



REPUBLIC OF KENYA



**Gitau v Jennings & 5 others; Acoverde (K)Limited & another (Interested Parties) (Commercial Case E629 of 2021) [2023] KEHC 18631 (KLR) (Commercial and Tax) (2 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18631 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E629 OF 2021  
DO CHEPKWONY, J  
JUNE 2, 2023**

**BETWEEN**

**WILLIAM K GITAU ..... PLAINTIFF**

**AND**

**STEPHEN JENNINGS ..... 1<sup>ST</sup> DEFENDANT**

**CHRISTOPHER JOHN BARRON ..... 2<sup>ND</sup> DEFENDANT**

**TATU CITY LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**OAKLANDS PROPERTIES KENYA LTD ..... 4<sup>TH</sup> DEFENDANT**

**MARY CHEGE ..... 5<sup>TH</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 6<sup>TH</sup> DEFENDANT**

**AND**

**ACOVERDE (K)LIMITED ..... INTERESTED PARTY**

**TRENTON (K) LIMITED ..... INTERESTED PARTY**

**RULING**

1. This is a ruling in respect of three (3) applications, being;
  - a. A Notice of Motion application dated 11<sup>th</sup> June, 2021 (herein referred to as ‘the Application for injunction’)
  - b. A Notice of Motion application dated 19<sup>th</sup> June, 2021 (here referred to as ‘The application for Joinder’)



- c. A Notice of Motion application dated 4<sup>th</sup> August, 2021 (herein referred to as 'Application for Consolidation of suits').
2. Pursuant to this Court's directions of 7<sup>th</sup> December, 2022, the applications were canvassed together.
3. For orderliness in the ruling, having taken into consideration the prayers sought in each application, court will first address the application for Consolidation, followed by the application for Joinder of parties before dealing with the application for injunction.

### **The application for Consolidation**

4. The application for consolidation is by way of Notice of Motion dated 4<sup>th</sup> August, 2021 and filed by the Plaintiff, William K. Gitau pursuant to order 11 Rule 3(1)(h) of the Civil Procedure Rules and it seeks the following orders:-
  - a. The suit be and is hereby consolidated with High Court Suit No.E702 OF 2021 Tatu City Limited & Oaklands Properties Kenya Limited v Tajibee Bhalla Limited LLP.
  - b. Costs of this application be provided for.
5. The application is supported by the grounds on its face and Supporting Affidavit sworn by the Applicant on 4<sup>th</sup> August, 2021, wherein it is averred that in the instant suit and High Court Commercial Case No.E702 of 2021, common questions of fact and law have been raised as they revolve around a dispute over the beneficial ownership of the same parcels of land and same transaction. It is also deponed that the two matters have the same parties, seeking similar reliefs and therefore the parties in either of the suits stand to be prejudiced if determined separately.
6. The application of Consolidation has been opposed by the 1<sup>st</sup> and 4<sup>th</sup> Defendants lengthy Grounds of Opposition dated 17<sup>th</sup> August, 2021, wherein they alleged that the Plaintiff having filed this suit cannot seek to have the same consolidated with High Court Commercial Case No.E702 of 2021 and yet he is not a party to it. They contend that the Plaintiff has the liberty to amend his Plaint and enjoin any party he so desires. They also contend that the subject matters in the two suits are different since in the instant suit the Plaintiff seeks the suit property through partnership at will and beneficial ownership as against the 1<sup>st</sup> – 4<sup>th</sup> Defendants while in High Court Commercial Case No.E702 of 2021, the Plaintiff seeks the lawyers to provide accounts for the monies received for the properties sold to third parties,. Their argument is that the application is an abuse of the court process and hence prohibited under Order 11 Rule 1(h) and Order 3 Rule 6 of the Civil Procedure Rules.
7. The 5<sup>th</sup> Defendant on the other hand has opposed the application on the basis that the subject matters in the two cases are different and that the application has failed to demonstrate the commonalities in them. She contends that the consolidation of the two files will lead to a convolution of issues which will render the court incapable of according the parties a fair trial.
8. The application was canvassed by way of written submissions, whereby the Plaintiff's submissions are dated 26<sup>th</sup> August, 2021 and so are the 1<sup>st</sup> – 4<sup>th</sup> Defendants' submissions, while the 5<sup>th</sup> Defendant's submissions are dated 30<sup>th</sup> August, 2021. I have read through each set of submissions in appreciation of the parties respective position on the application and will capture the same in the determination of the application.



