



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC NO. 165 OF 2021**

**BAMBURI SUPERMARKET LIMITED.....PLAINTIFF**

**- VERSUS -**

**RUPA GUPTA alias RUPA BULBULI BOSE.....1<sup>ST</sup> DEFENDANT**

**JABESS ODUOR.....2<sup>ND</sup> DEFENDANT**

**KENYA KAZI SECURITY SERVICES LIMITED.....3<sup>RD</sup> DEFENDANT**

**KHALID SALIM T/A KHALID SALIM & COMPANY ADVOCATES....4<sup>TH</sup> DEFENDANT**

**RULING**

**PRELIMINARIES**

1. For determinations by this Honorable Court are a case of three (3) Multiple applications brought by different parties and issues but over the same subject matter and to some extent the same subject parties . The said applications are dated 19<sup>th</sup> August, 2021, 23<sup>rd</sup> August 2021, and 7<sup>th</sup> September, 2021.
2. The main suit was filed by the Plaintiffs/Applicants vide a Complaint dated 19<sup>th</sup> August, 2021 where they are seeking for the following orders:-

***(a) A declaration that the Defendants their agents, assigns, employees, guards, officers, tenants or any other person authorized by the Defendants have no rights whatsoever to access, occupy, use, manage, run, lease, sub-lease, charge, sell transfer or any other manner interfere with the property known as Land Ref. No. 3413 sections I mainland North on which is erected a building known as GUPTA COMPLEX***

***(b) A declaration that the Defendants their agents, assigns, employees, guards, officers, tenants or any other person authorized by the Defendants have no rights whatsoever to access, occupy, use, manage, run, lease, sub-lease, charge, sell transfer or any other manner interfere with the property known as Land Ref. No. 3413 sections I mainland North on which is erected a building known as GUPTA COMPLEX***

This Honorable court has decided to critically assess each of the three (3) applications separately and the issues raised while dissecting the issues and the prayers sought under each of them. In the long run it has framed salient common emerging from each of the application and cutting across as areas of convergence where upon an informed just and fair decision will be arrived at.

**II. THE 1<sup>ST</sup> APPLICATION DATED 19<sup>TH</sup> AUGUST, 2021**

3. On the 19<sup>th</sup> August, 2021, the Plaintiff/Applicant brought this application under Certificate of Urgency and during the High Court Vacation under section 10 (2) & (3) of High Court (Organization and Administration) Act, Rules 16 & 17 (1) & (2) of the High Court (Organization and Administration) (General) Rules 2016 Rules 3 (1) and (2) of the High Court Practice and procedure Rules) Judicature Act (Cap 8. Sections 26 (1 and (2) of the Environment and Land Court Act 2011.

Further the said application was brought under the Provisions of Order 40 Rules 1, 2, and 3 of the Civil Procedure Rules 2010 and Sections 1A and 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya. The Plaintiffs/Applicants sought for the following Order:-

(a) Spend

**(b) That pending hearing and determination of this application there be and is hereby issued an order for injunction restraining the Defendants either by themselves or through their agents, assigns, employees, guards, officers, tenants or any other person authorized by and/or the Defendants from accessing occupying, using managing running, leasing, sub-leasing selling charging transferring or in any other manner interfering with the suit property known as Land Reference. No. 3413 sections I mainland North on which is erected a building known as GUPTA COMPLEX.**

**(c) The officer commanding station (OCS) Nyali police Station to ensure compliance with the court orders herein and to ensure that peace, law and order is maintained at all times that this order is in force and to ensure that the Plaintiff and its employees, shareholders, Directors, workers, agents assigns or any other person authorized by the Plaintiff to be on the property known as Land Reference. No. 3413 sections I mainland North on which is erected a building known as GUPTA COMPLEX are not barred or restrained from accessing the said property by the Defendant's agents, employees, guards assignees or any other person acting for an on behalf of the Defendants.**

**(d) Pending hearing and determination of this suit as No. (a) above.**

**(e) That costs of this application be borne by the Defendants jointly and severally.**

4. The said application is founded on the grounds and testimony of the 34 Paragraphed Supporting Affidavit of one Mr. KUNJ GUPTA sworn and dated 19<sup>th</sup> August 2021 and the fifteen (15) annexures marked as "KG -1 to 15" annexed thereof. He has disposed stating that he is in the Director of the plaintiff Company and hence duly authorized to swear the said affidavit together with an attached company's resolutions to that effect. The Director has disposed that the plaintiff is the registered owner to all that property known as Land Ref. No. 3413 Section I Mainland North on which is erected a building known as GUPTA BUILDING COMPLEX (hereinafter referred to as the suit property")

The Director held that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/ Respondents were presenting conducting themselves as the owners of the suit property and had taken over control management and possession of the suit property without approval and consent of the Plaintiffs/Applicants and an utter violation of the Plaintiff's rights and interest therein.

