



REPUBLIC OF KENYA



**Aress & 2 others (Suing on their own behalf and on behalf of Phase II Diamond Estate Association) v Ng'ang'a & 5 others; Registrar of Societies (Interested Party) (Civil Suit E242 of 2024) [2024] KEHC 11479 (KLR) (Commercial and Tax) (20 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11479 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E242 OF 2024  
MN MWANGI, J  
SEPTEMBER 20, 2024**

**BETWEEN**

**ABDIRIZAK BISHAR ARESS ..... 1<sup>ST</sup> PLAINTIFF  
FEISAL MOHAMMED ..... 2<sup>ND</sup> PLAINTIFF  
SULEKHA MOHAMED KHALIF ..... 3<sup>RD</sup> PLAINTIFF  
SUING ON THEIR OWN BEHALF AND ON BEHALF OF PHASE II DIAMOND  
ESTATE ASSOCIATION**

**AND**

**DOUGLAS NG'ANG'A ..... 1<sup>ST</sup> DEFENDANT  
MOHAMMED HUSSEIN ..... 2<sup>ND</sup> DEFENDANT  
ABDULLAHI IBRAHIM MOHAMMED ..... 3<sup>RD</sup> DEFENDANT  
MOHAMED ABDULAH OGLE ..... 4<sup>TH</sup> DEFENDANT  
ABDIKADIR AHMED ALI ..... 5<sup>TH</sup> DEFENDANT  
MAHAT DAHIR NOOR ..... 6<sup>TH</sup> DEFENDANT**

**AND**

**REGISTRAR OF SOCIETIES ..... INTERESTED PARTY**

**RULING**

1. There are two applications for determination. The first one, a Notice of Motion dated 2<sup>nd</sup> May, 2024 was filed by the plaintiffs. They seek the following orders-



1. Spent;
  2. Spent;
  3. That pending the hearing and determination of this suit, the Honourable Court be pleased to grant an interim conservatory order directed at the defendants jointly and severally whether by themselves, their agents and/or employees restraining them from managing, handling, or in any way interfering with the affairs of Phase II Diamond Estate Association Likoni Road and its residents and instead the plaintiffs/newly elected officials be allowed to manage the affairs of the Association and Estate;
  4. Spent;
  5. That pending the hearing and determination of this suit, the Honourable Court be pleased to issue an order directed to the interested party to issue an interim certificate recognizing the appointment of new officials;
  6. Spent;
  7. That pending the hearing and determination of this suit, this Honourable Court be pleased to grant a Mareva injunction freezing the Association's Bank Account held at Absa Bank, Queensway Branch, Account Number 2045186159 registered in the name of Phase II Diamond Estate Association and restraining the defendants/respondents by themselves, their servants, agents and/or employees from operating and/or otherwise interfering and/or dealing in any manner with any of the funds held in the stated Bank Account;
  8. Pending the hearing and determination of this suit, the Honourable Court be pleased to grant an order for the appointment of an independent Auditor to audit the accounts of the Association for the last 5 years;
  9. Spent; and
  10. That the costs of this application be provided for.
2. The said application is predicated on the grounds in support of it and the affidavit of Abdirizack Bishar Aress sworn on 2<sup>nd</sup> May, 2024, on his own behalf and on behalf of the officials of the Association.
  3. After going through the application, the supporting affidavit and annexures in support thereof, I granted interim orders in terms of prayers 2, 6 and 9 of the application.
  4. On being served with the said orders, the defendants filed a replying affidavit sworn on 15<sup>th</sup> May, 2024 by Abdullahi Ibrahim Mohamed, the 3<sup>rd</sup> defendant, and the Secretary of Phase II Diamond Estate Association Likoni Road Nairobi. He averred that he swore the said affidavit on his own behalf and on behalf of the 2<sup>nd</sup> to 6<sup>th</sup> defendants.
  5. The plaintiffs filed a further affidavit sworn by Abdirizack Bishar Aress in support of the plaintiff's application dated 2<sup>nd</sup> May, 2024.
  6. The defendants filed a Notice of Motion dated 9<sup>th</sup> May, 2024. The said application has been brought under the provisions of Order 40 Rule 7 of the Civil Procedure Rules, 2010 and the inherent powers of the Court. The defendants seek the following orders-
    1. Spent;
    2. Spent;



3. That the exparte orders made herein on 7<sup>th</sup> May, 2024 be set aside or discharged;
  4. The Court do grant any other relief as it may deem fit in the circumstances; and
  5. Costs of the application be provided for.
7. The application is supported by an affidavit sworn on 9<sup>th</sup> May, 2024 by Abdullahi Ibrahim Mohamed on his own behalf and on behalf of the other defendants. Most of the averments contained in the said supporting affidavit are also captured in the replying affidavit filed by the defendants in opposition to the plaintiffs' application dated 2<sup>nd</sup> May, 2024.
  8. The plaintiffs filed a replying affidavit sworn on 17<sup>th</sup> May, 2024, by Abdirizack Bishar Aress, in opposition to the defendants' application dated 10<sup>th</sup> May, 2024. Having gone through the said affidavit, I note that it is a replica of the plaintiffs' further affidavit that was filed in support their application dated 2<sup>nd</sup> May, 2024.
  9. In response to the plaintiffs' replying affidavit, the defendants filed a further affidavit sworn by Abdullahi Ibrahim Mohamed sworn on 23<sup>rd</sup> May, 2024.
  10. In response to the defendants' further affidavit, the plaintiffs filed a supplementary affidavit sworn on 5<sup>th</sup> June, 2024, by Abdirizack Bishar Aress.
  11. The interested party filed a replying affidavit sworn on 10<sup>th</sup> June, 2024 by Maria Goretti Nyariki, the Registrar of Societies. She confirmed having held a meeting with the parties herein on 2<sup>nd</sup> May, 2024 and giving directions on 3<sup>rd</sup> May, 2024 for elections to be held within forty-five (45) days from the date of the said letter, but the defendants wrote to her on 6<sup>th</sup> May, 2024 requesting her to revoke her decision.
  12. She averred that following the filing of the suit by the plaintiffs herein, she wrote to the parties on 21<sup>st</sup> May, 2024 informing them that she has submitted to this Court's jurisdiction and suspended the earlier directions issued on 3<sup>rd</sup> May, 2024, pending determination of the dispute by the Court.