## Analysis and Determination

9. Having read through and considered the application for consolidation, the responses thereto and respective submissions by the parties with regard to the grounds upon which each party has premised their arguments, I find the issue for determination being whether it will be viable to consolidate this suit with High Court Commercial Case No.E702 of 2021.
10. It is trite law that the purpose of consolidation of suit is to enable efficient and expeditious disposal of suits. It is also trite that consolidation of suits should be undertaken in a manner that is fair and not to occasion any injustice to either party. This was the decision in Supreme Court of Kenya case of Law Society Of Kenya –vs- The Centre For Human Rights & Democracy & Others (Petition No. 14 of 2013) where it was stated as follows at Paragraph 43:-

“The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes, and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it. In the matter at hand, this Court would have to be satisfied that the appeals sought to be consolidated turn upon the same or similar issues. In addition, the Court must be satisfied that no injustice would be occasioned to the respondents if consolidation is ordered as prayed.”
11. .In regard to the two suits; High Court Commercial Case No.E702 of 2021 was filed vide Originating Summons whereupon the Plaintiffs, Tatu City Ltd and Oaklands Properties K Ltd ( the 3<sup>rd</sup> and 4<sup>th</sup> Defendants ) have sued the Firm of Advocates Taijbee & Bhalla Advocates LLP seeking the firm of advocates to;
  - a. return the title deeds and documents in respect to the properties which are the same properties in this suit,
  - b. transfer Kshs.130,752,555.00 to the Plaintiffs in respect to the sale agreements of the suit properties; and
  - c. in default the court to make enforcement orders against the law firm.
12. In this suit, vide the Amended Plaint dated 14<sup>th</sup> September, 2021 on the other hand seeks reliefs of;
  - a. a declaration that the Plaintiff is the beneficial owner of the properties pursuant to the partnership at will;
  - b. in the alternative the 1<sup>st</sup> to 4<sup>th</sup> Defendants to hold the interest of the Plaintiff in constructive trust of in the titles for the properties;
  - c. a declaration that the Firm of Taijbee & Bhalla Advocates acted for the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties in the transactions carried out in the properties, Order for the 1<sup>st</sup> to 4<sup>th</sup> Defendants to deliver to the Plaintiff the original title for the properties;
  - d. Order that the 1<sup>st</sup> to 4<sup>th</sup> Defendants to deliver to the Plaintiff the house known as Oak House;
  - e. an Order of permanent injunction over the properties;



- f. an order directing the 5<sup>th</sup> Defendant to release to the Plaintiff all information, notes, papers and correspondence concerning the creation of partnership at will.
13. The Plaintiff also seeks an Order that the 1<sup>st</sup> to 4<sup>th</sup> Defendants to execute transfers of the properties and present them to the 6<sup>th</sup> Defendant for registration of transfers and issuance of title deeds to third parties who have purchased the properties, an Order that the 5<sup>th</sup> Defendant to pay damages to the Plaintiff on account of breach of fiduciary duties; an Order of Accounts to be issued to the 1<sup>st</sup>-4<sup>th</sup> Defendants on entire sale proceeds and an Order for the 1<sup>st</sup> to 4<sup>th</sup> Defendants to pay the Plaintiff USD 1,060,800.
14. Based on the reliefs sought for in the two suits, it is evident that they arise from the same transaction being the sale of the subject properties. The Originating Summons deals with the proceeds of the sale between the clients, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants herein and their Advocates while this suit deals with the ownership of the properties, production and delivery of title documents, transfer of the properties, the partnership at will and accounts of the proceeds of sale.
15. In this Court's view since these issues arise from the same transaction of the sale of the properties the subject matter of both suits, they are interrelated and can easily and conveniently be adjudicated together. This Court thus finds that there will be no prejudice suffered by either party as all issues will be addressed in one suit and no breach of advocate-client privilege will be caused by the consolidation since the issues herein relate only to the extent of the proceeds of sale. In the end, the Court finds that the Application dated 4<sup>th</sup> August, 2021 has merit and is hereby allowed as prayed.