5. According to the Director these Defendants were neither Directors nor shareholders of the Plaintiff's company but were total strangers to it with no right to run, operate, manage access use, occupy and collect rent from the suit property – he annexed the official search –CR-12 to that effect.

6. He deposed that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had leased out the suit property to tenants and were currently collecting and receiving rent on account of the suit property at the expense of the Plaintiff. He held that the Defendants had directly or through their tenants, employees, officers, guards and such authorized persons occupied the suit property which belonged to and registered in the names of the Plaintiff and had barred the Plaintiff and its directors, shareholders, nominees employees agents and persons authorized by the Plaintiff from accessing the suit property.

7. The Director stated based on information shared from his coordination – NARUN GUPTA that on 14<sup>th</sup> July, 2021 the 3<sup>rd</sup> Defendant's guards, posted on the suit property blocked harassed and prevented people including a Clerk, their Advocates, Co-Directors from entering the premises compelling the Advocate to do a letter dated 21.7.2021 and which was responded to dated 9<sup>th</sup> August, 2021 whereby the 3<sup>rd</sup> Defendant admitted being involved in providing emergency response services on the suit property and holding that it had entered into a contract with the 3<sup>rd</sup> Defendant to provide security to the building – GUPTA COMPLEX. The Director disposed that despite being the legal registered owner to the suit property but it was losing income in form of rental income at the behest of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

8. He held that there existed many other suits being:-

**(a) HCCC No. E070 of 2021 – Rupta Gupta alias Rupta Bulbuli Bose – Versus - Mr. Darman Gupta & 4 Others** and through a letter dated 16<sup>th</sup> July, 2021, the 4<sup>th</sup> Defendant informing tenants that all rent for the suit property should be paid to the 1<sup>st</sup> Defendant who is not the registered or beneficial owner hence has no right to relieve rent from the suit property.

**(b) Mombasa CM Civil No. 209 of 2019 Bamburi Supermarket Limited – Versus - Premial Gupta.**

**(c) CMCC (Mombasa) No. 701 of 2019 – Rupta Bulbuli Bose – Versus - Real Estates Limited.**

9. He deposed that the 1<sup>st</sup> Defendant despite known that she was neither a Director nor a shareholder of the Plaintiff and has right over the Plaintiff's property. She insisted that she was the owner of the suit property and hence entitled to manage and receive rent therefrom. She held to have the power to managed the property by court by virtue of being an administrator of the Estate of Prem Gupta who she alleged was her husband

10. The Director deposed that the 4<sup>th</sup> Defendant despite being an Advocate of High Court has acted fraudulently, negligently and deliberately interfering with the Plaintiff's rights over the suit property while hiding under the pretext of having instruction to act for the 1<sup>st</sup> Defendant and hence has ended up filing numerous cases and causing so much confusion yet the Grant Letters of Administration have not been confirmed and indeed there was an application seeking for the revocation of the said grant.

11. The Director held that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have been collecting and receiving rent due from the suit property but they have

adamantly refused to decline to account for the and submit the same to the Plaintiff not the rental tax to the Kenya Revenue Authority (KRA).

He urged for the court to grant the orders prayed as the Plaintiff has suffered great loss of the rental income and damage and is not allowed to have access to the suit property despite being the registered and legal owner.

On the 19<sup>th</sup> August, 2021 while before court, the Plaintiff was granted the interim orders and directed to serve for *inter - partes* on 29<sup>th</sup> September, 2021.

### **Replying Affidavit by the 1<sup>st</sup> Defendant to the application dated 19.8.2021**

12. On 17<sup>th</sup> September 2021, the 1<sup>st</sup> Defendant filed a 12 paragraphed Replying Affidavit dated and sworn on 8<sup>th</sup> September, 2021 by one RUPA GUPTA alias RUPA BULBUL BOSE the 1<sup>st</sup> Defendant herein and the six (6) annexures marked as “RBB – 1 to 6”

13. She deposed having read the application by the Plaintiffs/Applicants dated 19<sup>th</sup> August, 2021 and felt that the contents of Paragraph 3 of the said Supporting Affidavit of Kunj Gupta. She held the contents of it were misleading especially the annexed annexure marked as “KG - 3” being the official search of the CR - 12 form of Directors and Shares of the Plaintiff’s Company obtained from the Registrar of Companies. She held that these were subject matter in issue with regard to the shareholders management and control of the Bamburi Supermarket Limited already pending heading and determination before high court in the commercial case of HCCC No. E070 of 2021 – **“Rupa Gupta – Versus - Darman Gupta & 4 Others”**

14. She further deposed having instituted the above case at High Court in her capacity as the duly appointed Legal Administrator of the Estate of Prem Ramnath – Deceased - who was a shareholder of the Bamburi Supermarket. She held that the entering into all the tenancy agreements and the collection of the rental income on behalf of the Supermarket had always been executed by the deceased since the year 2006 to date. She insisted that this had been a well known to Mr. Kunj Gupta.

