



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC NO. 145 OF 2021

HADIJA ABDIRAHMAN.....PLAINTIFF/APPLICANT

- VERSUS -

BHUPENDRA RADHOD.....1ST DEFENDANT/RESPONDENT

AUTOLAND AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

COUNTY GOVERNMENT OF MOMBASA.....3RD DEFENDANT/RESPONDENT

LAND REGISTRAR MOMBASA.....4TH DEFENDANT/RESPONDENT

RULING

I. Introduction

1. The application before this Honorable Court for hearing and determination is the Notice of Motion dated 27th July 2021. It is brought by the Plaintiff/Applicant under the Provisions of Sections 1A, 1B, & 3A of the Civil Procedure Act, Cap. 21 Order 40 Rules 1, 2, & 4, Order 51 Rule 1 of the Civil Procedure Rules 2010 and Rule 3 (3) and 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013. (Hereinafter referred to as the “The Mutunga Rules”)

II. The Plaintiff/Applicant’s case

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

a) Spent.

b) Spent.

c) That this Honorable court be and is hereby pleased to issue an order of injunction restraining the 1st, 2nd and 3rd Defendants/Respondents jointly and severally by themselves, their agents, servants, employees, assignees, third parties and/or any other party from selling, transferring, charging, claiming, building, fencing, taking possession, leasing, demanding rent, auctioning, building, developing, registering transfer, subdividing and/or dealing or interfering in any other manner with the subject property known as Mombasa/Block/XVII/92 pending the hearing and determination of the suit.

d) That the Honorable court be and is hereby pleased to order/direct that the vesting orders and all other subsequent orders that were issued in CM/ELC 103/2012 in favour of Bhupendra Radhod be and are hereby quashed/vacated/set aside/dismissed as annuity.

e) That the Honourable court be and hereby pleased to order that all auctions that arose and/or were taken out of the vesting orders and all other subsequent orders from CM/LC No. 103 of 2012 and in regard to Plot No. Mombasa/Block/XVII/92 be are hereby revoked/cancelled forthwith respectively.

f) That the Honourable court be pleased to order that the Plaintiff/Applicant herein Hadija Abdirahman is the bonafide

legal, registered owner who has the proprietary interest and rights over the property known as Mombasa/Block/XVII/92.

g) That the Honourable court be pleased to order the Land Registrar Mombasa to proceed and cancel/revoke the title document and all other records issued to and/or in favour of Bhupendra Radhod without gazettelement or publication and all the entries made in the Register/green card and in the alternative the Plaintiff/Applicant herein be registered as the owner.

h) That this Honourable court be pleased to order/direct that the subordinate court had no pecuniary jurisdiction over the subject property being Mombasa/Block/XVII/92 and consequently all the orders issued and action executed out of the order be nullified/revoked accordingly forthwith.

i) That the Honourable court be pleased to order that all parties/persons on the subject property being Mombasa/Block/XVII/92 are trespassers and should be evicted forthwith and that the O.C.S Makupa police station or the nearest police station do ensure that they are removed and vacant possession is handed over to the Plaintiff/Applicant herein accordingly.

j) That the Honourable court be pleased to issue any other orders that it may deem fit in the circumstances.

k) That the costs of this application be in the course.

3. The application by the Plaintiff/Applicant is premised on the grounds, facts and testimony on the face of the application and further supported by the annexed Supporting Affidavit and annexures of HAJIDA ABDIRAHMAN the Plaintiff/Applicant herein. The Plaintiff/Applicant claimed to be the registered owner of all that parcel of land known as Land Reference No. Mombasa/Block/XVII/92. She annexed copies of the Certificate of title and certificate of official search dated 7th February 2020 and conducted on 13th February 2020 respectively. She claimed to have bought the suit premises from one Osman Alukongo Muhati, and annexed his certificate of title dated 14th June 2019 as well as the certificate of official search conducted and dated 18th December 2019. The Plaintiff/Applicant further stated that upon making an application her advocate was issued with a copy of a green card, which showed that on 14th June 2019 a decree of SRM (Mombasa) ELC NO. 14 of 2019, granting Osman Alukongo title to the suit land had been registered on 14th June 2019.