### **Application for Joinder**

16. The application for Joinder is dated 19<sup>th</sup> July, 2021 and brought under order 1 rule 10(2) and order 51 rule 1 of the *Civil Procedure Rules*. It seeks the following orders:-
- a. Spent.
  - b. Azim S. Tajjee Advocate and Tajjee & Bhalla Advocates be and are hereby enjoined as 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties.
  - c. Costs of this application be provided for.

The application is supported by the grounds on its face and Supporting Affidavit sworn on 19<sup>th</sup> July, 2021.

17. According to the 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties, they seek to be enjoined in the suit in their capacity as the Advocates who acted for the Plaintiff in the transactions with regard to the properties with the express knowledge of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. In that capacity they received funds and title documents on behalf of the Plaintiff in respect to the properties.
18. It is their contention that their purpose was to liaise with the 1<sup>st</sup> to 5<sup>th</sup> Defendants on behalf of the Plaintiff to facilitate the Plaintiff's acquisition of beneficial ownership of the properties. It is their position that they executed numerous letters, and attended several meetings over the said acquisition of beneficial ownership of the suit. They therefore hold that they have legal interest in the proceedings and they are proper and necessary parties and they ought to be enjoined in the suit for the court to effectively and efficiently determine all issues in controversy.



19. The application was opposed through a Notice of Preliminary Objection of 3<sup>rd</sup> and 4<sup>th</sup> Defendants dated 28<sup>th</sup> July, 2021, and later Amended Preliminary Objection dated 12<sup>th</sup> August, 2021 wherein it is stated that the 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties are holding over Kshs.130 Million on behalf of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants and are therefore estopped from enjoined in this suit under section 134 of the Evidence Act. They also aver that the 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties invoke advocate client privilege against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants by virtue of section 134 of the Evidence Act. They further contend that by virtue of section 6 of the Civil Procedure Act, this court cannot adjudicate over the proposed 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties since the issues are directly and substantially in issue in the Originating Summons between the 3<sup>rd</sup> and 4<sup>th</sup> Defendants and the 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties filed vide High Court Commercial Case No.E702 of 2021.
20. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants also filed their Replying Affidavit which was sworn by Christopher John Barron sworn on 30<sup>th</sup> July, 2021 opposing the application by virtue of the existence of High Court Commercial Case No.E702 of 2021 which deal with the same issues.
21. The 5<sup>th</sup> Defendant opposes the joinder of the 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties vide a Notice of Preliminary Objection dated 12<sup>th</sup> August, 2021 on the basis that there exists another suit being High Court Commercial Case No.E702 of 2021. That the joinder will be an abuse of the court process since the 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties have not demonstrated their interest in the matter that would assist the court to determine the issues in controversy. The 5<sup>th</sup> Defendant also filed Replying Affidavit sworn on 13<sup>th</sup> August, 2021 also opposing the application.
22. The parties filed their respective submissions on the application. The 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties submissions are dated 4<sup>th</sup> August, 2021, the 5<sup>th</sup> Defendant's submissions are dated 13<sup>th</sup> September, 2021.

### **Analysis and Determination of the Application for Joinder**

23. In determining the application for joinder, the first point of departure is the Law on Joinder of parties which is enshrined under Order 1 Rule 10(2) of the Civil Procedure Rules which states as follows:-

“The court may at any stage of the proceedings, either upon, or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon or settle all questions involved in the suit, be added.”
24. The Supreme Court of Kenya defined an Interested Party in the case of Communications Commission of Kenya and 4 Others –vs- Royal Media Services Limited & 7 Others, Petition No.15 OF [2014]eKLR relied on its earlier decision in the Mumo Matemo case and held as follows:-

“An Interested Party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. Similarly, in the case of Meme v. Republic, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:



- i. Joinder of a person because his presence will result in the complete settlement of all the question involved in the proceedings;
- ii. Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- iii. Joinder to prevent a likely course of proliferated litigation.

We ask ourselves the following questions:-

- a. what is the intended party's stake and relevance in the proceedings; and
- b. will the intended interested party suffer any prejudice if denied joinder?"