15. Additionally, She averred that as the duly appointed Legal administrator of the estate of the deceased, the issues pertaining to the shares and composition of the shareholders were also a subject matter in issue before the family Court in HCCC (Mombasa) Succession cause No. 5 of 2020 – The Estate of the late Prem Lal Ramnath. She argued that from the said Succession cause, the following were listed as being the assets for the deceased:-

- (a) Land – Land Reference No. Kilifi Township/Block IV/37
- (b) ½ Share in Land – Land Reference No. Kwale/Diani Beach Block/47.
- (c) 1 Share held in RAM Development Limited
- (d) 1 Share held in Bamburi Supermarket Limited

Wherein the beneficiaries were identified and listed as Rupa Bulbul Bose Gupta (widow); Varon Gupta Premnath (Son) & Yarika Gupta (Daughter).

16. She contended that, after the demise of the deceased, Mr. Kunj Gupta fraudulently distributed the shares holding of the deceased with the wrong intent of disinheriting the widow from the shareholding of the Bamburi Supermarket Limited – a company that was the registered owner of all that parcel of land known as Land Reference No. 4313 Section 1 Mainland North. As a result, she claimed, a criminal complaint was lodged.

She held that on 30<sup>th</sup> July, 2021 the High Court in the HCCC No. E070 of 2021 had issued injunctive orders restraining the Defendant’s from interfering with the tenants on the said premises until “*the inter parte*” hearing took place on 25<sup>th</sup> October, 2021 and that Mr. Kunj Gupta was bound by the said orders.

17. She felt that when they appeared before this court prosecution this application, Mr. Kunj Gupta and his advocates deliberately failed to disclose all these material facts to this court.

18. On 18<sup>th</sup> October, 2021 – Rupa Gupta alias Rupa Bulbul Bose filed a Supplementary affidavit in response to the Replying Affidavit of Varun Premal Gupta filed on 28.9.2021. In summary she held as follows:-

- (a) The Court should proceed to review the orders made on 23<sup>rd</sup> August, 2021 declining to discharge or vary the said orders as they remain intact.
- (b) The said orders were conflicting and had led the Plaintiff and its advocate being cited for contempt of the order of the HCCC. No. 070 of 2021 by Lady Justice Njoki Mwangi.
- (c) The Plaintiff blatantly breached the orders of high court having failed to recognize its jurisdiction.

19. Prior to the scheduled inter partes hearing of the 1<sup>st</sup> Application dated 19.8.2021 on 29<sup>th</sup> September, 2021 the 1<sup>st</sup> and 2<sup>nd</sup> Defendant filed the 2<sup>nd</sup> notice of motion application dated 23<sup>rd</sup> August, 2021. By the said application brought under the provisions of section 1A, 1B, 3A and 63 of the Civil Procedure Act Cap 21 and Order 51 Rule 1 of the Civil Procedure Rules 2010. It is brought by the 1<sup>st</sup> Defendant/Applicant and seeks for the following orders:-

(a) *Spend*

(b) *That pending hearing and determination of this application this Honorable Court be pleased to set aside, vary or discharge the ex-parte orders issued by Hon. Justice Naikuni at ELC – 3 Mombasa as on 19<sup>th</sup> August, 2021.*

(c) *That this suit be stayed pursuant to the provisions of section 6 of the Civil Procedure Act pending the hearing and determination of the High Court Commercial Case No. 70 of 2021 – Rupta Gupta –versus- M. Kurj Gupta & 4 Others.*

20. The 2<sup>nd</sup> Application is founded on the testimony and grounds of the 12 Paragraphed supporting affidavit of Rupa Bulbuli Gupta sworn and dated 23<sup>rd</sup> August, 2021 and the five (5) annexures marked as RG – 1-5” annexed hereto.

21. The deponent has deposed that he is the 1<sup>st</sup> Defendant in this matter and this authorized to swear this affidavit. He deposed that there exists a separate suit being High Court Civil Suit No. 70 of 2021 – Rupa Gupta – Versus - Kunj Gupta & 4 Others whereby on 30<sup>th</sup> July, 2021 the said court issued the following orders:-

(a) *Spend.*

(b) *That temporary information orders be and hereby granted against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants restraining them from interfering with the management, ownership and ruling of the affairs of the building known as GUPTA COMPLEX PREMISED on the Land Ref. No. 3413/I/MN especially the tenants herein who had been managed by the deceased Prem Lal Ramnath and the Plaintiff (now the legal Administrator of the estate of the deceased) pending the hearing and determination of the application inter-partes.*

Parties were directed to file and serve written submissions and be ready for highlighting of the submissions on 25<sup>th</sup> October, 2021.