4. Further, The Plaintiff/Applicant claimed that after transferring the suit land to herself and upon seeking clearance from the of the offices County Government of Mombasa, she was served with a notice dated 31st January 2020 from the County's department of lands, planning and housing, ordering the demolition of the illegal structures on the suit property. It later came to her attention that there existed yet another certificate of title issued to Bhupendra Radhod the 1st Defendant/Respondent issued on 9th February 2021, Pursuant to court orders issued on 14th August 2020 and 14th January 2021 in Mombasa CM No. 103 of 2012. The Plaintiff/Applicant believed that the existence of the said Certificate of title to the 1st Defendant/Respondent title to the suit land was prejudicial to her title, as he was in the process of selling it. She maintained that the said sale to the 1st Defendant/Respondent via a public auction as alleged on 7th May 2020 was void of merit and ought to be nullified. She averred that the lower court granted orders on misrepresented and non-disclosure of material facts. Additionally, the court lacked pecuniary jurisdiction to hear and determine the suit taking that the suit property was worth a value of a sum of Kenya Shillings Twenty Three Million (KShs 23,000,000/=). Thus this Honorable Court was urged to intervene and stop the sale to avert the Plaintiff/Applicant imminent danger of irreparable harm and loss.

III. The 1st Defendant/Respondent Replying Affidavit

5. On 27th September 2021, the 1st Defendant/Respondent filed a very detailed 32 Paragraphed Replying Affidavit sworn by BHUPENDRA RATHOD the 1st Defendant herein and eighteen (18) annexures marked as "BR 1 to 18" annexed thereto and raised several issues pertaining to how the Plaintiff/Applicant acquired their suit property. He wondered how she acquired the suit property on 7th February 2020, the money she paid as consideration, the rates paid to the County Government of Mombasa, the stamp duty paid prior to the registration of the transfer of the suit land. He raised several disagreements arising from the attached green card and the title deed by the Plaintiff/Applicant particularly the details on Part B of the proprietorship section. He also questioned the two (2) Court orders issued in the 1st Defendant/Respondent's favour in CMCC No. 103 of 2012 – Mombasa issued on 14th August 2020 and 18th January, 2021 and stressed that he did the right thing as he followed the law. He deponed that unlike the Plaintiff/Applicant who could not provide the Honorable Court with a history of her title to the suit property, he could trace the origin of his title to the suit land. He deponed that he bought the suit land at a public auction after the registered owner Ahmed Ali Mohamed defaulted on land rate arrears owned to the 3rd Defendant/Respondent to the tune of a sum of Kenya Shillings Twenty Seven Million Two Thirty Five Thousand, Eight Sixty Five Hundred (KShs 27,235,865/-). He averred that the 3rd Defendant/Respondent instructed the 2nd Defendant/Respondent to sell the suit property by way of public auction in accordance with the provisions of Section 17 of the Rating Act, Indeed the sale was pursuant to an order of court in Civil Case CM ELC 103 of 2012 issued on 15th October 2012.

6. During the sale by public auction he was the highest bidder at a sum of Kenya Shillings Twenty Three Million (KShs 23,000,000/=). Thereafter, he entered into a sale agreement with the 2nd Defendant/Respondent over the suit property on 7th May 2020 and deposited 25% of the purchase price, being a sum of Kenya Shillings Five Million Seven Fifty Thousand (KShs 5,750,000/=) with the 2nd Defendant/Respondent. On the same day, he was issued with a certificate of sale by the 2nd Defendant/Respondent. On 2nd February 2021 he paid stamp duty and on 28th April 2021 he took possession of the suit property, after the 2nd Defendant/Respondent had demolished all the illegal structures on it. He maintained that he was the legal and absolute registered owner of the suit property, as evidenced by a certificate of official search dated 12th May 2021. He urged the Honorable court to dismiss the application for being an abuse of the court process with costs.

IV. The 2nd Defendant/Respondent's Replying Affidavit.

7. On 28th October, 2021 the 2nd Defendant/Respondent filed a 17 paragraphed Replying Affidavit sworn by EZEKIEL M. KIMANZA and dated 22nd October, 2021 and three (3) annexures marked as “EMK – 1 to 3” annexed thereto.