25. According to the proposed 3<sup>rd</sup> Interested Party, he acted as an advocate for the Plaintiff in the transaction subject of the suit in which capacity he received funds and documents of title on behalf of the Plaintiff in respect of the said properties in which the Plaintiff acquired beneficial ownership, with the knowledge of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. As for the proposed 4<sup>th</sup> Interested Party, they have never and do not act for the 1<sup>st</sup> to 4<sup>th</sup> Defendants. They have denied Advocate-Client relationship between them and 1<sup>st</sup> to 4<sup>th</sup> Defendants. They desire to be enjoined in the proceedings as so they can explain their conduct in the matter in respect of the parties herein to avoid any prejudice on the Plaintiff's claim in the suit. The 3<sup>rd</sup> to 4<sup>th</sup> Defendants contend that the proposed Interested Parties should be estopped from being enjoined in the proceedings being the advocates.
26. Having carefully considered the submissions by all parties herein, I find that the 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties have not established their stake in the suit except as advocates and agents of the Plaintiff and their role in the suit will be critical in resolving all the issues involving the transactions that led to the Plaintiff's acquisition of beneficial ownership of the suit properties and the proceeds of sale. Having already allowed the application for consolidation, this Court finds no need of enjoining the proposed Interested Parties to the suit as the issues raised in their application are the issues in the Originating Summons in the High Court Commercial Case No.E702 of 2021 where Tajibee Bhalla Advocates are Defendants, hence will be dealt with in the consolidated suit. Therefore, the Notice of Motion Application dated 19<sup>th</sup> July, 2021 is for dismissal.

### **The Application for Injunction**

27. The application for Injunction is dated 11<sup>th</sup> June, 2021 and the same was filed by the Plaintiff seeking:-
  - a. Defendants from dealing with the properties subject of this suit; and,
  - b. Order compelling the 1<sup>st</sup> to 4<sup>th</sup> Defendants to execute transfers and forward the necessary completion documents to the 6<sup>th</sup> Defendant herein.
28. The application is premised on the grounds set out on its face and Supporting Affidavit sworn by the Plaintiff/Applicant, William K. Gitau on 11<sup>th</sup> June, 2021. To support his case, the Plaintiff avers that there exists partnership at will between himself and the 1<sup>st</sup> to the 4<sup>th</sup> Defendants which commenced in the year 2015. To establish the basis in the said partnership, the Plaintiff avers that the 1<sup>st</sup> Defendant made an offer to "buy him in" to the 3<sup>rd</sup> and the 4<sup>th</sup> Defendants by transferring him (the Plaintiff) five per centum (5%) of the developable land situated at Tatu City, Oaklands and Mchana and he accepted the same.



29. The Plaintiff avers that in consideration thereof, he was to offer his good will, business acumen, reputation and political experience together with his financial wherewithal. The Plaintiff avers that he indeed helped the 1<sup>st</sup> to 4<sup>th</sup> Defendants raise capital to purchase the properties in question and on 31<sup>st</sup> May, 2016, paid Kshs.348,025,547.00 to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the Plaintiff's purchase of property LR. No.11285 situated at Tatu city.
30. In support of this, the Plaintiff has attached correspondences between him, the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties and the Defendants discussing the sale of the properties, the possession of the titles to the properties and other transactions between them in bid to establish his alleged partnership.
31. The Plaintiff also avers that he acquired beneficial ownership/interest and has possession of the original titles to the said properties on the strength of the partnership at will being;
  - a. pending the inter-parties hearing and determination of the suit filed herewith, an Order of Injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants and their representatives, agents, employees or agents from dealing in any manner whatsoever by either entering into, selling, transferring or charging to 3<sup>rd</sup> Parties, the following properties:-
    - i. The forty-two (42) acres situate in Kijani (precinct) 2B being part of L.R. No.28867/1, as more particularly delineated on the plan registered on 15<sup>th</sup> June, 2017 in the Registry of Documents as Volume D1 folio 136/2362 File MMXVII;
    - ii. Fifty-one (51) acres situate in Ruiru/Mugutha Block 3/12 and Ruiru Mugutha Block 3/13 (Oaklands Block 12 and 13);
    - iii. The house known as "Oak House" situate on five (5) acres in Oaklands;
    - iv. Twelve (12) acres situate in the Commercial precinct of part of LR. No.28867/1 (comprising plots identified as CO-1, CO-2, CO-3, CO-4, C)-5 and CO-6);
    - v. Fourteen (14) acres and another 3.8 acres situate in the Industrial Precinct of part of LR. No.28867/1 (comprising plots identified as L3-56A, L3-56B, L3-56C, L3-56D, L3-56E, L3-56F, L3-56G, L3-56H, L3-56 I, L3-56J, L3-56K, L3-56L, L3-56K).
  - b. Pending the interparties hearing and determination of the Notice of Motion and/or the suit filed herewith, an Order be and is hereby issued directing the 1<sup>st</sup> to 4<sup>th</sup> Defendants to execute transfers and forward necessary completion documents to the 6<sup>th</sup> Defendant on the respective completion dates, to enable the registration of transfers and issuance of Original Titles to all the 3<sup>rd</sup> Party Purchasers who have made full payment for purchase of the sub-plots situate in the forty-two (42) acres situate in Kijani (precinct) 2B being part of L.R. No.28867/1 and Ruiru Mugutha Block 3/13 (Oaklands Block 12 and 13).
  - c. Costs of this application be provided for.