22. The deponent held that the Plaintiff observed the interim orders in the ELC 165 of 2021 on 19.8.2021 for failing to disclose material facts of the existence of the matters of HCCC E070/2021 and hence to him having these two orders having the same legal impost would cause confusion and conflicting. They are even embarrassing as they are all directed to the same Nyali Police Station to ensure compliance. He deposed that this state of affairs arose as there was deliberate non- disclosure of material facts by the Plaintiff to the Honorable Court. For this reason he urged that the said orders of 9<sup>th</sup> August, 2021 be vacated, discharged and/or set aside.

### **The 3<sup>rd</sup> – the grounds of opposition dated 27<sup>th</sup>**

#### **September, 2021**

23. On 28<sup>th</sup> September, 2021 the Law firm of Messrs Orienjo Kibet and Khalid Advocates for the 4<sup>th</sup> defendants filed grounds of opposition to the notice of motion application dated 19<sup>th</sup> August, 2021. They held that this matter was “*Sub-judice*” as there was a similar matter pending hearing and determination before High Court Mombasa – being HCCC Commercial Division No. 70 of 2021 seeking determination of the shares in the plaintiffs which turns owns the property the subject of this application. They held that this court issued orders that are in conflict with the orders granted in the High Court case. The held the plaintiff concealed material facts in obtaining the interim orders by filing a suit knowing very well there was pending suit with similar orders restraining the Plaintiff from interfering with the management. Ownership running of affairs of the building pending the hearing of the said suit. They admitted that the ownership of the suit land belongs to the plaintiff save what was contentious was the shares of the property thus, they urged court to dismiss the Notice of Motion application with costs for being frivolous, vexatious scandalous and otherwise an abuse of this Honorable Courts’ process.

### **THE 5<sup>TH</sup> APPLICATION DATED 7<sup>TH</sup> SEPTEMBER, 2021**

24. on the 8<sup>th</sup> September, 2021 the law firm of Messrs. Oluga & Company Advocates for eh Plaintiffs filed a Notice of Motion Application dated 7<sup>th</sup> September, 2021. It is brought under the Provisions of Section, 1A, 1B, B, 3A of the Civil Procedure Act Order 40 Rule 3(1) and (2) of the Civil procedure Rules Article 2 (1 and (2) , 3(1) 10 (2) (a) 159 (2) (e) of Laws of Kenya and Section 14 of ELC Act. Seeking for the following orders:-

(a) *Spend*

(b) *That Rupa Gupta alias Rupa Bulbul Bose, the 1<sup>st</sup> Defendant herein be summoned by this court to show cause why she should not be committed to civil jail for six (6) months for disobeying this Honorable Courts orders made on 19<sup>th</sup> August, 2021.*

(c) *Costs of the application be paid by the 1<sup>st</sup> Defendant.*

The said application is founded and supported by the grounds testimony and the 17 Paragraphed supporting affidavit of Kunj GUPTA dated

and sworn on 7<sup>th</sup> September, 2021 and the six (6) annexures marked as “KG – 1 to 6) annexed thereto.

## **THE SUBMISSIONS**

On 7<sup>th</sup> December 2021 while all the parties appeared before this court, it was directed that they all prepare – file and serve their written submissions to the above cited application. All of them fully complied and court reserved a date for ruling being 7<sup>th</sup> December, 2021.

### **A. THE SUBMISSIONS BY THE PLAINTIFF/APPLICANTS – MR. KUNJ GUPTA**

25. On 19<sup>th</sup> October, 2021, the Learned Advocates for Mr. Kunj Gupta the law firm of Messrs. Oluga & Co. Advocates prepared and filed their written submissions. They submitted that there had been an erroneous impression created by the Defendants that the issues raised as the ELC – 165 of 2021 were the same issues pending determination on HCCC No. E70/2021. The main issue under HCCC E070/2021 were the allegations by Rupa Gupta that the shares of deceased were fraudulently transferred. She sought for the orders that the Registrar of Companies to rectify the CR - 12 form to include the estate of the deceased as a shareholder. From the matters before the ELC 165/2021 were basically on the land ownership of the suit land; the trespass and their interference with the managing and running of the said suit land. The ELC did not deal with the shareholding and commercial aspects of the Bamburi Supermarket at all.

26. The Learned Counsel also submitted that there were no conflict between the orders of HCCC No. 70/2021 of 30/7/2021 and those of ELC No. 165/2021 of 19.8.2021 – as one dealt on the restraining orders from interfering with the management, ownership and running of the suit property while the other was restraining from the suit property which is owned by the Plaintiff. In fact both are in favour of the Bamburi Supermarket Limited.