### **Plaintiffs' submissions**

13. The plaintiffs filed written submissions dated 22<sup>nd</sup> May, 2024. Mr. Abdiaziz, learned Counsel for the plaintiffs submitted that the three main principles to be considered in order for conservatory orders to be granted are that an applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the Court grants a conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*, that if a conservatory order is not granted, the petition alleging violation of, or threat of violation of rights will be rendered nugatory, and that public interest must be considered before grant of a conservatory order.
14. Counsel stated that the plaintiffs are the elected officials of Phase II Diamond Estate, having been elected into office on 13<sup>th</sup> April, 2024 when the members of the Association and the residents of the Estate convened a meeting to elect new leaders. He contended that the defendants had clung onto leadership of the Association since the year 2021, and had been ruling with an iron fist since then. He further contended that the residents of the Estate, who are members of the Association got fed up and with the mis-management and harassment by the defendants and decided to elect new officials who are the plaintiffs herein.
15. He submitted that the plaintiffs are deserving of conservatory orders as the application and plaint establish a prima facie case with a probability of success, and that failure to grant them orders at this stage will render the substratum of the main suit nugatory. He also submitted that the plaintiffs will



suffer prejudice as a result of violations by the defendants, and that it is in the interest of the residents of the entire Estate that the defendants/respondents be restrained from managing and handling the affairs of Phase II Diamond Estate.

16. Counsel cited Nairobi Civil Appeal No. 151 of 2011 Invesco Assurance Co. Ltd v MW (minor suing thro' next friend and mother (HW) [2016] eKLR eKLR, and Judicial Service Commission v Speaker of the National Assembly & another [2013] eKLR, on the definition of conservatory orders.
17. From the above authorities, Mr. Abdiaziz stated that the conservatory orders being prayed for are aimed at preserving the substratum of the matter pending the hearing of the main issues in dispute, such matters being the affairs, monies and management of the Estate, pending determination of the suit filed herein.
18. Counsel submitted that granting of a temporary injunction under Order 40 of the Civil Procedure Rules, 2010 is a matter of judicial discretion, after the Court has considered the facts and applied them to the principles under Order 40 Rule 1(b) of the said Rules. He stated that the plaintiffs herein have proved that the defendants intend to cart away the Association's money held in trust for the residents of Phase II Diamond Estate, domiciled in Absa Bank Queensway Branch, Account No. 2045186159, registered in the name of Phase II Diamond Estate Association, without lawful justification.
19. Mr. Abdiaziz relied on the case of Giella v Cassman & Co. Ltd (1973) EA, where the Court outlined the general principles applicable where an order for an injunction is sought. He also relied on the case of Mrao Limited v First American Bank Kenya Ltd Civil Appeal No. 39 of 2002 cited in the case of Bulk Medicals Ltd v Paramount Universal Bank Ltd & 2 others [2006] eKLR, where the Court echoed the legal position that in order to establish a prima facie case, all that a party is required to demonstrate is the infringement of a right and the probability of the success of the applicant's case at trial. Counsel relied on the Concise Oxford Dictionary of current English, 8<sup>th</sup> Edition p. 950, for the definition of the word "probability".
20. Counsel submitted that the plaintiffs have surpassed the first test for being granted an injunction on the grounds that the defendants have been officials of the Association since the year 2021 and have been misappropriating funds contributed by the residents of the Estate and have been engaging in mismanaging the Estate's affairs, that they have limited the rights of the children to play outside, and that they have limited their playground space in the Estate, that they have forcefully closed and evicted owners of the Estate's shops against the wishes of the residents.
21. Other allegations leveled against the defendants are that there has been lack of transparency in the running of the affairs of the Estate with no AGM being called by the defendants and that there have been no elections, non-provision of financial reports to Estate residents for the past five (5) years and embezzlement of the Estate's collections.
22. Counsel stated that the plaintiffs have also alleged that the defendants have been illegally levying letting fees on the homeowners without any justification or authority from the residents, and that they have engaged in conflict of interest by providing security and garbage collection services to Estate residents, such as, by the outgoing Secretary venturing into the business of security guards. That without competition, he awarded himself the security tender for the Estate and that he has been charging high fees. The plaintiffs' Counsel urged this Court to stop the defendants in their tracks before they ruin the Association and the entire Estate in general.
23. He submitted that a party seeking interlocutory orders is required to satisfy the first and second requirements, and it is only when the Court is in doubt that it considers the third aspect. He urged this Court to find that the balance of convenience tilts in favour of the plaintiffs. He relied on the case



of Jan Bonde Nielsen v Herman Philipus Steyn also known as Hermannus Phillipus Steyn & 2 others [2012] eKLR, where the Court held that it was not strictly bound by the three principles in *Giella v Cassman Brown & Co Ltd* (supra), as a Court could also look at the circumstances of the case generally and the overriding objective of the law.

24. He also relied on the case of *Suleiman v Amboseli Resort* (2004) 2 KLR 589, where Ojwang Ag. J (as he then was), stated that even as the principles in *Giella v Cassman Brown & Co Ltd* (supra) remain the basic test, it was worth adopting a further, more intrinsic test which is in the nature of a general principle, in that the Court in responding to the prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice.
25. Mr. Abdiaziz contended that it was not true that the defendants are the bona fide elected members (sic) of the Association having been elected on 20<sup>th</sup> January, 2024 as they claim in their replying affidavit. He stated that the defendants want to fraudulently and arbitrarily cling onto the leadership of the Association with ulterior motives and not with the intention of properly managing the Estate. Counsel pointed to the fact that only the Chairman of the Association was changed in the impugned elections, which raises questions of authenticity of the said elections.
26. He prayed for the orders sought in the plaintiffs' application to be granted as the plaintiffs stand to suffer immense prejudice and damage that cannot be compensated by an award of damages or costs.