He stated that all these were with the knowledge and concurrence of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants, hence it is not available to the Defendants to deny the existence of the said partnership.



32. He further avers that to cover the presence of construction activities undertaken by the 1<sup>st</sup> to 3<sup>rd</sup> Interested Parties on the suit properties, all for the benefit of the Plaintiff, the 1<sup>st</sup> to 2<sup>nd</sup> Defendants requested the Plaintiff through the 5<sup>th</sup> Defendant to draw some Comfort Agreement for the 3<sup>rd</sup> Defendant's internal use, which was done.
33. The Plaintiff avers that the 1<sup>st</sup> to 4<sup>th</sup> Defendants have declared to release the original tile for the fourteen acres and another 3.8 acres situated in the Industrial Precinct part of L.R NO.28867/1 and the proceeds from the sale of two 2.55 acres to Kifaru Enterprises to the Plaintiff and his advocates Taijbee & Bhalla Advocates. They have instead gone on to demand for the return of the titles and lease document from 1<sup>st</sup> and 2<sup>nd</sup> Interested parties.
34. According to the Plaintiff, he has established a prima facie case that he has beneficial and legal right over the properties in question and would suffer substantial loss and eventually his rights infringed if the Defendants are not precluded from selling the subject properties or otherwise restrained through the prayers sought, his rights may eventually be infringed to the detriment of innocent 3<sup>rd</sup> Party Purchasers.
35. The 1<sup>st</sup> to 4<sup>th</sup> Defendants opposed the application for injunction and in doing so, the 1<sup>st</sup> Defendant filed Grounds of Opposition dated 21<sup>st</sup> June, 2021 while he 2<sup>nd</sup> to 5<sup>th</sup> Defendants filed Grounds of Opposition dated 25<sup>th</sup> June, 2021. The 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Defendants also filed a Replying Affidavit sworn by Christopher John Baron, the 2<sup>nd</sup> Defendant herein.
36. In summary, the Defendants case is that the subject properties belong to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants and the claim by the Plaintiff is based on falsehoods and fraudulent assertions as no partnership exists or has ever existed between the Plaintiff and Defendants. That the alleged partnership at will is wishful thinking and a mere state of mind based on wrong beliefs by the Plaintiff and predicate on an alleged contract that is unenforceable since the 1<sup>st</sup> Defendant had no authority or capacity to offer or transfer interests in the 3<sup>rd</sup> and 4<sup>th</sup> Defendants Company as he is not a shareholder of theirs and neither did they authorise such offer to the Plaintiff. The corresponding CR-12 were produced to illustrate that the 1<sup>st</sup> Defendant is neither a shareholder nor a director in the 3<sup>rd</sup> and 4<sup>th</sup> Defendant Companies, hence could not make any offer, more so, on a property worth billions of shillings in exchange for alleged good will, business acumen, reputation, political experience and financial wherewithal, which cannot be a consideration for acquiring an interest in law contrary to Sections of the Law of Contracts Act.
37. In response to the averment that 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties demand that the original document they are holding be returned, the Defendants have averred that the legal notion of partnership at will advanced by the Plaintiff does not create any beneficial ownership of the partnership property or properties that do not belong to the alleged partnership, that the agreement they entered into with 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties together with the Plaintiff are to do with a Company known as Sahara Longhorns Limited where they Plaintiff offered to provide certain services, that the Plaintiff is an employee as a consultant for the 3<sup>rd</sup> and 4<sup>th</sup> Defendant, having been given various contracts by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants for his Companies.
38. As for what the Plaintiff refers to as Comfort Agreement, the Defendant aver that while the term is not understood, the contracts exhibited herein are lawfully and bonafide and binding as they are the ones which made him get possession of the title documents but he was paid a salary or consultancy fees for the same, this cannot turn around and claim pieces of lands entrusted to him while under the Defendant's employment without any right.
39. The Defendants have admitted that they terminated the contracts between them, the Plaintiff, 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties due to their failure to discharge their contractual obligation diligently,