He deposed that on 20th July, 2017, he was instructed by the 3rd Defendant to recover outstanding Land Rates in respect of Title No. Mombasa/BLOCK XVII/92 on behalf of the 3rd Defendant. He consulted the 3rd Defendant and who agreed to appoint an Advocate to complete the execution proceedings in respect of CMCC (Mombasa) case No. 103 of 2012 – Municipal Council of Mombasa –versus Suleiman Ahmed Ali Mohamed which suit was filed in the year 2012 and judgment entered against the bona fide and registered owner of the suit land for recovery of the outstanding land rates.

8. He stated that upon entry of judgment from the aforesaid case, the 3rd Defendant lodged a prohibition against the title at the Land Registry pending execution. He held that immediately upon lodging the prohibition on the title and commencement of the execution by way of attachment against the registered owner the Land Registry records in respect to the suit property and the court file in the aforesaid civil case simultaneously disappeared thereby frustrating the 3rd Defendant’s execution proceedings. He stated that during this period the plaintiff was working in cahoots with others embarked on fraudulent scheme to destroy original land records and court files at the registry by falsifying records to unlawfully defeat the 3rd Defendant Decree and right to auction the suit property.

9. He deposed that on 18th June, 2020 the 3rd Defendant obtained orders for the reconstruction of the court file here after execution proceeded. He informed court that on 7th May, 2020 he conducted out a Public Auction in respect to the suit property where the 1st Defendant emerged as the highest bidder. On 9th February, 2021 the 1st Defendant was lawfully registered as the owner of the suit property upon payment of the full Auction price and the requisite stamp duty and registration charges.

10. He stated that on 31st March, 2021 the Plaintiff filed an application in CMCC (Mombasa) No. 103 of 2012 challenging the execution process which application was still pending before the lower court. He held that the claim by the Plaintiff and purported title to the suit property was fraudulent since the Plaintiff/Applicant or the previous alleged owners could not have lawfully obtained title to the suit property while there was a prohibitory order placed on the title by the 3rd Defendant in respect of the execution proceedings.

11. He opined that the Plaintiff and the alleged Osman Alukongo Muliati were fictitious individuals who were used to fraudulently falsifying records at the Land Registry in their scheme to illegally obtain title to the suit property. He further held that there was no way these two individuals could have lawfully transferred title to the suit property without first paying the entire outstanding Land Rates and obtaining a Rates Clearance Certificate from the 3rd Defendant.

12. He held that no stamp duty was ever paid either by the two individuals during the alleged transfer of the suit property to themselves and as such the Plaintiffs alleged title was fraudulent, illegal, null and void. He affirmed that he believed the title to the suit property was lawfully and legally registered to the 1st Defendant as purchaser for valuable considerations.

V. The 3rd Defendant/Respondent’s Replying Affidavit

13. The 3rd Defendant/Respondent filed a 15 paragraphed Replying affidavit on 29th October 2021 sworn by DR. JUNE MWAJUMA the Chief Officer of the 3rd Defendant. She deposed that the initial registered owner of the suit land was Suleiman Ahmed Ali Mohamed who failed to pay land rates to the 3rd Defendant/Respondent. The failure to pay rates necessitated the 3rd Defendant/Respondent to file a suit **CMCC NO. 103 of 2012 Mombasa Municipal Council – Versus - Suleiman Ahmed Ali Mohamed** for recovery of the unpaid rates, interest and penalties over the suit property. On 16th October 2012 the court ruled in favour of the 3rd Defendant/Respondent, as it obtained prohibitory orders against the title of the suit property as Series No. 351/12 in the 4th Defendant/Respondent.

14. On 20th July 2017, the 3rd Defendant/Respondent instructed the 2nd Defendant/Respondent to sell the suit land by public auction in order to recover the rate arrears. The deponent reiterated the argument maintained by the 1st Respondent that, at the time of selling the suit property, the registered person was Suleiman Ahmed Ali Mohamed and not Osman Alikongo Muhati or the Plaintiff/Applicant. The deponent denied being aware of the orders issued in SRM No. 14 of 2019, and besides he averred that the orders issued in CMCC 103 of 2012 had never been challenged, or set aside. Therefore, the decree thereto was executed. The Honorable Court was urged to dismiss the application as it lacked merit and for seeking final orders in an interlocutory stage.

