REPUBLIC OF KENYA

IN THE ELC COURT

AT MOMBASA

CASE NUMBER 113 OF 2021

IZERA ENTERPRISES LTD.....PLAINTIFF/APPLICANT

VERSUS

IMAGE FONT LTD.....DEFENDANT/RESPONDENT

RULING

1. Before this Honorable Court is the Notice of Motion application dated 5th July, 2021 and filed on the same date. The Plaintiff/Applicant also filed a Plaint and Verifying Affidavit sworn by one GITONGA WAMBUGU KARIUKI both dated 5th July, 2021 and other relevant documents as required by the provisions of Order 11 of the Civil Procedure Rules, 2010 (Hereinafter referred to as "The C.P.R). awaiting for confirmation and pre - trial conference to set down the matter for full trial accordingly.

The Plaintiff/Applicant filed the aforesaid application *"ex – parte"* under a Certificate of Urgency on 5th July, 2021 and the honorable court granted them temporary injunction orders being prayers 1 and 2 where it was certified the application as urgent and that pending *"inter - partes* hearing of the said Notice of Motion application the Defendant/Respondent by itself, agent and/or servants be restrained from making any demands on the Plaintiff/Applicant or its agents particularly with regard to a refund of the deposit of the purchase price that had been paid up by the Defendant/Respondent in pursuance of the sale agreement dated 11th February, 2021 for the sale of a portion of land measuring 2000 acres to have been excised from all that parcel of land known as Land Reference Numbers 12177/11 (Original No. 12177/7/3). CR. No. 70404 (Hereinafter referred to as "The Suit Property"). The agreement terms and conditions stipulated thereof had been duly entered between the Plaintiff/Applicant and the Defendant/Respondent respectively.

2. Further at the ex - parte stage, the honorable court directed that the pleadings be served upon the Defendant/Respondent for the inter - partes hearing on 28th July, 2021. Upon effecting service of the pleadings as directed, the Defendant/Respondent filed the following documents:-

a) A Memorandum of appearance dated 19th July, 2021 and filed on 21st July, 2021.

b) A Replying Affidavit dated 19th July, 2021.

c) A 12 paragraphed Grounds of Opposition dated 19th July, 2019 and filed on 21st July, 2021.

d) A Statement of Defence, Counter Claim, and a Verifying Affidavit dated 19th July, 2021 and filed in court on 21st July, 2021.

e) A list of several authorities.

Likewise, upon the Defendant/Respondent effecting service of with the above pleadings, the Plaintiff/Applicant filed and served a Reply to the Defence and a defence and the Counter Claim dated 26th July, 2021 and filed on 27th July, 2021.On 5th August, 2021 when this matter came up for *"the inter – parte"* hearing to the Notice of Motion application dated 5th July 2021, court directed that it be canvased by way of written submissions. Subsequently, the Plaintiff/Applicant prepared their written submissions together with a list of several authorities dated 26th August 2021 and filed on the same date. Thereafter, the Defendant/Respondent prepared their written submissions together with several authorities dated 14th September 2021 and filed in court on 15th September, 2021. The matter was slated for hearing on 21st September, 2021. On this material day, upon request by the Plaintiff/Applicant Advocate Mr. Gikandi Ngubuini and the Defendant/Respondent's Advocate Mr. Njuguna Paul Chuchu (Hereinafter referred to as *"The Plaintiff/Applicant Advocate"* and *"the Defendant/ Respondent Advocate"* were allocated brief moment to highlight on the salient emerging issues from their filed pleadings and written submissions. During their oral submissions, the learned Counsels were very robustly articulate, elaborate and hence extremely helpful to this honorable court. I sincerely thank them a lot for their diligence, dedication and resilience *"ex – parte"*. Thereafter the matter was reserved for delivery

of ruling on 30th September, 2021 through virtual means.

II. The Plaintiff/Applicant's case

3. The Notice of Motion application dated 5th July 2021 seeks for the following orders *inter alia*:-

> ***a) That pending the inter - parte hearing of this application, the Defendant/Respondent by itself, agent and/or servants be restrained from making any demands on the Plaintiff/Applicant and its agents particularly with regards to a refund of the deposit of the purchase price that were paid by the Defendant in pursuance of the sale agreement for the sale of a portion of land measuring 2000 acres to be excised from all that parcel of land known as Land Reference Numbers 12177/11 (Original No. 12177/7/3). CR. No. 70404 made between the Plaintiff/Applicant and the Defendant/Respondent dated 11th February, 2021.***
>
> ***b) That pending the inter - parte hearing of the suit, the Defendant/Respondent by itself, agent and/or servants be restrained from making any demands on the Plaintiff/Applicant and its agents particularly with regards to a refund of the deposit of the purchase price that were paid by the Defendant in pursuance of the sale agreement for the sale of a portion of land measuring 2000 acres to be excised from all that parcel of land known as Land Reference Numbers 12177/11 (Original No. 12177/7/3). CR. No. 70404 made between the Plaintiff/Applicant and the Defendant/Respondent dated 11th February, 2021.***

4. Mr. Kariuki held that he was the Managing Director of the Plaintiff/Applicant and hence was fully conversant to the facts of the matter. By its Certificate of incorporation attached, he stated that the Plaintiff/Applicant was a duly incorporated company under the Provisions of "The Companies Act" Cap 486 of the Laws of Kenya. He deponed that the Plaintiff/Applicant was the legal and registered owner of all that plot of land known as Plot Reference No. 12177/11 (Original No. 12177/7/3) CR. No. 70404 measuring 3,188 acres situated in Taita Taveta County No. 6. A copy of the Certificate of the deed - under the Registration of Title Act Cap 281 (repealed) was annexed and marked as proof or on ownership the suit land which was not in dispute.