competently and professionally and hence the claim by the Plaintiff as a beneficial owner of their properties as a partner at will, without any basis or right in law and fact.

40. The Defendants aver that they entered into sale agreements with third parties for sale of portions in the subject properties and deposited titles to the properties with their then advocates, but before the sale could materialize, the defendants cancelled the agreements. It is these title documents that the Plaintiff has used to hold them at ransom without fully disclosing the full facts to this court. Based on the foregoing, the Defendants have submitted that the Plaintiff has not placed any material evidence before the court to warrant the grant of the injunctive orders sought.

### **Analysis and Determination of the Application for Injunction**

41. Having considered each of the party's perspective on the application for injunction, the issue for consideration is whether the prayers sought in the application are merited.

42. On whether an injunction can issue, the law under order 40 (1) of the [\*Civil Procedure Rules\*](#) provides on when temporary injunctions can be granted:-

“Where in any suit it is proved by affidavit or otherwise: -

- a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b. that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

43. Further to the above provision, the principles laid out in the locus classicus case of Geilla –vs- Cassman Brown & Company Limited among other cases are that, for a temporary injunction to be granted, an Applicant must demonstrate that he has a prima facie case with probability of success, that he will suffer irreparable loss that cannot be adequately compensated by damages or that the balance of convenience is in his favour.

44. Taking cue from the above, this Court will first endeavour to find out whether the Plaintiff has established a prima facie case with a probability of success before considering whether he has shown any likelihood of suffering irreparable loss that cannot be compensated by damages or the balance of convenience being in his favour.

45. It has widely been accepted in the jurisprudence within our jurisdiction that a prima facie case is one which on the material presented to court would lead to the conclusion that there exists a right which has apparently been infringed upon by the opposite party so as to call for a rebuttal or explanation thereof. The burden therefore lies with the Plaintiff to show a clear and an unmistakable right that is to be protected and which is directly threatened by an act sought to be restrained. In addition, it has to be shown that the invasion on the said right has to be material, substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.

46. In demonstrating the above, the Plaintiff submitted that there exists a partnership at will between him and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants by which the 1<sup>st</sup> Defendant undertook to transfer five per



centum of all that developable land in Tatu City, Oaklands and Mchana to him in consideration of his good will, business acumen and reputation, political experience and financial wherewithal. Pursuant to the alleged partnership, the Plaintiff avers that he has assisted in the raising of capital for business by paying Kshs.348,025,547.00 to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants towards the purchase of the property LR. No.11285 measuring 1,005 acres situated in Tatu City, Ruiru and the sale of the developed portions pursuant to which the Defendants have realised close to Kshs.130 Million. The Plaintiff maintains that he has consequently acquired legal and beneficial rights over the properties enumerated at Paragraph 3 of his Supporting Affidavit out of the creation and sustenance of the said partnership at will. He further submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants requested him through the 5<sup>th</sup> Defendant to draw and indeed some Comfort Agreements were drawn between the 3<sup>rd</sup> and 4<sup>th</sup> Defendants and the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties for internal use to cover the presence of construction activities undertaken by 1<sup>st</sup> and 3<sup>rd</sup> Interested Parties on the suit properties, all for his benefit. (See paragraph 4 of the Supporting Affidavit). That having acquired the beneficial interest in the said suit properties, the Plaintiff now holds the original titles thereof as listed at Paragraph 5 of the Supporting Affidavit with the full knowledge of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. It is Plaintiff's claim that the 1<sup>st</sup> to 4<sup>th</sup> Defendants have declined to release to him the Original title for 14 acres and another 3.8 acres situated at the industrial precinct of Part L.R No.28867/1 and gone on to sell two 2.55 acres to Kifaru Enterprises therein, whose proceeds they have also declined to release to his advocates, Tajjee & Bhalla, Advocates. It is for these reasons that the Plaintiff seeks to have the Defendants to be restrained from further alienation of the properties.