The Learned Counsel submitted that they sought for injunction orders pending the hearing and final determination of the suit. They being the registered owners to the suit property had *Prima facie* case with a high probabilities of succeeding and that the Defendants had taken over control. Management, possession and use of the suit land without the approval and consent of the Plaintiffs. Indeed the Defendants had wrongfully leased it out to tenants and were currently collecting and receiving rent on account of the suit property at the expense of the Plaintiff. The Defendants had barred the Plaintiff and its Directors from accessing the suit land. As a result, the Plaintiff was losing rental income. He argued that the Defendants had adamantly declined to account for and submit it to rental tax to the Kenya Revenue Authority (KRA) and hence exposing the Plaintiff for being charged on allegation or offence for tax evasion and related tax offence. From these facts, he submitted that they were suffering irreparable loss and damage which could not be compensated by way of damage. They contended that if court was in doubt the balance of convenience tilted in favour of the plaintiff who undoubtedly the legal owner to the suit land.

27. On the issues raised on the application dated 23<sup>rd</sup> August 2021, the Advocates strongly opposed the orders of stay of the ELC No. 165/2021 under Section 6 of the Civil Procedure Act pending the hearing and determination of the high court - HCCC No. 070/2021. They relied on the provisions of under Section 6 of the Civil Procedure Act, Cap. 21 and the decision of “*London Distillers (K) Limited –versus- National Environment Management Authority & Another 2021 eKLR and Edward R. Ouko – Versus - Speaker of the National Assembly & 4 Others (2017) eKLR.*” where the condition for stay or principle of “*Res Sub – Judice*” were laid down as:-

**“.....For the Principle to apply certain condition precedent must be shown to exist; first, the mater in issue in the subsequent suit must also be directly and substantially in issue in the previous instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceedings must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”**

28. Thus, in summary the Learned Counsel held that the 1<sup>st</sup> Defendant’s application did not meet the above well laid - down requirements of *Res sub - judice* in that the issues, the parties and the subject matter in the two suits – HCCC E070/2021 and ELC 165/2021 were different and distinct and each with its own jurisdiction to effectively handle the matters placed before them for all these reasons they urged court to allow their applications of 19<sup>th</sup> August, 2021 and 7<sup>th</sup> September, 2021 and to dismiss the 1<sup>st</sup> Defendant’s Application of 23<sup>rd</sup> August, 2021.

### **B. THE SUBMISSIONS BY RUPTA GUPTA**

29. On 21<sup>st</sup> October, 2021 the Learned Advocate for the 1<sup>st</sup> Defendant – Rupta Gupta alias Rupa Bulbul Bose the law firm of Messrs. Martin Tindi & Company Advocates filed their written submissions accordingly. They submitted that the pre -dominant test within this case was the shareholding of the Bamburi Supermarket limited and the fraud by the Directors. They argued that once that issue was determined automatically the pending issues will be settled hence, it is for this primary reason that they felt it and needful for this court to first of all hold on through a stay of its proceedings under the provisions of section 6 of Civil procedure Act awaiting the validity and decision on the shareholding to be determined by the HCCC No. E070/2021. The Learned Counsel submitted that the Plaintiff abused the due process of Court by filing a separate suit ELC No. 165/2021 and added the same Defendants instead of filing a Defence or counter claim in the HCCC No. E070/2021. They camouflaged this suit to appear as and ELC matter whilst in reality it was the issue of shareholding.

30. To support their position, they relied on the decision of *JR No. E045 of 2020 – Republic – Versus - Paul Kihara Kariuki, the Attorney General & 2 Others.* where court spelt out several statutory that may arise from the abuse of the due process of Court for instituting Multiplicity of suits on the same subject matter, parties simultaneously in different court even though on different grounds, where two actions are commenced the second asking for a relief which may have been obtained in the first. Hence they submitted that the Plaintiffs had abused the due process of court. The Learned Counsel emphasized that the Plaintiff in the instant case abused the court process by filing another claim whilst the same subject matter in issue could be handled in HCCC No. E070 of 2021 with the application for interim injunctive orders sought by the Plaintiff. They submitted that the Plaintiff failed to satisfy the ingredients and standard principles laid down in the famous case of *Geilla – Versus - Cassman Brown & Company Limited (1973) E.A. 308.* They held that from all the allegations meted out to the effect that the Defendants had taken control, possession, management of the suit property and prevented them from access, collection and receiving of rental income and loss of income were aspect which would require the adduction of evidence during a full trial clearly then

they would not be an establishment *prima facie* case.

31. On the having suffered irreparable loss and damage which could not be compensated by way of damage – there being payment of a sum of Kenya Shillings One Million Eight Hundred and Sixty Four Thousand Six Hundred and Thirty One (Kshs. 1,864,631/=) per month needed to be computed. In the long run they argued the balance of convenience tilted in favour of the 1<sup>st</sup> Defendant taking that the above two ingredients above failed and the Plaintiff approached this court without clean hands based on the abuse of the due process and filing of another suit instead.

32. The Learned Counsel submitted that the Plaintiff contention that the HCCC E070/2021 has no jurisdiction to hear the matters filed in this court would amount to making this court sit as an appellate jurisdiction to determine that the High Court has no jurisdiction to deal with the matter before the Court. In any case they have already filed a Defence and a counter claim in that court.