VI. Submissions

15. On 30th September, 2021 while all the parties were present in Court, they were directed to have the Notice of Motion application be disposed off by way of written submissions. Pursuant to that, they all obliged and a ruling date was secured accordingly.

A. The Plaintiff/Applicant's Written Submissions

16. On 3rd November 2021, the Learned Counsel to the Plaintiff/Applicant the law firm of Messrs. Marende Necheza and Company Advocates filed their written submissions dated 1st November, 2021. The Learned Counsel submitted that the Plaintiff/Applicant herein had satisfied the conditions for an interlocutory injunction to be granted, as stated in **Giella - Versus - Cassman Brown Co. Ltd (1973V)E.A 358**. On the first limb, the Counsel submitted that the Plaintiff/Applicant had a prima facie case, being the absolute and legal registered owner of the suit land and having annexed the title thereto, after purchasing the same from one Osman Alukongo Muhati. The Learned Counsel maintained that she has neither sold nor transferred the suit land to the 1st Defendant/Respondent, or anyone else. Thus, they averred that the 4th Defendant/Respondent was wrong in issuing another title of the suit property to the 1st Defendant/Respondent. The Counsel noted that there were discrepancies and contradictions in the balance of the rate arrears to the 3rd Defendant/Respondent that led to the alleged sale of the suit property by the 2nd Respondent to the 1st Defendant/Respondent herein by public auction. While on one hand, the 1st Respondent claimed the arrears to be at a sum of Kenya Shillings Twenty Seven Million, Two Thirty Five Thousand Eight Sixty Five Hundred (Kshs 27,235,865/=) as at 20th July 2017, on the other hand the 3rd Respondent indicated the balance being a sum of Kenya Shillings Sixty Four Million Two Twenty Nine Thousand Five Ninety Nine Thousand (Kshs 64,229,599/=) as at 19th January 2021.

17. On the 2nd limb, the Learned Counsel submitted that the Plaintiff/Applicant stood to suffer irreparable injury which would not be adequately compensated by an award of damages. The Plaintiff/Applicant had proved to be the legal owner of the subject matter and that the 1st Defendant/Respondent had illegally acquired possession of the suit property through a fraudulent process conducted by the 2nd Defendant/Respondent. The Learned Counsel contended that the Plaintiff/Applicant stood to suffer irreparable damage if the court failed to intervene and stop the 1st Defendant/Respondent from selling or dealing in any way with the suit property. The Counsel argued that the Magistrate court which had no jurisdiction to hear and determine the case on rent arrears which was above the pecuniary jurisdiction limit of the court which stood at a sum of Kenya Shillings Twenty Thousand (Kshs 20,000,000/=) and as such the orders granted therein ought to be set aside. This Honorable Court was urged to grant the orders of injunction as prayed to preserve the suit land and prevent the suit from being rendered nugatory.

B. The 1st Defendant/Respondent's written Submission

18. On 15th December 2021, the Learned Counsel the Law firm of Messrs. Munyithia, Mutugi, Umara & Muzna Company Advocates to the 1st Defendant/Respondent herein filed their written submissions dated 14th December, 2021. Mr. Munyithia Counsel submitted that the Plaintiff/Applicant had not established "*a prima facie*" case with a probability of success since she was not an innocent purchaser for value without notice of the suit land; compared to the 1st Defendant/Respondent who has demonstrated the root of his title was anchored on a public auction as a result of unpaid land rate arrears to the 3rd Defendant/Respondent. Further the Plaintiff/Applicant had not produced the pleadings and judgement in Civil Case SRMCC ELC 14 of 2019 that purported to lift the court orders No. B2, B3, B5 and grant Osman Alikongo Mutahi title to the suit land. The Counsel submitted that the Plaintiff/Applicant had no tangible interest in the suit land and could not be compensated for any loss. They argued that the balance of probability tilted in favour of the 1st Defendant/Respondent who was in occupation of the suit land. The Honorable Court was urged to dismiss the application with costs.