#### **Defendants' submissions**

27. Mr. Tugee, learned Counsel for the defendants stated that the dispute herein relates to the management of the affairs of Phase II Diamond Estate Association Likoni Road Nairobi (Society), duly registered under the *Societies Act* and issued with certificate Registration No. R54042. He also stated that the membership of the Society is mainly drawn from the residents of Phase II Diamond Estate Likoni Road Nairobi.
28. Counsel stated that since its registration, the Society's affairs have been conducted in line with its Constitution, with management of its affairs being conducted by its registered officials who are the defendants herein. He further stated that upon expiry of their initial term, the Society's officials organized an election in line with the Rules of the Society's Constitution in a meeting held on 20<sup>th</sup> January, 2024, whereby most of the defendants were re-elected into office with the exception of the 1<sup>st</sup> defendant, who was replaced as the Chairman by Abdiweli Adan Kalicha, and that they thereafter proceeded to file the requisite returns with the Registrar of Societies.
29. He stated that in the application of 2<sup>nd</sup> May, 2024, the plaintiffs allege to be the officials of the Society, and allege to have been elected as the officials of the Society in a meeting of the Estate held on 13<sup>th</sup> April, 2024, and are seeking various orders to be granted. They also seek to take control the affairs of the Society including the management of bank accounts.
30. Counsel pointed out that this Court granted an order to restrain the defendants from managing the affairs of the Society and in their place, for the plaintiffs to take control of the Society's affairs. That being aggrieved by the said orders, the defendants filed an application dated 9<sup>th</sup> May, 2024 seeking inter alia orders for setting aside the exparte orders granted to the plaintiffs on 7<sup>th</sup> May, 2024.
31. Mr. Tugee stated that the crux of the defendants' argument is that the plaintiffs, who are merely residents of the Estate and not members of the Society, are misleading this Court to orchestrate a coup and impose the plaintiffs, who are strangers to the Society, to take over the affairs of Society to the detriment of its rightful members and officials, and the defendants.



32. Counsel for the defendants contended that this Court does not have the jurisdiction to determine the application by the plaintiffs as under the Societies Act, it is the Registrar of Societies who has the power and jurisdiction in the first instance, to hear and determine disputes relating to Societies registered under the Act. He stated that Section 18 of the Act sets out the procedure to be followed. He termed the current suit and application a blatant disregard of the laid down procedure.
33. Counsel further stated that by the time that the plaintiffs were making the instant application, the Registrar was already seized of the matter, and on 3<sup>rd</sup> May, 2024, the Registrar in exercise of her statutory mandate wrote to the parties making her determination of the matter and directing the defendants who are the bonafide officials on record to inter alia, convene an Annual General Meeting for the purposes of an election of office bearers of the Association within 45 days of the date of her letter.
34. Mr. Tugee submitted that the Registrar is still seized of the matter, and that in law, she is the one who currently has the administrative jurisdiction and statutory mandate to hear and determine all aspects of the current dispute. He argued that the application filed by the plaintiffs goes against the legal principles of exhaustion of other remedies and the doctrine of ripeness. On the latter principle, Counsel stated that the plaintiffs' application as conceived and presented is premature as the Registrar has not rendered a final decision on the matter.
35. Counsel contended that the exparte orders granted on 7<sup>th</sup> May, 2024 are contrary to Article 10 of the Constitution which binds this Court to bear in mind principles of the rule of law, good governance, integrity, transparency and accountability; which principles would be thwarted if this Court seeks to exercise and/or take jurisdiction reserved for another entity or office under the law, which in this case, is the Registrar of Societies.
36. Mr. Tugee relied on the case of *Islamia Madrassa Society v Zafar Niaz & 8 others* [2021] eKLR, where the Court found that the laid down procedure in resolving an impasse on who the officials of the Society therein were, was set out in Section 18 of the Societies Act, which should have been adhered to. The Court therein also found that the action by the plaintiff in filing the suit when it lacked capacity to do so, was a short cut.
37. Mr. Tugee stated that plaintiffs had not proffered an appeal against the Registrar's decision rendered on 3<sup>rd</sup> May, 2024, and that they failed to disclose the said decision even though they filed the suit and the application three (3) days after the Registrar's decision. He submitted that an appeal is the only avenue provided by law to challenge the Registrar's decision, and as such, the plaintiffs are estopped from commencing and/or continuing the current suit guised as a commercial dispute and obtaining orders from the Court through their interlocutory application.
38. On the issue of whether the plaintiffs have the locus standi to bring the proceedings herein, for and on behalf of the Society, Mr. Tugee stated that the plaintiffs are not elected officials of the Society and that they are acting contrary to the interests of the Society, and have not provided any evidence to demonstrate that they are newly elected as alleged or at all. He further stated that the validly elected officials of the Society have already raised the issue with the plaintiffs' documentation that was presented before the Registrar, which has been used to obtain the current conservatory reliefs as falsified, forged, and obtained fraudulently.
39. Mr. Tugee contended that the deposition by Abdirizack Bishar Aress that he is the Chairman of the applicant Society as per paragraph 2 of the supporting affidavit filed by the plaintiffs, and based on which the exparte orders of 7<sup>th</sup> May, 2024 were granted, is false and amounts to perjury.