In Conclusion, the Learned Counsel contended that the public perception especially the tenants within the Gupta Complex being exposed to the said 2<sup>nd</sup> order was more the reason should be a stay of this later case under the provisions of Section 6 of the Civil Procedure Act, Cap. 21 and allow the previous suit HCCC E070/2021 to proceed for hearing to avoid a future conflicting judgment and public ridicule and chaos. They urged court to grant the orders as prayed in their application with costs.

### **III. ANALYSIS AND DETERMINATION**

33. I have critically considered all the four (4) applications and the grounds of opposition, the well-articulated written submissions the cited authorities and the relevant provisions of the law. I must admit this though a straight forward matter but highly and sprinted fought by the parties. The complexity arises is caused mainly by the parties is splitting hairs on what is seemingly clear issues and also by spreading them over by filing multiplicity of suits at different court and interlocutory application.

34. In order to arrive at an informed decision, I have framed the following salient issues to guide me accordingly. These are:-

***(a) Whether the issues on the ownership of the suit land being LR. No. 3413 Section I Mainland North on which is erected a building known as Gupta Complex is contentious and in that case which court is legally mandated to make that determination? Whether the Plaintiff meets the requirement of being granted temporary injunction under the provision of Order 40 Rule 1 & 2 of the Civil Procedure Rules.***

***(b) Whether the issues of the directorship and shares of the Plaintiff's Company vis-à-vis the Estate of the late Prem Lal Ramnath and being a matter of commercial and probate and administration /Succession Nature which court has jurisdiction to hear and determine them?***

***(c) Whether there is any conflict created by the interim orders granted by High Court No. 070 of 2021 on 30<sup>th</sup> July, 2021 and the ELC No. 165 of 2021 on 19<sup>th</sup> August, 2021 vis-à-vis the Principles of “sub judice” and “Res judicata” as founded under the provisions of section 6 and 7 of the Civil Procedure Act Cap 21 of Laws of Kenya.***

***(d) Who will bear the costs to these applications?***

***ISSUE No. a). Whether the issues on the ownership of the suit land being LR. No. 3413 Section I Mainland North on which is erected a building known as Gupta Complex is contentious and in that case which court is legally mandated to make that determination? Whether the Plaintiff meets the requirement of being granted temporary injunction under the provision of Order 40 Rule 1 & 2 of the Civil Procedure Rules.***

35. Ideally, the purpose of a temporary injunction as stated in Order 40 Rule 1 of the Civil Procedure Rules, 2010 is to stay and prevent the wasting, damaging, alienation, the sale, removal or disposition of the suit property. The principles which guide the court in deciding whether or not to grant an interlocutory injunction are well settled in the now famous “*Giella V Cassman Brown (supra)*” as follows:

i. **prima facie with a probability of success,**

ii. **the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages, and**

iii. **if the court is in doubt on the existence or otherwise of a prima facie case, it will decide the application on the balance of convenience.**

The first requirement the applicants is required to establish a prima facie case. The Prima facie case was defined by the **Court of Appeal in MRAO Ltd V First American Bank of Kenya Ltd & 2 others (2003) eKLR** “so what is “a prima facie case” I would say that in civil cases it is a case in which on the material presented to the court or tribunal properly directly itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.” When examining whether the applicants have established a prima facie case, court ought not to indulge into examining the merits and demerits of the case as it was stated by **Odunga J in Peter Kasimba & 219 others V Kwetu Savings & Credit Co-operative Society Limited & 11 others (2020)eKLR**, stated that “at an interlocutory stage, the court is not required and indeed forbidden to purport to decide with finality the various relevant “facts” urged by the parties.”

36. I have taken cognizance that, apart from one Advocate of high Court, Mr. Khalid, all the parties in these matters herein are family

members. They seem to have deep vested disputes among themselves. They have decided to resolve the same by instituting multiplicity of court cases and not other alternative dispute resolution (ADR) mechanism available. Distinctively, there are over three suits now handling these matters being one on the commercial aspects the share holding of the Bamburi Supermarket; the succession cause for the Estate of the deceased and the suit land ownership. I am almost tempted to refer the matter for mediation.

The Plaintiff has sought temporary injunction orders against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants restraining them from interfering with the management, ownership and ruling of the affairs of the building known as GUPTA COMPLEX PREMISED on the Land Ref. No. 3413/1/MN especially the tenants herein who had been managed by the deceased Prem Lal Ramnath and the Plaintiff (now the legal Administrator of the estate of the deceased) pending the hearing and determination of the application “*inter-partes*”. The Defendants are pushing to be accorded what they are claiming to be their or deceased’s rightful shares in the Bamburi Supermarket Limited and they are alleging are being fraudulently taken away or disinherited.

