motion Application dated 8th July,2022 and the Originating Summons filed therewith should be allowed;
 - b. Whether the Plaintiff/Applicant should be granted the injunctive orders sought in the Application dated 8th July, 2022 after the amendment; and
 - c. Who should bear the costs of the two Applications?
21. On whether the Plaintiff's/Applicant's Notice of Motion Application dated 14th November, 2022 seeking for leave to amend the Plaintiff's Notice of Motion Application and the Originating Summons both dated 8th July, 2022 should be allowed, the Learned Counsel submitted That the Plaintiff/Applicant moved this Honourable Court through the Notice of Motion Application dated 8th July, 2022 seeking for injunctive orders against the Respondent herein for purposes of preserving the suit property pending the hearing and determination of the Originating Summons filed therewith. However, while the aforesaid application was pending hearing before this Honourable Court, the Plaintiff/Applicant conducted a Postal Search on the title to the suit property on 8th November, 2022,which search shows That the present registered owner of the suit property is African Gas and Oil Company Limited (AGOL) (See Annexure marked as "LMM - 2" to the Application dated 14th November,2022 for a true copy of the Certificate of Postal Search dated 8th November, 2022).
22. The above later discovery necessitated the filing of the Application dated 14th November, 2022 through which the Plaintiff/Applicant sought for leave to amend its earlier Application of 8th July, 2022 and the Originating Summons filed therewith to incorporate the new developments in this case whereby, the Defendant herein appeared to have fraudulently transferred the suit property to a third party



without first paying the entire purchase price to the original registered owner, the Plaintiff/Applicant herein, and without the knowledge and consent of the Plaintiff/Applicant. The discovery of the fraud committed by the Defendant against the Plaintiff herein had drastically changed the circumstances of this suit and it was only just That the Application dated 14th November, 2022 be allowed to bring all the parties involved on board and plead all the facts so That this Honourable Court could determine the real issues in controversy between all the parties pertaining the suit property with finality.

23. The Learned Counsel relied on Order 8 Rule 3 of the Civil Procedure Rules, 2010 which provided for amendment of pleadings with leave of court as follows:-

“(1) Subject to Order 1, Rules 9 and 10, Order 24, Rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.”

24. Further, Order 8 Rule 5 gives the court the general power to amend.

“5.

(1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

25. The Learned Counsel further relied on the case of Court of Appeal outlined the principles in amendment of pleadings in the case of:- “Elijah Kipngeno Arap Bii – Versus - Kenya Commercial Bank Limited [2013] eKLR” as follows:-

“...The law on amendment of pleading in terms of section 100 of the *Civil Procedure Act* and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob’s Precedents of Pleading – 12th Edition, in the case of Joseph Ochieng & 2 others Versus - First National Bank of Chicago, Civil Appeal No. 149 of 1991 as follows:-

“...The ratio That emerges out of what was quoted from the said book is That powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; That the proposed amendment must not be immaterial or useless or merely technical; That if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; That the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the Acts.”



26. Further, in the case of:- “Institute for Social Accountability & another – Versus - Parliament of Kenya & 3 others [2014] eKLR”, the court held as follows regarding the issue of amendment of pleadings:-

“...The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure That the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings...The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and That the amendment can be allowed without an injustice to the other side...”

27. From the above legal provisions and case law, it was apparent That the Plaintiff’s Application dated 14th November, 2022 was meritorious for the reasons That at the time when the Plaintiff filed its earlier Application of 8th July, 2022 together with the Originating Summons of even date, the Plaintiff was not aware That the Defendant had fraudulently transferred the suit property to African Gas and Oil Company Limited (AGOL). The Plaintiff became privy to the aforesaid fraudulent transfer of its property through the search conducted on 8th November, 2022. Thereafter, the Plaintiff promptly moved this Honourable Court through the Application dated 14th November, 2022 seeking for leave to amend its said earlier Application and Originating Summons.