5. The Managing Director averred that the Defendant/Respondent through series of correspondences, expressed interest in purchasing 2000 acres of land to be hived of from of suit land from the Plaintiff/Applicant which culminated in the execution of the sale agreement a sale agreement terms and conditions stipulated thereof on 11th February 2021. (Hereinafter refered as "The Sale Agreement") . Particularly, the Managing Director relied on Clauses 2, 9 and 15 of the sale agreement. For ease of reference, these terms have been summarized thus:-

a) Parcel of land to be sold – 2000 acres to be excised from the main land.

b) The total purchase price – Kenya Shillings Four Hundred and Sixty Million (Kshs. 460,000, 000/=)

c) A deposit – Kenya Shillings Sixty Nine Million (Kshs. 69,000,000/= upon the execution of the sale agreement being 15% of the purchase price.

d) Completion date: within one hundred and twenty (120) days from the date of this agreement (Simply put its 4 months).

e) Balance of the purchase price:- Kenya Shillings Three Ninety One hundred and Ninety One Million (Kshs. 391,000,000) to be paid upon the completion of the sale transaction, time being of essence.

According to the Managing Director in his deposition, upon the execution of the agreement the Defendant/Respondent made the deposit of Kenya Shillings Sixty Nine Million (Kshs. 69,000,000/=) on understanding that the balance of the purchase price would be paid up after the Plaintiff/Applicant had fully performed all its obligations of the said sale agreement. The portion to be sold was also mutually agreed upon and a sketch plan – prepared to that effect.

6. Further, the Managing Director deponed that the Plaintiff commenced the process of registration of the sub – divisions. The Deed plans and the Certificate of title deed were issued on 25th May, 2021. He held that in the course of time the Defendant would be notified through correspondences of these series of development activities taking place. He averred that in the process, the Plaintiff/Applicant was compelled to substantially incur a lot of resources – time, man hour and money in form of the exercises for the physical planning, surveying, approvals and the registration of the Deep plans.

7. The Managing Director further deponed that after signing the agreement, the Defendant/Respondent through some of its Directors requested to take physical possession of the suit land. They also requested to be introduced to a contractor who would clear the wild and unnecessary vegetations around the perimeter of the 2000 acres and develop a road of a width of 60 feet and to construct a perimeter wall fence. Being interested in ranch management they also requested to be allowed to install two (2) boreholes in order to access water for their livestock.

8. The Managing Director deponed that the Plaintiff/Applicant agreed to all these aforesaid requests and taking that he also lived on it. In actual fact, in the fullness of time the Defendants undertook the said developments. It's for this reason that the Plaintiff/Applicant felt that they would be highly prejudiced if the Defendant/Respondent were at this stage to walk out on it.

9. The Plaintiff/Applicant deponed that they wrote a letter dated 28th May, 2021 to the Defendant/Respondent informing them of the progress made on to the sale transactions – the sub division, the deed plans for the suit property and intention to procure the four (4) certificate of title deeds and intention to complete the registration process within ten (10) days from that date.

Surprisingly on receipt of that letter, the Defendant/Respondent all of a sudden seem to have changed its position. Through a reply to the

above letter by the Plaintiff/Applicant dated 2nd June, 2021 it stated for the very first time raised up fresh matters ostensibly touching on the legality, integrity of the agreement for sale and supposedly the existence of multiple Petitions and cases pertaining to the suit property filed and pending in court.

10. It's the Plaintiff/Applicant's deposition that through a letter dated 4th June, 2021 they clarified all the issues raised by the Defendant/Respondent and also requested the Defendant/Respondent to avail a duly executed Land Control Board Consent application forms to enable the Plaintiff/Applicant obtain the necessary LCB Letter of consent for transfer which would lead to the conclusion of the sale transaction but which the Defendant/Respondent adamantly refused to do so causing the delay in the concluding the transaction.

11. The Plaintiff/Applicant stated vide its letters dated 14th June, 2021 and 28th June, 2021 that the Defendant/Respondent outrightly declared the agreement was null and void and demanded for the refund of the deposit of the purchase price. Although the Plaintiff/Applicant never accepted that the said agreement was invalid, on realizing that there existed a dispute, vide a letter dated 22nd June, 2021, it invited the Defendant/Respondent that they all subject themselves to an arbitrator as the sale agreement made a provisions for arbitration in order to resolve the matter amicably. But the Defendant/Respondent's reaction according to the Plaintiff was that it instead started issuing threats that if the refund had not been effected they would take appropriate legal action against both the Plaintiff/Applicant and its advocates. It was the assertion by the Plaintiff/Applicant that the position taken by the Defendant/Respondent to exit from it was not founded in the agreement.