37. From the documents placed on record, it seems the Plaintiff has a Certificate of Title which is an indication that the land is legally and absolutely registered in its names. Nonetheless, these are issues to be adjudicated during the full trial. In the meantime, the Plaintiff/Applicant has satisfied the ingredient founded under the now famous case of “**Giella – Versus – Cassman Brown**” of having established a *prima facie* case with a high chance of success. These are matters to be heard and rightfully determined before the High Court and Environment Land Court. There is no conflict as they are very distinct and separate subject matters.

38. The second requirement is for the Plaintiffs/Applicants to prove to court that they might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. The Plaintiffs/Applicants have stated the Defendants had wrongfully leased it out to tenants and were currently collecting and receiving rent on account of the suit property at the expense of the Plaintiff. Additionally, that the Defendants had barred the Plaintiff and its Directors from accessing the suit land. As a result, the Plaintiff was losing rental income and had adamantly declined to account for and submit it to rental tax to the Kenya Revenue Authority (KRA) and hence exposing the Plaintiff for being charged on allegation or offence for tax evasion and related tax offence. From these facts, he submitted that they were suffering irreparable loss and damage which could not be compensated by way of damage. They contended that if court was in doubt the balance of convenience tilted in favour of the Plaintiff who undoubtedly the legal owner to the suit land.

39. In the given circumstances, I concur that the the Plaintiffs/Applicants stand to lose immensely. The provision of Order 40, Rules 1 & 2 of the Civil Procedure Rules, 2020 empowers court to grant an order of temporary injunction to restrain such acts and to prevent the wasting, damaging, alienation, sale, removal or disposition of the suit property. The Plaintiffs/Applicants stand to suffer irreparable injury that cannot be quantified by damages. On this preposition, I fully associate myself with the ratio in the **Court of Appeal in Nguruman Limited V Jan Bonde Nielsen & 2 others (2014)eKLR** “*in conclusion, we stress that it must always be borne in mind that the very foundation of the jurisdiction to issue orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of multiplicity of suits and where facts are not shown to bring the case within these conditions the relief of injunction is not available.*”

When court is in doubt, it examines on which side the balance of convenience tilts to. In this case, the balance of convenience tilts in favour of preserving the suit property during the hearing and determination of the suit.

**ISSUE No. b. Whether the issues of the directorship and shares of the Plaintiff's Company vis-à-vis the Estate of the late Prem Lal Ramnath and being a matter of commercial and probate and administration /Succession Nature which court has jurisdiction to hear and determine them?**

40. As stated above, I reiterate that these are matters to be heard and rightfully determined before the High Court and Environment Land Court. These courts have proper jurisdiction to deal accordingly.

There is no conflict as they are very distinct and separate subject matters. The only issue to ponder upon is for the parties to seriously consider resolving these matters amicably or in the alternative consolidate them for whatever its worth. I need say no more under this sub – heading whatsoever.

**ISSUE No. c. Whether there is any conflict created by the interim orders granted by High Court No. 070 of 2021 on 30<sup>th</sup> July, 2021 and the ELC No. 165 of 2021 on 19<sup>th</sup> August, 2021 vis-à-vis the Principles of “Sub judice” and “Res judicata” as founded under the provisions of Section 6 and 7 of the Civil Procedure Act Cap 21 of Laws of Kenya.**

41. Additionally the two (2) issues raised by the Defendants herein to the effect that there were in breach of the *vis-à-vis* the Principles of “**Sub judice**” and “**Res judicata**” as founded under the provisions of Section 6 and 7 of the Civil Procedure Act Cap 21 of Laws of Kenya by the Plaintiff in filing this case. Therefore, there is need for Stay of the proceedings of the case before this court. Sections 6 & 7 provides that:-

**6. “No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”.**

41. From this provision, the ingredients to satisfy the condition of granting stay of the suit or proceedings in any matter in Court are as follows:-

a). There has to be a matter pending or previously heard in court;

b). The matter involved a subject in issue which was directly and substantially in issue in a previously instituted suit or proceeding.

c). The matter must have been between the same parties, or between parties under whom they or any of them claim, litigating under the same title;

d). The matter must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

The provision of Section 6 is a bar to parallel prosecution of cases in two forums of equal jurisdiction. These two provisions of the law are so intertwined. Thus, the legal justification as to why the provisions of both Sections 6 and 7 of the Civil Procedure Act as advanced by the Defendants herein are not applicable here is graphically stated out herein below.