28. In the Application dated 8th July, 2022, the Plaintiff had sought for injunctive orders against the Defendant only without notice That the Defendant had fraudulently transferred the suit property to a third party without first, paying the original registered proprietor of the suit property, the Plaintiff/Applicant herein, the agreed consideration as per the Agreement for Sale and without the knowledge and consent of the Plaintiff. Owing to the fact That the Defendant had already transferred the suit property to a third party, issuing such injunctive orders against the Defendant only would serve no purpose at all since the Defendant was no longer the registered owner of the suit property. The Learned Counsel therefore urged the Honourable Court to allow the Application for amendment in the interest of justice and fairness so That all the issues in controversy between all the parties involved can be determined with finality in this suit. After allowing the Application for Amendment as sought, the Learned Counsel urged the Honourable Court to then proceed and consider the Application for injunctive orders against Bayshore Limited and African Gas And Oil Company Limited (AGOL) as the 1st and 2nd Defendants/Respondents, respectively.

29. On whether the Plaintiff/Applicant should be granted the injunctive orders sought in the Application dated 8th July, 2022 after the amendment, the Learned Counsel argued That on whether the injunctive orders sought should be granted, we rely on the celebrated case of “Giella - Versus - Cassman Brown (1973) EA 358” and as was reiterated in the case of “Nguruman Ltd versus Jan Bonde Nielsen and 2 Others CA NO.77 of 2012(2014)eKLR” where the Court of Appeal held as follows:

“...In an interlocutory injunction application, the Applicant has to satisfy the triple requirements:

- a) Establish his case at a prima facie level;
- b) Demonstrate irreparable injury if a temporary injunction is not granted; and



- c) In case of any doubts as to (b) above, by showing That the balance of convenience is in his favour...”

30. The Counsel cited the Court of Appeal in the case of “MRAO Ltd - Versus - First American Bank of Kenya Ltd (2003) eKLR” enunciated what constitutes “a prima facie case as follows:

“...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 legal right which has apparently been infringed by the opposite party as to call for explanation or rebuttal from the latter...”

31. The Learned Counsel reiterated the contents of Paragraphs 4 to 12 above on the factual background leading to the filing of the instant suit and humbly submit That the Plaintiff/Applicant had established a prima facie case. The Defendant herein has fraudulently sold and transferred the Plaintiff's land to African Gas and Oil Company Limited (AGOL) without first paying the Plaintiff the agreed consideration as per the Agreement for Sale executed between the Plaintiff and the Defendant on 8th June, 2017. Owing to the foregoing, the Learned Counsel humbly submitted That the injunctive orders as sought in the Amended Notice of Motion Application dated 14th November, 2022 That is annexed to the Notice of Motion Application dated 14th November, 2022 as Annexure “LMM-1”, were necessary to preserve the suit property pending the hearing and determination of the Amended Originating Summons.

32. On the irreparable injury That the Plaintiff/Applicant stood to suffer if the injunctive orders were not granted, the Learned Counsel submitted That if the Defendants/Respondents were not restrained through the issuance of the injunctive orders as sought in the Amended Notice of Motion Application, the Plaintiff/Applicant was likely to suffer irreparable harm since the Defendants/Respondents are likely to transfer the suit property to unsuspecting third parties hence defeating the Plaintiff's/Applicant's proprietary rights in the suit property.

33. The Learned Counsel relied on the case of “Pius Kipchirchir Kogo - Versus - Frank Kimeli Tenai(2018) eKLR” which defined the concept of balance of probabilities as follows:

“...The meaning of balance of convenience in favour of the Plaintiff is That if an injunction is not granted and the suit is ultimately decided in favour of the Plaintiff, the inconvenience caused to the Plaintiff would if injunction is granted but the suit ultimately dismissed...”

34. It was clear from the Defendants'/Respondents' conduct That if the injunctive orders sought were not granted, the Defendants/Respondents were likely to deal further with the suit property by transferring the same to unsuspecting third parties or even obtain loan facilities with the suit property as security. This would occasion the Plaintiff/Applicant greater inconvenience should this suit be ultimately decided in its favour. If the suit property was transferred to innocent third parties, the Plaintiff's/Applicant's proprietary interest in the suit property may be defeated even if this suit was determined in its favour.

35. On the other hand, the Defendants/Respondents never stood to suffer any inconvenience if the suit property is preserved by granting the injunctive orders as sought should the Plaintiff's suit be dismissed. This was because the Defendants/Respondents were in possession and actual occupation of the suit property which property, the 2nd Defendant/Respondent was presently using for its expansive gas and oil commercial business. Therefore, the balance of convenience tilted in favour of the Plaintiff/Applicant.