40. Counsel submitted that the affairs of the Society including its operations, management, meetings, leadership are governed by *the Constitution* of the Society which was adopted by the members in the initial meeting of 1<sup>st</sup> August, 2021. He contended that the plaintiffs herein have never been members of the Society and as such, they do not qualify to be officials of the Society. He referred to Rule 3(a) of the Society's Constitution which provides that any person over the age of 18 who is a resident of Phase II Diamond Park Estate shall be eligible for membership of the Society, subject to the approval of the Committee, upon which one becomes a member, but the plaintiffs only allege to be residents of Phase II Diamond Park Estate and have never officially applied for membership of the Society.
41. He stated that the plaintiffs allege to reside in Phase II Diamond Park Estate, but residing in an Estate ought not be confused with membership of the Society, as membership of a Society is through subscription and not through being a resident of an Estate. He indicated that the plaintiffs have not even attempted to prove their membership in the Society, yet they seek to manage the affairs of a Society to which they do not belong.
42. As to the meeting purportedly held on 13<sup>th</sup> April, 2024, in which the plaintiffs claim to have been elected as officials, Mr. Tugee stated that the purported elections of 13<sup>th</sup> April, 2024 were not held, and the minutes and resolutions produced by the plaintiffs were made up. He submitted that the defendants have produced sworn affidavits from numerous residents who have expressly stated that they never attended the said meeting, and that their names were included without their permission, and with an intention to mislead the Court.
43. Mr. Tugee challenged the minutes of the meeting of 13<sup>th</sup> April, 2024, that refer to an entity known as Diamond Park 2. He stated that the resolution arising from the said meeting indicates that an alternative Association with the name Diamond Park 2 Residents Association was to be registered. He contended that the Diamond Park 2 is a stranger to Phase II Diamond Estate Association Likoni Road Nairobi.
44. He submitted that the said meeting was in contravention of the prescribed procedure for meetings of the Society for reasons that, pursuant to Rule 8(d) of *the Constitution* of the Society, a Special General Meeting of the Society can only be held after a request in writing to the Secretary by not less than a third of the members, which was not adhered to, and such evidence has not been exhibited by the plaintiffs.
45. He added that under Rule 9 of *the Constitution* of the Society, only the Chairperson or in his absence, the Vice-Chairperson is allowed to chair the meetings of the Society, but both the Chairperson and Vice-Chairperson were part of the plaintiffs' meeting of 13<sup>th</sup> April, 2024.
46. He submitted that from the foregoing, the defendants had demonstrated that the plaintiffs were never validly elected as officials of the Society and most importantly, have never been members of the Society, and do not possess the requisite locus standi to institute a suit or make the instant application on behalf of the Society.
47. The defendants contended that in obtaining the ex parte orders of 7<sup>th</sup> May, 2024, there was deliberate non-disclosure of material facts, and for that reason, the said orders should be discharged. Mr. Tugee relied on the case of *Aga Khan Foundation Services Kenya v Republic & others* [2004] 1 EA 1, to the effect that ex parte orders are in their nature provisional and can be set aside either by the Judge who granted them or by another Judge, should the Judge who granted them not be available for any reason.
48. In expounding on the issue of non-disclosure of material facts, Mr. Tugee submitted that the plaintiffs have in their suit and application withheld that the matter of the Society's officials is pending resolution before the Registrar of Societies (Registrar). That they appeared and made representations before



the said Registrar on 2<sup>nd</sup> May, 2024, which are principally the same grievance presented before this Court, and that the Registrar has already made a determination on the matter, which is binding on the plaintiffs, unless challenged on appeal.

49. Counsel submitted that the plaintiffs did not disclose that there was a pending matter before the Environment and Land Court, being ELCL/E136 of 2024; Phase II Diamond Estate Association versus Regnoil Oil Kenya Limited, which is related to the current proceedings. He stated that the said case relates to the attempted grabbing of public land by Regnoil Oil Kenya Ltd, whose principal Shareholder Mohamed Khalif Ali is the father of the 3<sup>rd</sup> plaintiff herein, Sulekha Mohamed Khalif, who is being used together with others, to unprocedurally take over the Society in order to compromise the proceedings in the said ELC case.
50. Mr. Tugee stated that contrary to the plaintiff's submissions, failure to disclose the ELC case to this Court is a significant material non-disclosure given the clear nexus between the present case and the ELC case, as the plaintiffs' intention is to abuse the Court process and gain control of the Society's affairs in order to compromise the ELC case and ultimately manage to grab the public land in question in the said case.
51. Counsel relied on the decision arising from the case of the Judicial Commission of Inquiry into the Goldenberg Affair and another v Kilach [2003] eKLR, wherein the Court stated that duty is placed upon an *ex parte* applicant to make full disclosure of all relevant information in his possession whether or not they assist his application, and it is important for full and frank disclosure to be made as the Court is only privy to one party's evidence. Counsel also relied on the case of *The King v The General Commissioners for the Purposes of the Income Tax Act* for the District of Kensington [1917] 1 KB 486 (as cited with approval in the case of *Nixon Murathi Kiratu v Director of Criminal Investigations another; Mercy Nyakio Mburu & another (Interested parties)* [2019] eKLR, where the Court laid down the legal principle that an *ex parte* applicant must make a full and fair disclosure of all material facts.
52. He stated that in addition to the non-disclosure, the plaintiffs have misrepresented various facts to this Court in their application, including the allegation that the meeting of 2<sup>nd</sup> May, 2024 aborted because the defendants walked out, which is not true because the meeting was concluded and the Registrar subsequently issued her determination on 3<sup>rd</sup> May, 2024. Counsel stated that from the authorities he cited, the plaintiffs had an obligation to disclose all material facts within their knowledge, and since they did not, the *ex parte* orders wrongly obtained by the plaintiffs should be vacated forthwith.
53. Mr. Tugee cited the case of *Giella v Cassman Brown & Company Ltd (supra)*, on the principles that need to be satisfied by the plaintiffs in order for an injunction to be granted, Counsel stated that the plaintiffs must satisfy the three principles laid down in the said case. He also cited the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125, on what constitutes a *prima facie* case.
54. Counsel submitted that the plaintiffs have filed the suit and application herein, in their alleged status as officials of the Society, but they have not rendered any evidence to prove that they are indeed members of the Society and not merely residents of the Estate. He stated the defendants have substantively poked holes in the legitimacy of the alleged elections during which the plaintiffs claim to have been elected as officials of the Society.
55. Mr. Tugee submitted that the reasons given above, the plaintiffs have not established a *prima facie* case with a probability of success.
56. As to whether the plaintiffs have demonstrated that they will suffer irreparable loss, Mr. Tugee was of the view that they have not, as the legitimacy of the plaintiffs' elections as the officials of the Society



has been put into question, and at the same time, the defendants assert that they are the validly elected officials from a meeting held on 20<sup>th</sup> January, 2024, and both parties have produced documents to support their respective positions.