**7. “No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties or between parties under whom they or any of them claim, litigating under the same title, in court competent to try such subsequent suit or this suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court’.**

42. From the above provisions of the law, for the doctrine of Res Judicata to be achievable, the following the ingredients must to be fulfilled:-

a) The suit or issue was directly and substantially in issue in the former case

b) The former suit was between the same parties or parties under whom they or any of them claim;

c) Those parties were litigating under the same title;

d) The issue was heard and finally determined in the former suit.

e) The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

Expounding on the essence of the doctrine of Res Judicata, the court in “**John Florence Maritime Services Limited & Another – Vs- Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR** pronounced itself as follows:

**“The rationale behind Res Judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter, Res Judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of Judgements by reducing the possibility of inconsistency in Judgements of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, very essence of the rule of law would be in danger of unravelling uncontrollably”**

43. Indeed, the above are matters of pure law from a face value but nonetheless, in as much as they involve the same parties, but the matters are still pending determination and not as yet concluded. As provided for under Article 162 (b) of the Constitution of Kenya and Section 3 of the Environment and Land Court Act. No. 19 of 2012, vests all matters of the use, had and occupations of title tot eh original and unlimited jurisdiction of the ELC and not any other court. It is evident that there exists more than four (4) matters spread out and filed by the same parties at different courts. But in particular the matter pending hearing and determination before the High Court Civil and Commercial Court (Mombasa) No. 070/2021 is solely on the shares and commercial aspects of the Plaintiff Property and being a matter of commercial nature. It is just fair and prudent that court proceeds to handle it in the spirit of the Court of Appeal case of CA. No.83 of 2016 (Mombasa) **Co-operative Bank – Versus - Patrick Njuguna Kangethe – (2017) eKLR** on mixed grill cases of commercial nature.

In conclusion on this issue, therefore, its noted that the subject matters and issues are substantially distinct. These are matters to be heard and rightfully determined before the High Court and Environment Land Court. There is no conflict are at as they are very distinct and separate subject matters. As a result these principles are inapplicable unless otherwise stated.

#### **ISSUE No. d). Who will bear the costs to these applications?**

44. The provisions of Section 27 (1) of the Civil Procedure Act, dictate that Costs follow the events. In this case the findings from each of the filed applications.

That notwithstanding, based on the principles of natural justice, equity and conscience and taking that this is dispute involving a family, I direct that each party for the time being bears their costs.

#### **DETERMINATION**

45. Based on the fore going analysis, I do proceed to make the following directions/orders:-

a) **THAT the Notice of Motion dated 19<sup>th</sup> August, 2021 by the Plaintiff/Applicant be and is hereby allowed.**

b) **THAT the Notice of Motion application dated 23<sup>rd</sup> August, 2021 by the Defendant/Applicants is found to unmeritorious**

and hence dismissed.

c) THAT grounds of opposition dated 27<sup>th</sup> September, 2021 by the 4<sup>th</sup> Defendant is found to be unmeritorious and hence be and is hereby dismissed.

d) THAT the Notice of Motion application dated 7<sup>th</sup> September, 2021 by the Plaintiff/Applicant be and is hereby stayed awaiting the outcome of these orders made today – 7<sup>th</sup> December, 2021 save on the fulfillment of the following conditions:-

(i) All the rental income collected and received from the proceeds of the suit land from the months of July 31<sup>st</sup> onwards to be deposited in joint escrow bank Account of the Law Firms of Messrs. Oluga & Company Advocates, Messrs. Martin Tindi & Company Advocates Messrs. Cootow & Associates and Messrs Oruenjo, Kibet & Khalid Advocates within the next 14 days from today.

(ii) These account holders/Signatories to be empowered to run, manage and operate the said afore accounts on the day to day operations and settlement of over heads unlawful the matter is heard and determined.

(iii) The 1<sup>st</sup> Defendant, by herself agents and servants to provide this court with a detailed and comprehensive accounts and financial statements of all the rental income collected and received from the month of July, 31 todate within the next thirty (30) days.

e) THAT the parties are advised if not possible to withdraw all the court cases pending in all the other courts over the same subject matter, the same to be consolidated save to state:-

(i) The HCCC (Mombasa) No. 070/2021 which is distinctly and solely on the fraudulent and irregular matters of shares onto the plaintiff's property to continue being heard to its logical conclusions accordingly.

(ii) The ELC. No. 165/2021 which is distinctly and solely in matters of ownership and title of the suit land to be fixed for hearing within the next ninety (90) days from this date on priority basis.

(iii) There be a mention of the ELC 165/2021 on 1<sup>st</sup> February, 2022 for pre-trial conference sessions under order 11 of the Civil Procedure Rules and case management and taking an appropriate hearing date.

(iv) THAT each party to bear their own costs of the application hereof.

IT IS SO ORDERED.

RULING IS DATED, SIGNED and DELIVERED at MOMBASA VIRTUALLY THIS .....7<sup>TH</sup> .....DAY OF ..... DECEMBER..... 2021.

HON. JUSTICE L.L NAIKUNI

JUDGE

ENVIRONMENT AND LAND COURT, MOMBASA

In the presence of:-

*M/s. Yumna – the Court Assistant*

*Mr. Oluga Advocate for the Plaintiff/Applicant.*

*Mr. Martin Tindi Advocate Defendants/Respondents.*