47. The Defendants denied the claim by the Plaintiff that there existed a partnership between him and them. According to the Defendants in their submissions, the Plaintiff is seeking Prohibitory Orders for a right he has failed to demonstrate how it has been or is about to be infringed on by the Defendants. He is also seeking the said orders on behalf of parties who are unknown to the application. The Defendants have also submitted that the Plaintiff has contradicted himself in claiming the right as a partner at will with the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants while at the same time says he is a beneficial owner of the suit properties. It is also their submission that the Plaintiff has not provided any evidence of the alleged partnership, which led to his acquisition of the suit properties.
48. The Defendants contend that partnerships are regulated by The Partnership Act and their existence are questions of fact. That the Plaintiff has failed to disclose the nature and name of the alleged partnership, the business it carries on, the address, profits, bank statements, employee details, and many other factors or circumstances of a partnership. The Defendants have taken issue with the nature of consideration the Plaintiff offered in exchange for the partnership. The Defendants went on to submit that it is unattainable for the Plaintiff to claim ownership of properties registered in the name of a Company, which is a distinct personality. They claim to have employed the Plaintiff after he lost the election as a Governor of Kiambu in 2017 and who gave his Companies jobs on contract (the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties herein). He was paid millions of shillings for the same but he was dismissed and contracts terminated on 6<sup>th</sup> May, 2021.
49. I have carefully and keenly considered the arguments that have been advanced by either party in support of their respective position on the orders being sought by the Plaintiff. It is this Court's respectful view that what the Plaintiff seeks are injunctory orders to restrict or restrain the 3<sup>rd</sup> and 4<sup>th</sup> Defendants from dealing with their properties as listed in the pleadings. To deserve this, the court expects that the Plaintiff to have demonstrated or asserted his unmistakable legal right in the said properties. His claim is about beneficial ownership or interest in the said properties arising out of a partnership at will.
50. A legal or proprietary right cannot be transferred or granted in any other manner other than by operation of the law or by a legal instrument such as a Deed or an Agreement executed by the



proprietors of such rights on one hand and the beneficiary of the rights being granted on the other hand.

51. In pleading a partnership relationship between him and the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, the Plaintiff's case then falls under the purview of the Partnership Act, No. 12 of 2012 which regulates partnerships. The manner of constituting a partnership is expressly provided for in this Act. (see Sections 4, 7 and 24 thereof). The Plaintiff then claims that out of the partnership relationship between him and the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, he acquired a right in the properties as a beneficial owner.
52. A partnership deed or partnership agreement is a written legal document that contains a contract entered into as between two or more individuals who have the intention of doing business with each other and share profits and losses. The only difference between the two would be that a partnership agreement is not registered in a court of law. It would contain the name of the firm as determined by all the partners, name and details of all the partners, and the date on which the business commenced, and power of each partner, salary or commission payable to each partner, process of admitting a partner, procedure to be followed in case of dispute arising and for settlement of accounts in the event of dissolution of the partnership. (<https://byjus.com/commerce/par...>). It is only by such a document that partners define the terms of their relationship, regulate the nature of business and liabilities, rights and duties so as to avoid misunderstandings
53. A beneficial owner is an individual person other than a legal person corporate body who has control over express trust or fiduciary relationship or on whose behalf an undertaking takes place. (<https://www.grantthornton.co.ke/b...>). *It is therefore clear that beneficial ownership arises from a legal title or documents with a registrable interest or for the contract to be legally enforceable. A beneficial owner includes any individual who directly or indirectly, either; (i) exercises control over a reporting Company; or, (ii) owns or controls at least 25% of the ownership interests of a reporting Company.* (<https://www.fincen.gov/beneficial>)
54. In this case, the subject properties are uncontestably currently registered in the names of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, who are Companies. It is worth-noting that having alleged a legal right, the Plaintiff ought to have presented or availed evidential material such as partnership deed or agreement to illustrate the partnership between him and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. He has not attached any such material or provided any agreement or deed in which he was offered the 5% interest in the developable subject properties that were to be transferred to him to demonstrate or show his right in the subject properties as a beneficial owner. Section 107 of the Evidence Act provides:-
  1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section 108 provides:-