C. The Written Submission by the 2nd Defendant/Respondent

19. On 14th January 2022, The Learned Counsel the law firm of Messrs. Sherman Nyongesa and Mutubia Advocates for the 2nd Defendant/Respondent filed their written submissions. Mr. Mutubia the Learned Counsel submitted that although the Plaintiff/Applicant alleged to have purchased the suit land from Osman Alukongo Mutahi, but the purported sale was not supported by any completion documents such as transfer form, receipt of land rates, stamp duty and transfer fees. Further, the Plaintiff/Applicant could not have acquired the title after 16th October 2012 as there was a prohibition on the register placed by the 3rd Defendant/Respondent. Therefore, they argued that the actions by the Plaintiff/Applicant amounted to admission of forgery and fraud. Additionally, contention was that the said Osman Alukongo Muhati could not have obtained the title through the Civil suit ELC No. 14 of 2019, on the ground that no order was annexed to prove its existence and the pleadings thereto. The Counsel argued that the Plaintiff/Applicant could not seek prayers challenging the judgement in CMCC 103 of 2012 without first setting aside the judgement or

preferring an appeal. Hence, the Counsel opined that the present application was an abuse of the court process. The Counsel further argued that the judgement and decree in Civil case CMCC 103 of 2012 stood as the same had never been challenged by the Plaintiff/Applicant.

20. The Counsel maintained that the 2nd Defendant/Respondent filed the Civil Case CMCC No. 103 of 2021 in the Magistrate's court since the jurisdiction to hear and determine land rates as demanded by the county government was vested upon the Resident Magistrate's court as provided for by the Rating Act. The Learned Counsel submitted that since the Plaintiff/Applicant failed to exhibit crucial transactional documents before court, it showed that she was engaged in a fraudulent transfer of the suit property and her title was null and void.

D. The 3rd Defendant/Respondent's Written Submission

21. On 8th December 2021, the Learned Counsel for the 3rd Defendant/Respondent herein the law firm of Messrs. Miller & Company Advocates filed written submissions. M/s. Kaguri, the Counsel submitted that the Plaintiff/Applicant had sought the court orders in finality at an interim stage, making the application incompetent and devoid of merit. They argued that the same would need full trial before they were finally granted by court. The Counsel was guided by the case of **"Oksana Investment Supplies Limited - Versus - Alice Wanjiru Wamwea (2019)eKLR** where it was held that court should not grant interim relief which amounted to final relief to submit that the Plaintiff/Applicant was not entitled to be seeking for permanent orders in an interlocutory application.

22. On whether the Plaintiff/Applicant had met the conditions set out in the famous case of Giella (supra), to entitle her to injunctive orders, the Counsel submitted that: on prima facie case he claimed that the title to the suit land was in the names of 1st Defendant/Respondent after he purchased it at a public auction, and as such the Plaintiff/Applicant had no title whatsoever. Indeed, as the suit land was registered in the name of Suleiman Ahmed Ali Mohamed at the time of the said auction. On the second limb, the Counsel submitted that its only through a full trial where oral evidence would be tendered could the purported loss be ascertained by court, but as at the moment the Plaintiff/Applicant stood to suffer no loss that could not be compensated by an award of damages. On the balance of convenience, the Counsel submitted that it tilted heavily in favour of the 3rd Defendant/Respondent having established that it had an overriding interest over the suit property for claim of unpaid rates and having undertaken the rightful procedure to recover the same. Further, they averred that the Plaintiff/Applicant had not established how she came to be in possession of the subject matter. They urged the Honorable Court to dismiss the application with costs to the 3rd Defendant/Respondent.

VII. Analysis and Determination

23. I have carefully read and considered the pleadings herein the written submissions cited authorities and the relevant Provisions of the law made by the Learned Counsels. In order to arrive at an informed decision, the Honorable Court has framed the following three (3) issues for determination.

(a) Whether the orders sought by the Plaintiff/Applicant being of permanent nature can be granted at the interlocutory stage.

(b) Whether the Notice of Motion application dated 27th July, 2021 meets the required temporary injunction under Order 40.

(c) Who will bear the costs of the Notice of Motion.