57. Counsel asserted that there is need for this Court to interrogate who between the plaintiffs and the defendants is telling the truth in regard to who the validly elected officials of the Society are, and that can only be done after a full hearing that allows for testing the evidence presented before this Court. He relied on the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* (supra), where the Court held that establishing a prima facie case alone is not a sufficient ground for granting an interlocutory injunction.
58. Counsel submitted that if the plaintiffs will be eventually successful in the suit, they will not suffer any irreparable injury/loss if the interlocutory conservatory orders sought are not granted at this stage because any loss suffered can be compensated by an award of damages, and if this Court finds in favour of the plaintiffs upon the hearing of the substantive suit, the defendants will simply and seamlessly hand over the management of the Society to the plaintiffs.
59. In concluding his submissions, Mr. Tugee asserted that the balance of convenience tilts in favour of the defendants because if ultimately the plaintiffs succeed in the suit, the defendants will hand over leadership to the plaintiffs, but if an injunction is granted and the defendants are eventually successful, the Society's affairs will have been managed by strangers who are non-members and who will not have acted in the best interest of the Society but for their own personal interest. He added that the said state of affairs will occasion anarchy, confusion, and injustice that will result in tremendous prejudice to the defendants, the members of the Society, and the residents of the Estate, and impose unelected persons to run the affairs of a membership Society by deceiving this Court.
60. He contended that the Society will be at the risk of an influx of claims for various breaches of contract during the period at which the plaintiffs would have been in charge of the Society's affairs as demonstrated by the 2<sup>nd</sup> interested party's application dated 13<sup>th</sup> May, 2024.
61. Counsel prayed for the ex parte orders granted on 7<sup>th</sup> May, 2024 to be discharged, for the hearing of the main suit to be expedited to determine the rights of the parties conclusively, and then decide whether or not to grant the reliefs sought in the plaint.

### **Rejoinder by the plaintiffs**

62. The plaintiffs in their written submissions dated 22<sup>nd</sup> May, 2024, addressed the application dated 9<sup>th</sup> May, 2024 filed by the defendants seeking to have the ex parte orders discharged. Mr. Abdiaziz Advocate, stated that the defendants seek to have the said orders discharged on the allegation of non-disclosure of material facts. He indicated that the same was not true as the plaintiffs moved to Court with clean hands, and are deserving of the remedies sought.
63. Counsel contended that failure to disclose about the existence of ELCL/E136 of 2014; *Phase II Estate v Regnoil Oil Kenya Limited* was not material to the present case, as the said suit and this one, deal with two distinct issues being election of officials of an Association, and the other being ownership of property. He stated that the plaintiffs are not estopped from bringing the present suit against the defendants herein. Counsel contended that the defendants are bringing non-issues to this suit and shifting the Court's attention from the real issues in dispute which are mis-management of the Estate and embezzlement of the residents' funds contributed for running the affairs of the Estate.
64. Counsel stated that the interim orders issued by the Court were granted because this Court was satisfied that the applicants and fellow Estate's residents' rights were being or were likely to be trampled upon,



and therefore the same needed to be protected in the interim pending the hearing and determination of the application and suit.

65. He submitted that although setting aside of the said orders is at the Court's discretion, the said discretion should be exercised judiciously and not capriciously. He stated that the defendants have admitted that the plaintiffs have already taken the reigns of the Estate and reversing the same will cause more harm than good as the defendants' term lapsed, and they do not have any mandate from the residents of the Estate. He contended that setting aside the orders already in force will be a clear miscarriage of justice.
66. Counsel stated that the orders of 7<sup>th</sup> May, 2024 were obtained with full disclosure of material facts and will be, and have been used only for the intended purpose of sheltering the members and residents of the Estate from the defendants' rule of tyranny and misfeasance.
67. The plaintiffs filed supplementary submissions dated 5<sup>th</sup> June, 2024, wherein Mr. Abdiaziz Advocate stated that by the Registrar of Societies rendering a decision vide a letter dated 21<sup>st</sup> May, 2024 in which she suspended her earlier decision of 3<sup>rd</sup> May, 2024, she submitted to this Court's jurisdiction, and became functus officio. Counsel stated that this Court has the requisite jurisdiction to entertain the suit before it, as the issues raised by the parties herein touch on the issue of election of officials and mismanagement of the Estate finances and use of force to run the affairs of the Estate.
68. As for not disclosing about the letter from the Registrar dated 3<sup>rd</sup> May, 2024, Counsel stated that the plaintiffs were not in receipt of the said letter as at the time they were filing the suit herein.
69. Mr. Abdiaziz referred to the plaintiffs' supplementary affidavit sworn on 5<sup>th</sup> June, 2024, and contended that the plaintiffs have brought to light the defendants' unlawful actions of forging and cooking up affidavits to be used before Court for purposes of gaining an upper hand to their advantage. He further contended that the residents of Phase II Diamond Estate will be highly prejudiced if the orders obtained on 7<sup>th</sup> May, 2024 are set aside over an illegality perpetuated by the defendants as proved before this Court.
70. He relied on the case of John Njue Njenga v Nicholas Njiru Nyaga & another [2013] eKLR, where the Court of Appeal stated that whoever comes to equity must come with clean hands and equity frowns upon secrecy and underhand dealings. The said Court went on to say that the applicant therein had not gone to Court with clean hands and was undeserving of the orders he had sought.
71. Counsel prayed for the plaintiffs' application to be allowed with costs, and for the defendants' application to be dismissed with costs.