12. The Plaintiff/Applicant held that should the demands by the Defendant/Respondent be complied with several issues would go unresolved. These are:-

a) The actual fate of the sale agreement or the supplementary agreement

b) Whether there was any breach to the terms of the agreement and what are the consequences

c) How would the Plaintiff/Applicant be compensated for the expenses they already incurred.

d) What would happen to the changes already effected by the Defendant/Respondent on the suit land? Vis a vis the damages that they had occurred. The threats by the Defendant/Respondent were calculated to arm-twist the Plaintiff/Applicant to agree to the refund and which by itself was a breach of the agreement and hence it was necessary to be granted an injunction order with costs.

III. The Defendant/Respondent's case

13. As indicated above the Defendant/Respondent upon being served they responded accordingly. From the 12 Paragraphed grounds of opposition and the Replying Affidavit dated 19th July, 2021, the Defendant/Respondent averred in summary as follows:-

a) The entire suit and the application were frivolous, vexatious, scandalous and an abuse of low and due process.

b) The application for injunction orders failed to disclose any cause of action against the Defendant/Respondent.

c) The Plaint was fatally and incurably defective for failure to comply with the provisions of Order 4 Rule 2 of the CPR, 2010 and hence incapable of supporting the motion.

d) The Plaintiff/Applicant was guilty of non-disclosure of material facts.

e) The Sale agreement which was the basis of the suit was a nullity *ab-initio* both for want of execution and lack of Land Control Board Letter of consent issued under the provision of Section 3 of both the Contract Act Cap 23 and Section 6 of the Land Control Act, Cap 302 respectively.

f) The Sale agreement had expired by effluxion of time and it was null and void hence incapable of sustaining any cause of action in law.

g) The supporting affidavit was incurably and/or fatally defective in law for failure to conform with the mandatory provisions of Order 19 of CPR 2021 and should be struck out with costs.

h) There was no *prima facie* case made out by the Plaintiff/Applicant:-

(i) To warrant being granted the temporary injunction order sought.

(ii) The provisions of Order 40 rules 1 & 2 of the Civil Procedure Rule were not applicable as there was no property in dispute between the Plaintiff/Applicant and Defendant/Respondent

(iii) The orders sought were tantamount to asking the court to sanction an illegality and/or forgery by the Plaintiff/Applicant.

(iv) The title deed to the property to be sold was an outright forgery and/or fraud. Court should not be seen to be supporting such an illegality.

In the long run and based on these grounds of opposition and the contents of the replying affidavit, the Defendant/Respondent urged the court to dismiss the Plaintiff/Applicant's application with costs.

IV The Submissions.

A. The Submissions by the Plaintiff/Applicant

14. The Plaintiff/Applicant's Advocate submitted that upon the execution of the sale agreement and following the payment of the deposit as agreed the Defendant/ Respondent moved into the property and took vacant possession for the suit property – through delivery of fencing posts, carrying out of various works such as drilling of two (2) boreholes, stock piling of treated timber fencing poles, clearing of mature vegetation on a portion of the land measuring 13 Km. by 20 M (approximately 67 acres of Land) causing a big destruction to the suit land. According to him, from the said development activities, it meant that no other person could be willing to purchase the land.

15. The Plaintiff/Applicant Advocates argued that It was for these reason that, in default of the terms and conditions of the sale agreement by any party the other party should forfeit 10% of the purchase price. He submitted that the vendor was always willing and ready to finalize the transaction and transfer land to the purchaser. He opined that the Defendant/Respondent's actions indicated that it was committed to the said transaction and the Plaintiff/Applicant had already created legitimate expectation that the Defendant would act in accordance to the terms and conditions stipulated in the sale agreement it's their submissions that the Defendant/Respondent should therefore be estopped from renegating on the agreement. He cited the principle of Estoppel as a principle of justice and equities and the provisions of Section 120 of "The Evidence Act Cap 80" and relied on the decision of ***John Mburu –Vs- Consolidated Bank Of Kenya (2015)eKLR*** to support this point of law**.**

16. The Plaintiff/Applicant Advocate further submitted that on the allegations meted on them by the Defendant/Respondent on the integrity of the agreement and non - disclosure of material facts to the effect that the company trading in the names and style of Zinger Enterprises Limited had not been a major shareholder of the Plaintiff/Applicant, it held that the Defendant/Respondent had been totally dishonest about the issue as the Plaintiff/Applicant had referred the Defendant/Respondent to the relevant resolutions which indicated that Mr. Wambugu Gitonga Kariuki and Wanjau Wambugu were shareholders of the company Zinger Enterprise Limited and had been authorized to look for buyers to the suit property and to sign the necessary conveyancing documents on behalf of the said company hence there were no bad intentions on their part.