ISSUE NO. (a) Whether the orders sought by the Plaintiff/Applicant being of permanent nature can be granted at the interlocutory stage.

Brief Facts:-

24. The first issue The Honorable Court would like to deal with is the prayers sought in the application in relation to the prayers sought in the main suit. In the Plaint dated 27th July 2021 the Plaintiff/Applicant seeks:-

a) The Magistrate court had no jurisdiction to issue orders in CMCC 103 of 2012

b) Cancellation of the 2nd Defendant's sale and transfer of ownership of the suit land to the 3rd defendant for being illegal;

c) An order to the 4th Defendant/Respondent to rectify his records and register the plaintiff as the proprietor of the suit land.

This Honorable Court has noted that similar orders are sought in the application. They are:-

- a) Cancellation of the Orders of court directing the auction of the suit land;
- b) An order of the court that the applicant is the registered owner of the suit land;
- c) The 4th Defendant/Respondent to be ordered by court to cancel the 1st Defendant/Respondent's title to the suit land and register the Plaintiff/Applicant as the owner.
- d) Magistrate court had no pecuniary jurisdiction over the suit land.

25. The nature of the orders sought by the Plaintiff/Applicant will mark the final determination of the suit at an interlocutory stage. The Plaintiff/Applicant herein has invited court to determine with finality some much contested issues between the parties based on affidavit evidence at an interlocutory stage, so that the purpose of hearing the suit will no longer readily apparent. Ownership of the suit land as well as cancellation of a certificate of title are questions of finality that cannot be determined on affidavits. What the court is called to determine at an interlocutory stage of an interlocutory injunction, is whether there is a prima facie case with a probability of success, not necessarily a case that must succeed. By determining these finality orders at this stage would be engaging in a mini trial and effectively determining the entire suit on the basis of affidavit evidence without the benefit of holding proper hearing entailing adducing of both oral and documentary evidence and cross-examination of the witnesses. For this reason alone, the Honorable Court will therefore not consider all the prayers in the application which result in granting finality relief claimed in the main suit at this interlocutory stage.

26. In the given circumstances and based on the forgoing, the Honorable Court is left with only the issue of whether the Plaintiff/Applicant has met the conditions for the granting of an interlocutory injunction as set out in **Giella – Versus - Cassman Brown & Co Ltd (1973) EA 358**, where it was stated:- ***“First an applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”***

27. The three (3) conditions set out in the case of **Giella (Supra)**, need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of:- **Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others [2014] eKLR**, ***“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Limited - Versus - Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between”***.

28. In dealing with the first condition of prima facie case, the Honorable Court is guided by the definition melted down in **MRAO Limited – Versus - First American Bank of Kenya Ltd & 2 others (2003) KLR 125**, ***“So what is a prima facie case, I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself would conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”*** The Plaintiff/Applicant avers to be the legal and registered owner of the suit land and annexed a Certificate of title issued on 7th February 2020. She claims to have bought the same from one OSMAN ALUKONGO MUHATI and annexed his title issued on 14th June 2019, who acquired title pursuant to a

court order in the Civil Case of CM ELC 14 of 2019 which ordered the lifting of court orders No. B-2, B-3 and B-5 and granted Osman Alukongo Muhati as the registered owner. Further she claims that the purported public auction that was carried out by the 2nd Defendant/Respondent on behalf of the 3rd Defendant/Respondent was illegal and ought to be cancelled.

29. The 1st, 2nd and 3rd Defendants on the other hand, have rejected the Plaintiff's title to the suit land. The 1st Defendant/Respondent claims he is in occupation of the suit land as the registered owner, as he was issued with a certificate of title on 9th February 2021. He alleges it was issued to him after he purchased the suit land at a public auction, following the orders of court issued in the Civil Case CMCC 103 of 2012. The 2nd Defendant supported the title to the suit land 1st Defendant/Respondent's and denied that the Plaintiff/Applicant or her predecessor to title Osman Alukongo Muhati ever had ownership to the suit land. Further it was averred that the suit land was initially owned by the Suleiman Ahmed Ali Mohamed who defaulted in paying land rates to the 3rd Defendant/Respondent, hence the court issuing orders that the same be sold by way of Public auction.