36. On who should bear the costs of the two applications, the Learned Counsel argued That the filing of the two instant Applications was necessitated by the fraudulent acts of the Defendant herein of transferring the suit property, the property of the Plaintiff/Applicant, to a third party without first having paid to the Plaintiff/Applicant the full consideration for the suit property as per the Agreement for Sale executed by the parties on 8th June, 2017 and without the knowledge and consent of the Plaintiff/Applicant. The Learned Counsel humbly beseeched the Honourable Court to exercise your discretion in favour of the Plaintiff/Applicant and direct That the Defendant should bear the costs of the two Applications.
37. In conclusion, the Learned Counsel urged the Honourable Court owing to the foregoing submissions and the nature of the issues in controversy between the parties herein, the Learned Counsel urged the Honourable Court to make a finding That the Plaintiff's/Applicant's Notice of Motion Applications dated 14th November, 2022 and 8th July, 2022(as amended) were meritorious and allow the same as prayed and to proceed and issue directions for the hearing of the Amended Originating Summons in order to meet the ends of justice.

VII. Analysis & Determination.

38. I have carefully read and considered the pleadings herein by the Plaintiff and the Defendant herein, the written submissions, the myriad of cases cited herein by parties, the relevant and appropriate provisions of *the Constitution* of Kenya, 2010 and statutes.
39. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-
- a. Whether the Notice of Motion application dated 14th November, 2022 by the Plaintiff/Applicant has merit?
 - b. Whether the Notice of Motion application dated 8th July, 2022 by the Plaintiff/Applicant has merit?
 - c. Who will bear the Costs of Notice of Motion applications dated 14th November, 2022 and 8th July, 2022.

ISSUE No. a). Whether the Notice of Motion application dated 14th November, 2022 is merited?

40. Under this sub-title, the impugned application resolves around and this Honourable Court will there endeavor to examine three main substratum for its determination. These are:
- i. Whether the Plaintiff has made out a case for the joinder of African Gas and Oil Company Limited as the 2nd Defendant in this suit?
 - ii. Whether leave to amend the notice of motion application and originating summons both dated 8th July, 2022 by the Plaintiff can be granted?
 - iii. Whether interim orders issued on 12th October, 2022 with respect to the Plaintiff's Notice of motion application dated 8th July, 2022 as against the Defendant herein equally applies to African Gas and Oil Company Limited(AGOL),the third-party Purchaser herein with immediate effect



41. Legally speaking, amendment of pleadings are anchored on the provisions of Order 8 Rule 5(1) of the Civil Procedure Rules which Provides:-

“ 5(1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to cost or otherwise as are just.”

42. Further, the provision of Order 8 Rule 3(1) and (5) of the Civil Procedure Rules, 2010 which provides as follows:-

“ 1. subject to Order I, Rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such as it may direct, allow any party to amend his pleadings.

5. An amendment may be allowed under sub rule (2) notwithstanding That its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as the cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.....”

43. This Order gives the court the mandate to allow amendment of pleadings at any stage of the proceedings on such terms That may be just. The amendment sought in this case is for enjoinder of a co- defendant. Parties are at liberty to choose the necessary parties in a suit where they claim certain reliefs arising from a transaction or a wrong committed. A party cannot force a plaintiff to sue persons That they do not have a claim against as if the case is dismissed then the party must bear the burden of paying costs.

44. That is a reason why before a party files a suit in court, he/she must be sure of the party to have a duel with. You do not start battles on all fronts hoping to settle on one person. You must be sure of the defendant you want to sue.

45. In this case the Applicant states That circumstances of this case have changed drastically since when this suit was filed on July 2022. A Postal Search That was conducted on 8th November, 2022 over the suit property reveals That the Defendant herein has since fraudulently transferred the suit property to African Gas and Oil Company Limited (AGOL),a third-party company That was not party to the Agreement for Sale as between the Plaintiff and the Defendant. Pursuant to the aforesaid change of circumstances of this case, the Plaintiff's cause of action against the Defendant herein had changed. This was therefore an important fact That the Plaintiff wished to plead in its Notice of Motion and Originating Summons.