17. The Plaintiff/Applicant's Advocate further opined that there existed no cases pending before any court of law where the Plaintiff/Applicant had been sued by any party with regard to the integrity of the title held by the Plaintiff/Applicant over the suit property. He asserted that the attempts made by Sagalla Ranchers to invalidate the Plaintiff/Applicant title over the suit property were thwarted in ELC (Mbsa) No. 210 of 2013 and ELC (Mbsa) No. 175 of 2013 – as both were determined by being dismissed with costs in favour of the Plaintiff/Applicant

Indeed the Plaintiff/Applicant's advocate submitted at length the nature, scope and meaning of all these court cases in so much details but which for purposes of the interlocutory matter before court, I wish not to belabor on them at the moment as they are not necessarily pari material before this court at this early stage of the suit.

18. The Plaintiff/Applicant's advocate asserted that the Plaintiff/Applicant was the legal and registered owner and proprietor to the suit property. It had been in occupation of the suit property for over ten (10) years without any interruptions or interference from any person claiming ownership of the same. He stressed that there was no caution, restriction or encumbrance registered against the title held by the Plaintiff/Applicant over the property.

19. On the allegation of forgery to the Plaintiff/Applicant's title deed as alleged by the Defendant/Respondent, the Plaintiff/Applicant submitted that this was a serious allegation and which ought to be pleaded and proved by the party alleging. On the said issue they relied on the court of Appeal case of ***"Vijay Morfaria –Vs - Nansingh Madhu Singh Darbar & another (2000) eKLR*** and the provisions of Section 107 of the Evidence Act Cap 80 of Laws of Kenya.

20. By and large, it was the submissions by the Plaintiff/Applicant's Advocate that there existed a genuine dispute. This was whereby – the Plaintiff/Applicant maintained that it entered into a valid agreement with the Defendant/Respondent which was not void or voidable. On the other hand the Defendant/Respondent firmly held that the agreement was null and void for several grounds. These included want of execution, non disclosure of material facts and effluxion of time among others. As a result, the Defendant/Respondent was now demanding for a refund of the deposit of the purchase price. To this, the Plaintiff/Applicant maintained that in such given circumstances, there was a well laid down legal process enshrined in the agreement and which ideally ought to be followed as the terms of this agreement were binding to both parties.

21. The Plaintiff/Applicant argued that since the Defendant/Respondent had to forfeit the 10% of the purchase price, the Plaintiff/Applicant was willing to release to the Defendant/Respondent a sum of Kenya Shillings twenty three Million (Kshs. 23,000,000/=) as the Defendant/Respondent was no longer willing to go on with the transaction and continue g to hold a sum of Kenya Shillings Forty Six Million (Kshs. 46,000,000/=) to be held by the Plaintiff/Applicant's Advocate. On the other hand, they contended had they been the ones in default, the Plaintiff/Applicant would have had to release a sum of Kenya Shillings Sixty Nine Million (Kshs. 69,000,000/=) to the Defendant/Respondent and paid a further amount of Kenya Shillings Forty Three Million (Kshs. 43,000,000/=) being the envisaged 10% of the purchase price as per the terms and conditions of the sale agreement. But in this case, they argued that it was the Defendant/Respondent to bear the brand as the party that breached the contract. To buttress their argument on this aspect, they relied on the authorities of ***"Pius Kimaiyo –Vs - Co-operative Bank of Kenya Ltd. (2017) eKLR and Sharok Kher Mohamed Ali & Another –vs- Southern Credit Banking Corporation Ltd. (2008) eKLR.*** All on record.

22. With regard to the arbitration clause in the contract clause – the Plaintiff/Applicant asserted that although an arbitration clause was factored in the agreement, since the parties herein had submitted themselves to the jurisdiction of this court and taken steps in validation of

the suit therefore felt the dispute should be resolved by court and hence no need to be referred to arbitration. For all these the Plaintiff/Applicant applied to be granted the orders of injunction as prayed and if possible to have the main suit be disposed of in the most expeditious manner possible. I have noted that the Plaintiff/Applicant counsel had an opportunity to fully highlight the written submissions and court took note of all the submission herein.

B. The Submission by the Defendant/Respondent

23. The Defendant/Respondents Advocate in its submissions relied on the grounds of opposition and the Replying affidavit afore mentioned hereof. He held that the Plaintiff/Applicant herein was not entitled to the orders sought as the entire suit and motion herein never disclosed any cause of action, reasonable or otherwise against the Defendant/Respondent as the sole agreement was null and void and incapable of supporting any cause of action in law.