### **Analysis and Determination**

72. I have considered the application filed by the plaintiffs and the one filed by the defendants, the affidavits in support of and in opposition to the said applications, as well as the further and supplementary affidavits. I have also considered the submissions filed by Counsel for the parties. The issues that arise for determination are-
  - i. If this Court has the jurisdiction to determine the matter before it;
  - ii. If the answer to issue No. (i) is in the affirmative, whether the plaintiffs have satisfied the conditions for being granted an interim injunction;
  - iii. If the Registrar of Societies should be directed to issue an interim certificate to the plaintiffs recognizing them as officials of the Society;



- iv. If a mareva injunction should be granted;
- v. If an order for audit of the Society's accounts for the last five (5) years should be granted; and
- vi. If the ex parte orders granted on 7<sup>th</sup> May, 2024 should be discharged.

If this Court has the jurisdiction to determine the application dated 2<sup>nd</sup> May, 2024.

73. In their application, the plaintiffs not only seek conservatory orders pending the hearing and determination of the suit, but also seeks a mareva injunction to freeze the bank account of the Association (hereinafter referred to as the Society). The plaintiffs also seek an order directed to the interested party to issue them with an interim certificate recognizing the appointment of new officials of the Society, and also an order for the appointment of an independent Auditor to audit the accounts of the Society for the last five (5) years. In Mr. Tugee's view, the plaintiffs should not have filed the suit before this Court when the Registrar of Societies (Registrar) was seized of the matter of election of the officials of the Society, and since the said Registrar had vide her letter dated 3<sup>rd</sup> May, 2024 given directions to the officials of the Society (defendants) to hold elections within forty-five (45) days from the date of the said letter.
74. On the other hand, Mr. Abdiaziz for the plaintiffs took the stand that the Registrar is functus officio after she wrote the letter dated 21<sup>st</sup> May, 2024 submitting to the jurisdiction of this Court. Due to the two conflicting positions taken by the two Advocates, it is necessary to look at the provisions of Section 18 of the *Societies Act*.
75. The said Section provides as follows-
  - “(1) If the Registrar is of the opinion that a dispute has occurred among the members or officers of a registered society as a result of which the Registrar is not satisfied as to the identity of the persons who have been properly constituted as officers of the society, the Registrar may, by order in writing, require the society to produce to him, within one month of the service of the order, evidence of the settlement of the dispute and of the proper appointment of the lawful officers of the society or of the institution of proceedings for the settlement of such dispute.
  - (2) If an order under subsection (1) of this section is not complied with to the satisfaction of the Registrar within the period of one month or any longer period which the Registrar may allow, the Registrar may cancel the registration of the society.
  - (3) A society aggrieved by the cancellation of its registration under subsection (2) may appeal to the High Court within thirty days of such cancellation.” (Emphasis added).
76. From the provisions of Section 18(1) of the *Societies Act*, the Registrar of Societies has the powers to deal with issues of election of officials of Societies. When a dispute was brought to her attention as to who the bonafide officials of the Society herein are, she invited the two parties to a facilitative meeting held on 2<sup>nd</sup> May, 2024. After holding a meeting on the said date, on 3<sup>rd</sup> May, 2024, she directed the parties herein to hold elections within forty-five (45) days from the said date. The said elections were however not held as directed, as the plaintiffs moved to Court and sought interim orders, pending inter partes hearing of their application dated 2<sup>nd</sup> May, 2024.
77. The defendants accuse the plaintiffs of non-disclosure of material information by failing from the outset to inform this Court that the Registrar was seized of the dispute that the plaintiffs brought to Court. The plaintiffs however state that by the time they filed their application on 6<sup>th</sup> May, 2024, they had not received the letter dated 3<sup>rd</sup> May, 2024 from the Registrar. A perusal of the supporting affidavit sworn by Abdirizack Bishar Aress sworn on 2<sup>nd</sup> May, 2024 states that when the defendants



attended the meeting called by the Registrar, they were asked hard questions and they walked out. The defendants however state that they did not walk out of the meeting, as the said meeting was concluded, and it culminated in the Registrar writing the letter dated 3<sup>rd</sup> May, 2024. From a reading of the entire supporting affidavit that was sworn on the day of the meeting on 2<sup>nd</sup> May, 2024, I am satisfied that the plaintiffs had not received the letter dated 3<sup>rd</sup> May, 2024 and could therefore not have spoken of the contents of a letter they had not received. As concerns the allegation raised by the plaintiffs that the defendants walked out of the meeting of 2<sup>nd</sup> May, 2024, I do not think that the plaintiffs are being candid. In the replying affidavit sworn by the Registrar, she deposed that the defendants attended the meeting although they had written to her asking her to postpone the said meeting. She further deposed that the meeting was turned into a shouting contest between the parties herein. In my view, if the defendants had walked out of the meeting as alleged, the Registrar would not have had difficulties in stating so in her affidavit.

78. It therefore appears to me that the plaintiffs moved to Court because of the meeting they held on 13<sup>th</sup> April, 2024 in which they were allegedly elected as the officials of the Society. The defendants on the other hand also claim to have been elected as the officials of the Society in a meeting held on 20<sup>th</sup> January, 2024.
79. Faced with the impasse, the Registrar of Societies could have dealt with the issue of the elections of the officials if the plaintiffs herein had not moved to Court. Nonetheless, since the plaintiffs' application is not only seeking an order for them to be recognized as the bonafide officials of the Society and to have the Registrar issue a certificate to that effect, by virtue of the other prayers being sought, the High Court in the exercise of its unlimited and original jurisdiction conferred on it by Article 165(3)(a) of *the Constitution* has the jurisdiction to hear the and determine the prayers sought by the plaintiffs. The Registrar could not have granted conservatory orders, a *mareva* injunction and an order for the audit of the accounts of the Society, as those are issues that that fall under the jurisdiction of the High Court.
80. In addition to the foregoing, my understanding of the provisions of Section 18(1) of the *Societies Act* is that it gives the Registrar the powers to determine a dispute as to who the bonafide officials of a Society are, and the Registrar may require the Society to produce to him within a month of the service of the order, evidence of the settlement of the dispute and of the proper appointment of the lawful officers of the Society. In the alternative, evidence of the institution of proceedings for the settlement of such dispute can be provided to the Registrar. It is therefore evident from the said provisions that resolution of disputes when it comes to leadership of Societies can also be filed in Court, as the plaintiffs herein have done.
81. Mr. Tugee asserted that the plaintiffs should have filed an appeal, in my view, an appeal can only lie after the decision of the Registrar has been communicated to the parties and they are dissatisfied with it. In the present scenario, the defendants vide their letter dated 6<sup>th</sup> May, 2024 expressed their dissatisfaction with the decision of the Registrar, but they did not file an appeal. As I had earlier stated, the suit herein was filed before the plaintiffs had received communication from the Registrar directing that fresh elections be held within forty-five (45) days from 3<sup>rd</sup> May, 2024.