46. The test in applications for joinder was firstly, whether an Applicant can demonstrate he has an identifiable interest in the subject matter in the litigation though the interest need not be such interest as must succeed at the end of the trial. Secondly, and in the alternative it must be shown That the Applicant was a necessary party whose presence is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit. Has the Applicant demonstrated he had sufficient interest in the subject matter of the suit or That he is a necessary party whose presence is necessary to enable the court to effectually and completely adjudicate upon all the issues in the suit?



47. The Plaintiff has submitted That while the notice of motion dated 8th November, 2022 was pending hearing before this Honourable Court, the Plaintiff/Applicant conducted a Postal Search on the title to the suit property on 8th November, 2022, which search shows That the present registered owner of the suit property is African Gas and Oil Company Limited (AGOL). The above later discovery necessitated the filing of the Application dated 14th November, 2022 through which the Plaintiff/Applicant seeks for leave to amend its earlier Application of 8th July, 2022 and the Originating Summons filed therewith to incorporate the new developments in this case whereby, the Defendant herein appears to have fraudulently transferred the suit property to a third party without first paying the entire purchase price to the original registered owner, the Plaintiff/Applicant herein, and without the knowledge and consent of the Plaintiff/Applicant.
48. The provision of Order 1 Rule 3 of the Civil Procedure Rules, 2010 states as follows: -
- “All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”
49. The provision of Order 1 Rule 10 (2) of the Civil Procedure Rules, 2010 states as follows: -
- “The court may at any stage of the proceedings, either upon, or without the application of either party, and on such terms as may appear to the court to be just, order That the name of any party improperly joined, whether as Plaintiff or Defendant be struck out, and That the name of any person who ought to have been joined, whether as Plaintiff or Defendant or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon or settle all questions involved in the suit, be added.”
50. It will be seen from Order 1 Rule 3, That the court may order the joinder of a person as defendant if there is a claim against him arising out of the same act or transaction complained of or if a separate suit were brought against him it will bring common questions of law or fact as in the existing case. It should however be noted That the joinder of the person as defendant in this instance must be in relation to a claim made against him by the plaintiff, for if it were not the case, he would not be Defendant. The very presence of a person as Defendant implies That the Plaintiff had a case against him.
51. I refer to the case of “Jacinta Wanjiru Mwendwa – Versus - Samwel Theuri & 3 others [2019] eKLR”, my brother Justice Sila Munyao held That:-
- “With regard to Order 1 Rule 10 (2), it will be noted That the court has discretion to order the name of a person to be removed from proceedings or to be added to the proceedings, either as Plaintiff or Defendant, or the joinder of a person whose presence the court feels is necessary for the determination of all questions in the suit. Now, the court will only enjoin a person as defendant if the court feels That the Plaintiff has a claim against such person, and as I have explained above, you cannot be Defendant if there is nothing That the Plaintiff has against you. Before giving the order to enjoin a person as Defendant, the court must thus be satisfied That the Plaintiff has a claim against such person, for you would not wish for a situation where a person is enjoined as defendant, but there is really nothing That the Plaintiff has against such person. It is the same thing where a person is enjoined as Plaintiff. The court must be satisfied That such person has a claim similar to what the existing Plaintiff has against the existing Defendant.”



52. In the instant case, a postal search indicated That the intended 2nd Defendant is the present registered owner which indicates That the Defendant herein appears to have fraudulently transferred the suit property to a intended 2nd Defendant. From this position, the Plaintiff/ Applicant has established That the party to be enjoined as a Defendant is a necessary party to the determination of this suit therefore the prayer for enjoinder is hereby allowed.
53. In the case of “Rubina Ahmed & 3 others – Versus - Guardian Bank Ltd (Sued in its capacity as a successor in Title to First National Finance Bank Ltd) [2019] eKLR” the Court of Appeal while dismissing an appeal relied on Halsbury’s Laws of England, 4th Ed. (re-issue), Vol. 36(1) at paragraph 76, which stated the following about amendments of pleadings:-
- “...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”. [Emphasis added].
54. The court has the power to amend pleadings which power can be exercised at any stage of the proceedings before Judgment as per Bullen and Leake & Jacob’s Precedents of Pleading, 12th Edition, which provides as follows concerning amendment of pleadings:
- “...power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); That as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; That the proposed amendment must not be immaterial or useless or merely technical; That if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action...”
55. Similarly, in the Halsbury’s Laws of England, 4th Ed. (re-issue), Vol. 36(1) at paragraph 76, state the following about amendments of pleadings: -
- “...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”.
56. The Applicant sought for leave to amend the Notice of Motion and Originating summons both dated 8th November, 2022 so as to capture the latest discovery on the already enjoined 2nd Defendant and bring its claim against it. The Respondent did not file any objection to the application for amendment therefore the application was unopposed.