24. The Defendant/Respondent's Advocate argued that while seeking an injunction order in order to preserve the subject matter pending the hearing and determination of the suit, the court has the discretion to issue, discharge or vary and/or even set aside an injunction order if the ends of justice so demanded. In so doing, it had been held that the injunction order could not stand on its own as it was dependent on their being a pre - existing cause of action against the Defendant arising out of an invasion, actual or threatened by him of a legal or equitable right of the Plaintiff for enforcement of which the Defendant was amenable to the jurisdiction of the court. He emphasized that, granting of the injunction was highly dependent on the existence of a cause of action. On this aspect of the submission the Advocate relied on the decishion of ***"Bridge International Academies – Vs - Mwakio Kalondi [2019] eKLR***

25. Further, the Defendant/Respondent's Advocate in its submissions referred court to the prayers sought by the Plaintiff/Applicant in the filed Plaint holding that the Plaintiff/Applicant's was merely seeking for the court to regularize, declare and/or remedy the agreement and therefore this made the said agreement null and void. He reiterated and stressed that no cause of action could be sustained for the following numerous reasons:-

a) The agreement was not enforceable for want of proper execution by the Plaintiff/Applicant under the provisions of Section 3 of the Laws of Contract Act and Section 37(2) and (3) of the Companies Act of 2015 having been executed by parties who were neither directors nor shareholders of the Plaintiff/Applicant's company.

b) As per Clauses 1.1 (b) and 12 of the agreement, the transaction ought to have been completed 120 days upon its execution and thus it ceased to have any legal effect on 12th June, 2021. It expired by effluxion of time. It was never extended.

c) There had been non - disclosure of material facts by the Plaintiff/Applicant on the existence of multiplicity of pending suits and Petitions instituted on the Plaintiff/Applicant's title deed to be the suit land.

d) The Plaintiff/Applicant's failure to obtain a letter of consent from the LCB to transfer the property to the Defendant/Respondent as required by the provisions of the Land Control Act Cap 302.

e) The Plaintiff/Applicant's failure to provide the Defendant/Respondent with the completion documents authored in Clause 4.1 of the agreement todate.

f) The Plaintiff/Applicant's failure to grant the Defendant/Respondent with vacant possession as per the provision of Clause 6.3 of the agreement. On this part of the submissions, the Defendant/Respondent relied on the decisions of "***Festus Ogadia –Vs - Haus Molliri [2009] eKLR*** and the ***Court of Appeal (Nairobi) Civil Appeal No. 165 of 2007 – D. Njogu & Co. Advocates – Vs - National Bank of Kenya Ltd. [2016] eKLR .***

g) The Plaintiff/Applicant filed the case one month after the time for the agreement had expired.

26. The Defendant/Respondent's Advocates submitted that the Plaintiff/Applicant had not met the principles laid out in the case of ***Giella – Vs - Cassman Brown*** to warrant being granted the injunction orders sought as provided under Order 40 (1) and (2) of the Civil Procedure Rules 2010. They held that the Plaintiff/Applicant had failed to demonstrate that it had *"a prima facie"* case with a probability of success against the Defendant/Respondent for the reasons elaborately afore stated herein.

27. The Defendant/Respondent's Advocate also submitted that the Plaintiff/Applicant had failed to demonstrate that they would suffer any irreparable harm if the orders were not granted and which could not be compensated with damages in that:-

a) The Plaintiff/Applicant was still in possession of the suit land as the Defendant/Respondent had not taken possession and would only take full possession upon making full payment of the purchase price – Clause 6.3

b) Plaintiff/Applicant under Clauses A, B, C & D of the agreement undertook to excise portion A to be sold to the Defendant/Respondent the costs of the said process – time, energy and money were to be incurred by the Plaintiff/Applicant

c) The Plaintiff/Applicant's title deed was issued on 1st May 1972 for a term of 45 years which expired on 1st May, 2017 – 4 years ago and to date there was no evidence whatsoever on record that the term of the title was extended – Thus the Defendant/Respondent submitted the Plaintiff/Applicant proceeded to obtain and issued the Defendant/Respondent with the three (3) title deeds to a property that had already expired – clearly the Plaintiff/Applicant was before court with unclean hands.

The Defendant/Respondent's Advocate argued that his client was a company of good financial standing having undertaken to enter into an agreement for a sum of Kenya Shillings Fourty Six Million (Kshs. 460,000,000/=) and paid up a deposit of Kenya Shillings Sixty Nine

(Kshs. 69,000,000/=) it could therefore be able to refund any damages awarded to the Plaintiff/Applicant and it would be adequate remedy. To buttress their submissions the Defendant/Respondent relied on the decisions of the Court of Appeal – ***Director of Public Prosecution – Vs - Justus Mwendwa Kathenge & 2 others [2016] eKLR; and Nguruman Ltd case Civil Appeal NO. 266 OF 2016***

28. The Defendant/Respondent argued that the Plaintiff/Applicant having failed on principles 1 & 2 considered for granting temporary injunction the balance of convenience tilted in favour of refusing and/or decline to grant the injunction orders sought and vacate the interim orders granted by this honourable court on 6th July, 2021 and dismiss the application with costs.

VI. Analysis and determination

29. I have carefully and critically considered all the Plaintiff/Applicant's claim against the Defendant/Respondent, the parties filed pleadings – the oral and written submissions, the bulk of authorities tendered and the provisions of law applicable with reference to the said application dated 5th July, 2021 by the Plaintiff/Applicant.