**Whether the plaintiffs have satisfied the conditions for being granted an interim injunction.**

82. In order to determine the above issue, it is important to first address the contestation raised by the defendants and their Counsel as to whether or not the plaintiffs had the *locus standi* to file the application dated 2<sup>nd</sup> May, 2024 in their capacity as officials of Phase II Diamond Estate Association



Likoni Road Nairobi. In the case of Alfred Njau –Vs- City Council of Nairobi [1983] KLR 625 the Court of Appeal, held inter alia on the issue of locus standi-

“...Locus standi” literally means a place of standing and refers to the right to appear or be heard in Court or other proceedings and to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding”.

83. The plaintiffs contend that they were elected in a Special General meeting of Diamond Park 2 Residents held on 13<sup>th</sup> April, 2024 at 2.30 p.m., after issuance of a Notice dated 15<sup>th</sup> March, 2024 for an Extraordinary Resident’s meeting. A perusal of the said Notice shows that it was addressed to the residents of the said Estate and it was signed by Sulekha Mohamed Khalif, as the Interim Secretary. It is however not clear how she came about to be appointed as the Interim Secretary.
84. *The Constitution* of Phase II Diamond Estate Association Likoni Road provides as follows in clauses 9(c), (d) and (e) in regard to the holding of a Special General Meeting-
- “(c) A special general meeting may be called for any specific purpose by the committee. Notice in writing for such meeting shall be sent to all members not less than 7 days before the date thereof and where practicable by press advertisement not less than 7 days before the date of such meeting.
  - (d) A special meeting may also be requested for a specific purpose by order in writing to the Secretary of not less than a third of the members and such meeting shall be held within 21 days of the date of requisition. The notice of such meeting shall be as shown in Rule 8(c) and no matter shall be discussed other than that stated in the requisition.
  - (e) Quorum for general meetings shall be not less than two thirds of the registered members of the Society.” (Emphasis added).
85. As per clause 7 of *the Constitution* of the Society, the Committees contemplated shall consist of one office bearer of the Society and two other members elected at the Annual General meeting. In this instance, the plaintiffs have not exhibited any evidence to show that the Committee called for a Special General Meeting under clause 9(c) of *the Constitution* of the Society, or that a third of the members of the Association wrote to the Secretary requesting for a meeting under clause 9(d) of the said Constitution, and that the plaintiffs were elected as officials of the Society in a properly convened Special General Meeting or a Special Meeting of the Society.
86. From their affidavit sworn on 2<sup>nd</sup> May, 2024, in support of their application, the plaintiffs averred that they took matters into their own hands and called a meeting on 13<sup>th</sup> April, 2024, where issues affecting the Estate were deliberated and new officials were elected and almost 100 residents signed the said minutes.
87. The plaintiffs further averred that the new officials through their Secretary wrote a letter to the Registrar of Societies informing the Registrar of the new development in the Estate and submitted the minutes of the meeting of the residents together with a list of the Estate officials.
88. They deposed that the residents of the Estate once again through the Secretary wrote a letter dated 19<sup>th</sup> April, 2024 to the Registrar of Societies requesting for the immediate freezing of the Association’s accounts to avert misuse of the Association’s funds by the rogue outgoing officials, after which the said Registrar called for a consultative meeting for 2<sup>nd</sup> May, 2024 for the officials to resolve the underlying issues. As earlier stated, the said meeting went on as scheduled.



89. Going back to *the Constitution* of the Society, Clause 6 provides that the office bearers of the Society shall be –

“

- “(i) The Chairperson;
- (ii) The Vice-Chairperson;
- (iii) The Secretary;
- (iv) The Vice-Secretary;
- (v) The Treasurer; and
- (vi) The Vice-Treasurer,

All of whom shall be fully paid-up members of the Society and shall be elected at the Annual General meeting to be held each year.” (Emphasis added)

90. Clause 6(b) of *the Constitution* of the Society provides that all office bearers shall hold office from the date of their election, for a period of two (2) years, until the succeeding Annual General Meeting subject to the conditions contained in sub-paragraphs (c) and (d) of the said Rule but shall be eligible for re-election.

91. From the provisions I have reproduced from Clause 6 of *the Constitution* of the Society, it was not envisaged that there would ever be an Interim Secretary who would issue Notices of meetings of the Society as there is provision for a Vice-Secretary who would step into the shoes of the Secretary if a vacancy was to arise in the office of the Secretary, or in his absence.

92. As was correctly pointed out by the defendants, the Special General meeting convened on 13<sup>th</sup> April, 2024 by the Sulekha Mohamed Khalif, the 3<sup>rd</sup> plaintiff herein, was for Diamond Park 2 Residents after the purported issuance of a Notice dated 15<sup>th</sup> March, 2024. It is evident from the said Notice that it was not addressed to the members of Phase II Diamond Estate Association. As was correctly pointed out by the defendants, there is a stark difference between being a resident of Phase II Diamond Estate, and being a member of Phase II Diamond Estate Association Likoni Road Nairobi. There was also no evidence exhibited to demonstrate that the plaintiffs who allege to have been elected as officials of the Society are indeed its members by virtue of having applied for membership, that they had been admitted by the Committee as members of the said Society, and they had paid up membership subscriptions.