57. Ordinarily, Courts should freely allow amendments but this discretion should be exercised judiciously. I find That the prayer for leave to amend the Plaintiff's pleadings is merited and is hereby allowed.
58. The Other issue for determination is whether the interim Orders issued on 12th October, 2022 with respect to the Plaintiff's Notice of Motion Application dated 8th July, 2022 as against the Defendant herein equally applies to African Gas and Oil Company Limited(AGOL), the third party Purchaser herein apply. Having determined That the 2nd Defendant is a necessary party in this suit the interim orders issued on 12th October, 2022 pending the hearing and determination of the amended Notice of Motion dated 14th November, 2022 should be granted accordingly.

ISSUE No. b). Whether the Notice of Motion application dated 8th July, 2022 has merit?

59. Under this Sub – heading, having granted the prayers for joinder of the necessary parties and the amendment of the pleadings as sought, it is only fair, just and Equitable That there be a stay of the reliefs sought from the application dated 8th July, 2022 for the time being in force. In my own view, these are issues That may be re – visited again in the near future in the course of the proceedings and in the fullness of time. By so doing, it will accord the Plaintiff an opportunity to file and serve an amended Notice of Motion application and originating summons to allow the 2nd Defendant participate and defend themselves accordingly.

ISSUE No. c). Who Will Bear The Costs Of Notice Of Motion Application Dated 14th November, 2022 And Notice Of Motion Application Dated 8th November, 2022.

60. It is now well established That the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds That costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh – Versus Tarchalan Singh” eKLR (2014) and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014).
61. In this case, this the matter is still proceeding on for further hearing, this Honourable Court for found both applications will be in the cause.

VIII. Conclusion & Disposition

62. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to the principle of Preponderance of Probabilities and a balance of convenience.
63. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, this court arrives at the following decision and specifically orders a s follows:-
- a. That the Notice of Motion application dated 14th November, 2022 be and is found to have merit hence hereby allowed in its entirety.
 - b. That the Notice of Motion application dated 8th November, 2022 be and is hereby stayed.
 - c. That this Honourable Court joins Africa Gas and Oil Company Limited (AGOL) as the 2nd Defendant/Respondent in this suit.
 - d. That leave be and is hereby granted to the Plaintiff to amend its Notice of Motion Application and Originating Summons both dated 8th July, 2022 accordingly.



- e. That this Honourable Court hereby deems the Draft Amended Plaintiff's Notice of Motion Application and Originating Summons annexed herewith to have been duly filed upon payment of the requisite court fees.
- f. That an order hereby due issue That the Defendants are served with the amended Plaintiff's Notice of Motion Application and Originating Summons within 15 days of this ruling.
- g. That corresponding leave is hereby granted to the 1st and 2nd Defendants to file their responses to the amended Notice of Motion Application and Originating Summons within 15 days thereafter.
- h. That for expediency sake the suit be fixed for hearing on 23rd May, 2024. There be a mention date on 22nd February, 2024 for taking direction of the Amended Originating Summons under the provision of Order 37 Rules 13 and 16 and conducting of a Pre – Trial Conference under the provision of Order 11 of the Civil Procedure Rules, 2010 accordingly.
- i. That the costs of the Notice of Motion application dated 8th and 14th November, 2022 shall be in the cause.

It Is So Ordered Accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 1ST DAY OF NOVEMBER 2023.

.....

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

ENVIRONMENT AND LAND COURT AT MOMBASA

Ruling delivered in the presence of:

- a. M/s. Yumna, the Court Assistant.
- b. M/s. Ndenda Advocate for the Plaintiff/Applicant.
- c. Mr. Ogendo Advocate for the Defendants/Respondents.