30. Arising from the surrounding facts, there is no doubt in the mind of court that there are two different certificate titles issued to the suit land one. One is held by the Plaintiff/Applicant issued on 7th February 2020 and the one held by the 1st Defendant/Respondent issued on 9th February 2021. There can only be one title to a suit land within the meaning and Provisions of Section 26 of the Land Registration Act, for this very reason, there is need for court to go to the root of each title in order to determine which of the two is lawful. Both parties have alleged fraud on each other, and it has been held before to be trite law under the provisions of Section 104 to 107 of the Evidence Act Cap 80 that where fraud is alleged it must be specifically pleaded and particulars thereof given. Court can only determine allegations of fraud with finality during a proper full trial and not on conflicting affidavit of evidence.

31. On 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 facie, 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.”*

32. This Honorable Court has no evidence to the effect suggesting that damages could not have been an adequate remedy. The Plaintiff/Applicant herein avers in her supporting affidavit that the 1st Defendant/Respondent is aggressively bidding to sell the suit land. However, despite that allegation, there is no evidence adduced to prove the steps taken by the 1st Defendant/Respondent to sell the suit land. While on one hand, the Plaintiff/Applicant has not placed material facts before this court that establishes she stands to suffer irreparable injury, the 1st Defendant/Respondent states he is in occupation of the suit land. In considering this second limb the Honorable Court is alive to that fact that land is not the same everywhere and each parcel of land holds different sentimental value to the owners. The Plaintiff/Applicant has not demonstrated to court, that the loss she stands to lose if at all as no standard by which their amount can be measured with accuracy. The issue concerning the Plaintiff/Applicant is that the 1st Defendant/Respondent may sell the suit land, the view of this Honorable Court, the value of land of the suit land can easily be calculated and quantified to the cent.

VIII. Conclusion & Disposition

33. I have carefully considered and weighed the conflicting interest by the parties herein as regards to balance of convenience. Clearly, both parties have interest in the suit land and have invested in it as seen from the two titles issued. At this point, this Honorable court cannot make a clear determination on which of the two title deed is legally, rightfully and properly acquired, until both parties are subjected into an intensive hearing during a full trial.

In the meantime court is called to preserve the title to the suit land and protect the interest of all parties, especially the Plaintiff/Applicant and 1st Defendant/Respondent herein who stand to suffer hardship if the suit land is alienated by either of them.

34. 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 dated 27th July 2021 by the Plaintiff/Applicant be and is unmerited and is hereby dismissed with costs to the 1st, 2nd and 3rd Defendants/Respondents who participated in the hearing of the application.

b) **THAT** for the seek of preserving the suit land, pursuant to the provisions of Section 68 of the Land Registration Act 2012, there be an Order of Inhibition inhibiting the registration of any dealings with Mombasa/Block XVII/92 until further orders of this court or until this suit is heard and finally determined.

c) **THAT** the Plaintiff/Applicant be and is hereby ordered to make an application to the Land Registrar, Mombasa, under Regulations 79 of the Land Registration (General) Regulations, 2017 for the registration of the Inhibition order issued in (1) within the next thirty (30) days from the date of this ruling at her Costs.

d) **THAT** for the sake of expediency, this suit should be fixed for hearing and be disposed off within the next ninety (90) days from this date. There should be a mention on 25th April, 2022 for purposes of conducting an intensive Pre – Trial Conference and fixing an appropriate hearing date thereof.

e) **THAT** the Plaintiff/Applicant to bear the costs of the Notice of Motion Application hereof.

IT IS SO ORDERED ACORDINGLY.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 7TH DAY OF MARCH 2022.

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIROMNENT AND LAND COURT

MOMBASA

In the presence of:

M/s. Yumna, Court Assistant;

Mr. Ondieki Holding brief for Mr. Shimaka Advocate for the Plaintiff/Applicant.

Mr. Munyithia Advocate for the 1st Defendant/Respondent.

Non Appearance for the 2nd Defendant/Respondent.

M/s. Kaguri Advocate for the 3rd Defendant/Respondent.

Non Appearance for the 4th Defendant