In order to arrive at an informed decision, I have framed the following issues to be considered for determination of the injunction prayers sought in the afore mentioned interlocutory application. These are:-

> ***a) Whether there is any cause of action existing in the Plaintiff/Applicant's application and suit against the Defendant which is capable of being adjudicated in the full trial or not and hence need to be preserved by temporary injunction orders pending its hearing and final determination.***
>
> ***b) Whether the Plaintiff/Applicant has met the threshold as set out under Order 40 Rule 1 and 2 of the Civil Procedure Rules 2010 to warrant being granted an interlocutory temporary injunction orders to preserve the suit property pending the hearing and final determination of the main suit.***
>
> ***c) Whether the parties are entitled to the reliefs sought herein.***
>
> ***d) Who will bear the costs?***

ISSUE NO. 1:- ***Whether there is any cause of action existing in the Plaintiff/Applicant's application and suit against the Defendant which is capable of being adjudicated in the full trial or not and hence need to be preserved by temporary injunction orders pending its hearing and final determination.***

To begin with, under this sub – heading, I feel there is need to briefly address the concept of "**the Cause of action"**. According to the Black Law dictionary 9th Edition "***Cause of action" means a group of operative facts giving rise to one or more bases for suing a factual situation that entitles one person to obtain a remedy in court from another person"***

From an except of the book **"The Law of Pleading Under the Codes of Civil Procedure"** ***pg 170 (2nd edition 1899 by Edwin Bryant*** **it states:-**

> ***"…….Cause of action may be defined generally to be a situation or state of facts that entitles a party to maintain an action in a judicial tribunal. This state of facts may be (i) a primary right of the Plaintiff actually violated by the Defendant or (ii) the treated violation of such right, which violation the Plaintiff is entitled to restrain or prevent as the case of actions or suits for injunction or (iii) there may be some doubts as to some duty or right or the right be clouded by some apparent adverse right or claim, which the Plaintiff is entitled to have cleared up, that may safely perform his duty or enjoy his property" (*****Emphasis is mine*****).***

Primarily, based on the these definition and interpretation, my understanding is that the cause of action is a legal theory or grounds of actions, a claim, conduct, occurrence or transaction contained in the pleadings capable of being determined by court. Therefore, on this front I am left to determine whether there exists any cause of action in this case. The answer is affirmative.

Fundamentally, from the pleadings and the proceedings adduced so far by the parties herein, there appears to be a few areas of mutual convergence by the parties. It is not in dispute that the Plaintiff/Applicant, an incorporated company under the Companies Act 2015 are the legal registered owners to all the suit property. They have annexed a certificate of title deed under the Registration of Titles Act Cap. 281 (now Repealed) registered on 1st May, 1972 for a term of 45 years (though elsewhere from records I seem to have seen a copy of title citing a period 99 years). Further it is also not in dispute that from the year 2020 the Plaintiff/Applicant and the Defendant/Respondent also a Company had been exchanging correspondences expressing interest to purchase part of the suit land – measuring 2000 acres to be hived off from the said land upon the sub-division. Indeed, these communication exchanges culminated into the formal preparation and eventual execution of a sale agreement dated 11th February, 2021 terms and conditions stipulated thereof for the purchase of the land at a sum total of Kenya Shillings Four hundred and Sixty Million (Kshs. 460,000,000/=) and indeed a sum of Kenya Shillings Sixty nine Million (Kshs. 69,000,000/=) was paid by the Defendant/Respondent as deposit an amount, which to me is equivalent of 15% (a departure from the conventional conveyancing standard of 10%) of the total purchase price, which was remitted into the Plaintiff/Applicant's advocate account as a stakeholder and the balance of the purchase price being (Kshs. 391,000,000) would be credited into the Plaintiff/Applicant's advocate bank account on or before the completion date in exchange of the compensation documents all well captured under Clause 4.3 of the agreement.

From the interpretation clause of the agreement "the completion date" is defined as "a period of within one hundred and twenty (120) days from the date of execution of this agreement". Ideally, all facts remaining constant, quick computation of time, this period would be lapsing

on 11th June, 2021. It appears the sub-division process commenced in earnest where the land to be sold was also agreed upon and a sketch plan prepared and the registration process of the sub - division of the land, Deed plan and certificate issued on 25th May, 2011 and the Defendant/Respondent notified.

Additionally, it is also not in dispute that though the agreement bore an arbitration clause but by consent of the parties concurred since each of all had submitted to the jurisdiction of the court, that clause got to be compromised. Instead, they opted to have the dispute heard and determined by the Honorable Court.

Be that as it, there are several issues both on facts and law upon which the Plaintiff/Applicant and the Defendant/Respondent seem to be vehemently in bitter contestation. For the sake of time constraints, I have summarized the said issues of disagreement by the parties as follows:-

(a) Taking of vacant possession - While the Plaintiff/Applicant submitted that after the execution of the agreement the Defendant/Respondent took physical possession – causing some development on it, for instance making of a makeshift a road, a fence drilling of two (2) boreholes and dumping of some materials on land – and they annexed some photographs to that effect, on the other hand the Defendant/Respondent has categorically refuted this fact stating that they could never have done so as the Plaintiff/Applicant had still continued being on the land and that they were adhering with and guided by the provisions of Clause 6.3 of the agreement which held they only "be entitled to take exclusive and full legal property only upon the payment of the full purchase price.