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side”.

55. In the court's humble view, the Plaintiff ought to have provided evidential material or written agreement or deed that was executed between him and the 3<sup>rd</sup> and 4<sup>th</sup> Defendants to establish a prima facie case for the injunctory order he seeks to issue in his favour. He has not and this Court cannot



confer, apportion or grant such rights of ownership or proprietorship of the subject properties herein to the Plaintiff.

56. Having considered the arguments and evidence advanced by either party, this Court finds that the question of whether or not the Plaintiff has a legitimate interest in the subject properties is an issue to be addressed upon consideration of further evidence by all parties, hence the court refrains from addressing the parties rights over the same together with other contentious issues at this interlocutory stage.
57. In the circumstances, this Court is persuaded that the Plaintiff has failed to establish a prima-facie case within the parameters set out in the Nguruman Case (supra) and others in this jurisdiction to warrant being granted the injunctive orders sought. And having failed to establish a prima-facie case, it is this Court's view that the Plaintiff is unlikely to suffer loss that cannot be adequately compensated by damages nor will the balance of convenience be in his favour
58. With regard to the mandatory injunction where the Plaintiff seeks the court to compel the 3<sup>rd</sup> and 4<sup>th</sup> Defendants to sign the transfer forms so that they can transfer the properties to 3<sup>rd</sup> Parties. His argument is that the 3<sup>rd</sup> Party Purchasers have ongoing transactions concerning the suit properties wherein they have made payments and stand to suffer innocently. The Defendants on the other hand argued that the 3<sup>rd</sup> Parties are unknown to anyone except to the Plaintiff, thus their capacity to transact on the properties is questionable
59. A mandatory injunction is too draconian to be granted at interlocutory stage as the same may determine a matter in the ultimate. It is trite that although the court has discretion to grant the same, the same can only be granted in compelling and deserving circumstances, thus the discretion should be exercised only in exceptional circumstances. (See case of *Shepherd Homes Ltd -vs- Sandhan Megany* [1970] 3 ALL E R., *Sharrif Abdi Hassan V. Nathif Jama Adan* [2001] eKLR and *Locabail International Finance Ltd -vs- Agroexport & Others, the Sea Hawk* [1986] I ALL R,901).
60. In the circumstances of this case, having established that the Plaintiff has failed to establish a prima facie case to warrant the grant of an interlocutory injunction pending further evidence at the main trial, this Court declines to grant the order sought in prayer No.(4) of the application at this stage, for the contested issues and rights to be canvassed at full trial.
61. Consequently, the application dated 11<sup>th</sup> June, 2021 is declined and dismissed with costs to be in the main cause.
62. For avoidance of doubt, the following orders do issue: -
  - a. The Notice of Motion application dated 4<sup>th</sup> August, 2021 is hereby allowed and consequently an order for the consolidation of this suit with High Court Commercial Case No.E702 of 2021 (O.S) issued.
  - b. The Notice of Motion Applications dated 19<sup>th</sup> July, 2021 and 11<sup>th</sup> June, 2021 are hereby dismissed for want in merit.
  - c. Costs of all the three applications shall be in the main cause.
  - d. Parties are directed to expedite and fix the matter for pretrial and or hearing of the main suit.
- 63 It is so ordered.

**RULING DATED AND SIGNED AT KIAMBU THIS 31<sup>ST</sup> DAY OF MAY, 2023.**

**D. O. CHEPKWONY**



**JUDGE**

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 2<sup>ND</sup> DAY OF  
JUNE , 2023.**

**HON. ALFRED MABEYA**

**JUDGE**