93. A perusal of the minutes of 13<sup>th</sup> April, 2024 shows that it was resolved that that an alternative Association with the name of Diamond Park 2 Residents Association was to be registered. That in itself evidently demonstrates that the plaintiffs were not bonafide officials of Phase II Diamond Estate Association Likoni Road, because if they were, and if they had the best interest of the Society at heart, they would not have resolved to register another Society to serve the same community, as that would be working at cross-purposes with the Society that was registered in the year 2021.

94. From the foregoing summation, it is apparent that the plaintiffs in their affidavits did not exhibit a Notice of a properly convened Annual General meeting, a Special Meeting or a Special General Meeting to elect new officials of Phase II Diamond Estate Association Likoni Road Nairobi. It then follows that the Notice issued by the 3<sup>rd</sup> plaintiff herein, as the purported Interim Secretary was null and void ab initio and was of no consequence whatsoever. Any action therefore taken pursuant to the said Notice, including the purported election of the plaintiffs as the new officials of the said Society was illegal, as



it had no legal backing. Given the said circumstances, I do agree with Mr. Tugee that the plaintiffs did not have the requisite locus standi to file the application herein on behalf of the Society. That being the case, the plaintiffs on behalf of the Society have not passed the first hurdle of establishing a prima facie case as set out in the case of *Giella v Cassman Brown & Co. Ltd* (supra).

95. The plaintiffs' prayer is to continue remaining in office as per the ex parte orders granted by this Court on 7<sup>th</sup> May, 2024. They accuse the defendants of harassment of residents, misappropriation of the funds paid by the residents of Phase II Diamond Estate. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* (supra), the Court held as follows-

“On the second factor, that the applicant must establish that he might otherwise suffer irreparable injury which cannot be 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.” (Emphasis added)

96. Had I found that the plaintiffs had the locus standi to file the application dated 2<sup>nd</sup> May, 2024, my finding on whether the plaintiffs have satisfied the 2<sup>nd</sup> condition of irreparable loss for being granted an interim injunction would have been that they have not. They have alleged misappropriation of funds in the hands of the defendants. It is my finding that the plaintiffs would not have successfully assailed the 2<sup>nd</sup> condition for being granted an order for an injunction, as their claim of misappropriation of funds is speculative and unsupported by evidence, and if at all the defendants would have been found to be culpable, the plaintiffs would have been compensated by an award of damages.
97. The plaintiffs also allege abuse of human rights by the defendants by allegedly limiting the rights of the children to play outside, and by limiting their playground space in the Estate. Those are however matters that fall in the realm of the Constitutional Court and not the Commercial Court.
98. Having found that the plaintiffs have failed to establish a prima facie case against the defendants due to lack of locus standi, and that they would not have surmounted the hurdle of irreparable loss if they had locus standi, the balance of convenience tilts in favour of the defendants.
99. Since I have found that the plaintiffs had no locus standi to file the application herein, there is no need to dwell on the issues of whether they concealed material facts from the Court by not disclosing about the pending case in ELCL/E136 of 2024; *Phase II Diamond Estate Association versus Regnoil Oil Kenya Limited*.
100. In the further affidavit filed by the defendants, they annexed a Notice dated 29<sup>th</sup> December, 2023 on a letter head of Phase II Diamond Estate Likoni Road Nairobi, in which members of the said Society were notified of a meeting that was to be held on 20<sup>th</sup> January, 2024 at Pearl Village in South C. Agenda item No. (iv) of the said Notice was on election of a Management Committee. The said meeting was convened by the Secretary Abdullahi Ibrahim Mohamed. In the minutes of the said meeting, the names of the members who attended are captured thereon, as well as their signatures. On item D on re-election of the Management Committee, the minutes show that it was unanimously resolved that all except one Management Committee (member), were to continue in office for the next two (2) years. The minutes



show that there was a change in the Chairman's position and the outgoing Chairman Douglas Ng'ang'a was replaced by Abdiweli Adan Kalicha as the new Chairman.

101. In the said further affidavit, the defendants averred that the newly elected Chairman, the Secretary and the Treasurer of the Society notified the Registrar of Societies by filing Form H in accordance with Rule 11 of the Societies Rules on elections and change in the person holding the position of the Chairman, and that the Registrar of Societies is yet to effect the said change. Having found that the purported elections of 13<sup>th</sup> April, 2024 were not conducted in a properly convened meeting of the Society, it is upon the defendants to pursue the registration of the changes made in the meeting of 20<sup>th</sup> January, 2024 with the Registrar of Societies, since there can be no vacuum in the running of the affairs of the Society.
102. Allegations of forged documents and affidavits can only be determined upon hearing of witnesses and not at the interim stage. In light of my finding that the plaintiffs are not members of the Society and had no locus standi to file the application dated 2<sup>nd</sup> May, 2024 on behalf of the Society as they were not elected as officials of the said Society in a properly convened meeting, it means that the prayers sought in the application dated 2<sup>nd</sup> May, 2024 cannot be granted.
103. This Court exercised its discretion when it granted the exparte orders. However, having addressed its mind to the lengthy affidavits that were filed and having perused the annexures in support of each party's case, and having applied the applicable law to the facts of the application, the order that commends itself to me is for the setting aside of the exparte orders that I granted on 7<sup>th</sup> May, 2024.
104. In the result, the plaintiffs' application dated 2<sup>nd</sup> May, 2024 is hereby dismissed with costs to the defendants. The defendants' application dated 9<sup>th</sup> May, 2024 is hereby allowed with costs to be borne by the plaintiffs. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20<sup>TH</sup> DAY OF SEPTEMBER, 2024.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:

Ms Anjiko h/b for Mr. Abdiaziz for the plaintiffs

Mr. Tugee for the defendants

Ms B. Wokabi – Court Assistant.