(b) The legality and integrity of the sale agreement – vide a letter dated 2nd June, 2021 the Defendant/Respondent raised a myriad of serious issues pertaining to the legality of the agreement and integrity of the whole sale transaction. These included the failure to obtain a letter of consent from the Land Control Board (L.C.B.), the capacity and competency on the execution of the sale agreement, the multiplicity of suits and petitions filed before this court on the property, the expiry of the completion date by effluxion of time as per the provisions of Clause 12.0 of the agreement, the legality of the title deed and hence to a point of demanding for the refund of the deposit and renegation of the agreement altogether.

(c) The breach of the sale agreement – the scope, nature and meaning of it –as to whether indeed there was a breach or not who had caused it and its ramifications therefrom.

(d) In the event that there was a breach of contract if at all what would be the legal consequences as far as the provisions of the Law of Contract and the agreement vis – a vis the provision of Clauses 9.1, 9.2, 9.3 and 9.4 were concerned.

(e) The issue of compensations and damages such as the costs incurred in embarking of the physical planning, Surveying, approvals, registration and the fact that the Defendant/Respondent had already carried to out some activities on the suit land changing its facelift altogether if at all as being claimed by the Plaintiff/Applicant in this process.

These are issues which raises serious cause of action. Certainly, they cannot be capable of being determined at the interlocutory stage but through a full trial where both oral and written evidence will be produced in chief and cross examination for the veracity of the facts checked in accordance with the procedures and laid down under the provisions of law particularly "The Evidence Act" Cap. 80. Hence, the court's finding under this heading is that indeed there exists serious and in - depth cause of action that the court needs to make a determination after a full trial. In saying so, I fully concur with legal ratio encompassed from the authority cited by the Defendant/Respondent in the ***case of "Bridge International Academies – Versus - Mwakio Kalondi [2019] eKLR*** which held that:-

"A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent on their being a pre - existing cause of action against the Defendant arising out of an invasion, actual or threatened by him of a legal or equitable right of the Plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court.

ISSUE NO. 2 - ***Whether the Plaintiff/Applicant has met the threshold as set out under Order 40 Rule 1 and 2 of the Civil Procedure Rules 2010 to warrant being granted an interlocutory temporary injunction orders to preserve the suit property pending the hearing and final determination of the main suit.***

Under this sub – heading, I must determine whether the Plaintiff/Applicant is entitled to temporary injunction orders that it prayed for. In deciding whether to grant the temporary injunction I must fully admit that both the Plaintiff/Applicant and Defendant/Respondent have extensively submitted under this heading citing the relevant provision of law and authorities, including the precedent and principles set out on the now famous case of ***"GELLA –VERSUS- CASSMAN BROWN [1973] E.A. 358*** . From this famous precedent, the conditions for granting of an interlocutory injunction were settled as follows:-

"The condition for the grant of an interlocutory injunction are now, I think well settled in East Africa.

First, an applicant must show a prima facie case with a probability of success.

Secondly an interlocutory injunction will be ne normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.

Thirdly, if the court is in doubt, it will decide an application on the balance of convenience".

Before proceeding further the fundamental issue to ponder here is whether the Plaintiff/Applicant made **"a prima facie case"** with a

probability of success. In the case of ***"MRAO –VS- FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS [2003] eKLR 125 "a prima facie"*** case was described as follows:-

> ***"A prima facie case in a civil application includes but not confined to "a genuine and arguable case", it is a case which, on material presented to the court a tribunal property directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter"***

Under the 1st issue herein on whether there arises and/or exists any cause of action, it is evident the answer is in affirmative. The sale transaction of the said land commenced well from 11th February, 2021. I have noted that parties were fond of exchanging correspondences as a means of communication which is highly commendable as the records speaks louder than mere verbal words. It appears everything was moving smoothly until the Plaintiff/Applicant wrote a letter dated 28th May, 2021 marked as "GWK -4" I guess routinely informing the Defendant/Respondent on progress made so far and the future plans vide the following words:-

> ***"We anticipate to complete the registration process referred to in the above paragraph within the next ten (10) days from today's date"***

I am not sure whether the Plaintiff/Applicant meant to have the registration of documents process or the sale transaction altogether to have been completed by 7th June, 2021. Apparently, there seem to be bit of grey area from this statement and which may only be clearly deciphered and fully elaborated during the full trial.

However, upon receipt of this letter by the Defendant/Respondent hell broke loose. Vide a reply dated 2nd June, 2021 the Defendant/Respondent appeared to have completely changed its mind on the whole sale transaction from the numerous issues raised on the legality of the Plaintiff/Applicant's company, the numerous court cases and petitions over the suit property pending in this court hence the allegations on non-disclosure of material facts on the part of the Plaintiff/Applicant and total denial of having taken vacant possession. Evidently, it is not rocket science that by this moment, the Defendant/Respondent for reasons well known to them, ceased bearing any more interest in this transaction. Apparently, their relationship had irretrievably entered the door of no return. It was a replica of the biblical house built on sand. Thence, their only huddle was how to back out of it without incurring any single penny or damages whatsoever. It is rather unfortunate that these issues were emerging almost at the tail end of the sale transaction. From the facts adduced, the whole issue set the Plaintiff/Applicant off balance. Although it attempted to ameliorate the situation by making emphatic responses the said issues vide the several letters, but graphically it appears the dice had already been casts as the horse appears to have already bolted from the stable. It was too late in the day! According to the Plaintiff/Applicant thereafter the Defendant/Respondent started demanding for a refund of the deposit made.

As a rejoinder, the Plaintiff/Applicant has admittedly proposed that they would be ready to refund sum of Kenya Shillings Fourty Three Million (Kshs. 43,000,000/=) while retaining a sum of Kenya Shillings Twenty Three Million (Kshs. 23,000,000 which is the 10% of the total purchase price. In furtherance to this, they also indicated that should they be the ones in default, they would be ready and willing pay off the Defendant/Respondent. On the contrary, to the said the Defendant/Respondent will not hear of it is as according to them there is no reasonable nor legal justification for such a preposition. My conclusion therefore is that the Plaintiff/Applicant has shown there exists an arguable and genuine **"Prima facie"** Claim to either part or all of the purchase price sum having been engaged all along and working towards the fulfilment of the obligation of the sale agreement. The Plaintiff/Applicant has shown they **<u>may</u>** have a high chance of success at the main trial.

On the 2nd principle - Does an award of damages suffice to the Plaintiff/Applicant? The Defendant/ Respondent until much later on the day appeared to be ready and willing to back roll the process with case. Indeed, it was capable of depositing a sum of Kenya Shillings Sixty Nine Million (Kshs. 69,000,000/=) onto the Plaintiff/Applicant bank account without any difficulties. Therefore, for this very reason he court would like to grant the Defendant/Respondent the benefit of doubt that in the event of any damages cause arising from the breach that making 10% of deposit of the purchase price a sum of Kenya Shillings forty six million (Kshs. 46,000,000/=) would not be difficult at all to raise. For this reason I agree with the Defendant in its submission that it is capable to refund any damages awarded and hence damages if any would be an adequate remedy. However, on the flip side, it is implied in the ordinary conventional conveyancing practice that the Vendor often tends to incur a substantive – statutory or otherwise - expenses at the initial stages of the transactions. From the legitimate expectation created, they confidently utilize the deposit proceeds to achieve this end. In this case though strongly disputed, the Plaintiff/Applicant used the sums for the various activities stated herein. Additionally, the Plaintiff/Applicant owns the suit land and which court can order that the Defendant/Respondent be compensated whatsoever as damages.

On the 3rd principle regarding the balance of convenience I proceed to allow the application dated 5th June, 2021 and grant the temporary injunction in favour of the Plaintiff/Applicant as there will be need to preserve the suit property and the deposit sum pending the hearing of full trial.

<u>ISSUE NO. 3:-</u> ***Whether the parties are entitled to the reliefs sought herein.***

The Plaintiff/Applicant is entitled to the orders sought in the notice of motion application dated 5th July, 2021. Hence, in the interest of justice, equity and conscience, I now direct as follows:-

a) That temporary injunction be and is hereby granted to the Plaintiff/Applicant as prayed under the notice of motion application dated 5.7.2021 in terms of preserving the title deed to the suit land restraining both the Plaintiff and Defendant from undertaking any transaction on the suit land whatsoever until the suit is heard and determined.

b) That the conventional conveyancing 10% of the purchase price being Kshs. 46, 000, 000.00 to be derived from the total deposit sum of Kshs. 69,000,000/= to be placed in an interest earning joint Escrow account within the next fourteen (14) days to be held by

both law firms of M/s. Gikandi Ngubuini Advocate and Njuguna Kiai & Kahari Advocates at a bank of reputable 1st tier status according to the provisions of the Banking Act and Banking Regulations of the Laws of Kenya to be mutually agreed by the parties until this case is heard and determined.

c) That this matter be fixed for full trial on priority basis within the next ninety (90) days from today upon conducting the pre - trial conference in accordance with the provisions of Order 11 of C.P.R.)

d) That the costs of the notice of motion to be in the cause.

IT IS SO ORDERED.

Ruling **Delivered, Dated** and **Signed** in Open Court this **30th** Day of **September, 2021.**

HON. JUSTICE L.L. NAIKUNI

JUDGE

(ELC- MOMBASA)

In the presence of:-

M/s. Yumna – the Court Assistant

Mr. Gikandi Ngubuini for the Plaintiff/Applicant.

Mr. Njuguna Paul Chuchu for the Defendant/Respondent