



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**HCCOMM/E528 OF 2020**

**SIMON KARANJA NGUGI.....PLAINTIFF**

**VERSUS**

**MARGARET WANJIRU KIHANYA.....DEFENDANT**

**RULING**

#### **Introduction**

1. Vide a Notice of Motion dated 4<sup>th</sup> December 2020, filed without a Plaint, registered as **HCCOMM/E529/2020**, the Plaintiff moved this court in seeking orders that the pending the hearing and determination of the application and the suit, this court grants an interim injunction stopping ongoing construction on **LR No. 11612/3** or any part thereof pending a joint valuation by the parties herein. The Plaintiff also prayed for any other or further orders the court may deem fit to grant plus costs of the suit.
2. At the *ex parte* stage I observed that the agreement between the parties contains an arbitration clause providing for the mode of dispute resolution. I declined to grant *ex parte* orders and scheduled the matter for *inter partes* hearing on 26<sup>th</sup> January 2021. The Plaintiff again approached the court by a Plaint also dated 4<sup>th</sup> December 2020 premised on the same dispute. However, the suit was registered as **E528** of 2020 suggesting that it was filed before the above suit.
3. More significant is the fact that the Plaintiff filed an application dated 21<sup>st</sup> December 2020 in **E528** of 2020 seeking an injunction similar to the one sought in the earlier application pending the hearing of the application an order that the application dated 4<sup>th</sup> December 2020 be heard *ex parte*. On 26<sup>th</sup> January 2021, the applicant's counsel attributed the existence of the two files to confusion at the registry. I ordered that **E529** of 2020 be closed and the pleadings be transferred to **E 528** of 2020. This ruling relates to the application dated 4<sup>th</sup> December 2020 originally filed in **E529** of 2020.
4. The application is premised on the grounds that on the 4<sup>th</sup> April 2018, the Plaintiff and the defendant entered into a contract wherein the Plaintiff was employed as the main contractor to undertake civil engineering works on the defendant's property Land Reference No. **11612/3** on the terms that the defendant would be paid a total of **Kshs. 74,070,207.54** in intervals as the works progressed. The Plaintiff contends that the defendant failed to pay him the agreed sums as a consequence of which the works were suspended.
5. The Plaintiff states that as at 30<sup>th</sup> November 2018, a total sum of **Kshs. 44,69,458/=** arising from partially completed works was outstanding, and that the defendant has purported to illegally terminate the contract and appointed a new contractor who took over the site before a joint inspection is done to certify the works done by the Plaintiff and pay the Plaintiff his dues.
6. The Plaintiff states that he has a strong case with a high probability of success and therefore the defendant should be restrained from further interference with the construction before a joint inspection is done and/or before this matter is referred to arbitration, and, that the balance of convenience tilts in favour of granting the injunction to protect and preserve the construction site. Lastly, the Plaintiff states that the orders sought are in the best interests of justice and will in no way prejudice the defendant.

#### **Defendant's grounds of opposition**

7. The defendant filed grounds of opposition stating that the application is frivolous, vexatious and an abuse of the court process; that the applicant has not satisfied the principles governing the grant of temporary injunctions, particularly, that he will suffer irreparable injury

which cannot adequately be compensated by an award of damages. Further, the defendant states that the Plaintiff claims a liquidated sum of **Ksh.44,669 458/=** for alleged construction works on the defendant's property, hence, he cannot suffer irreparable harm. Additionally, she states that if the injunction is granted, she will be prejudiced. Lastly, that the subject agreement provides for arbitration in the event of a dispute, hence, the application is pre-mature and defective.

### **Defendant's Replying Affidavit**

8. The defendant, M/s Margaret Wanjiru Kihanya swore the Replying affidavit dated 9<sup>th</sup> February 2021. She deposed that the applicant deliberately failed to fully disclose the circumstances surrounding the execution of the agreement between the parties, hence he approached this court with unclean hands.

9. She deposed that on or about November 2017 she authorized her son, Joe Kihanya, to engage and retain the services of one Anthony Ngone Waithaka through his company, Hurricane Ventures Kenya Limited to undertake general contractor services on the subject property and as evidenced by the cheques exhibited by the Plaintiff. That the commitment fee was paid to the said company as directed by Mr. Anthony Ngone Waithaka. She deposed that all the tax invoices from various suppliers of goods exhibited by the applicant also confirm that Hurricane Ventures Kenya Limited undertook the said work and not the applicant as claimed, and, save for the commitment fee of **Kshs. 1,000,000/=** paid to the said company, the balance was to be paid by transfer of 3 parcels of land excised from the subject property valued at **Kshs. 7,000,000/=** each to the said Anthony Ngone Waithaka in full settlement of the agreed fees for the works.

10. She deposed that in or about April 2018, Mr. Anthony Ngone Waithaka informed her that he had procured a buyer for two of the said parcels and he requested her to transfer the said parcels to one James Thuo Wambui as the purchaser, and he (Anthony Ngone Waithaka) as the contractor and herself as the vendor transferring **LR Nos. 11612/54 and 11612/55** to the said James Thuo Wambui at an agreed price of **Kshs. 7,000,000/=** each.

11. She also deposed that around May 2018 the said Anthony Ngone Waithaka informed her that he had procured a buyer for the third parcel in final settlement of his dues and he requested her to transfer the same to a one Veronica Wanjiku Kabiro at a negotiated price of **Kshs. 6, 500 000/=**. She averred that she paid **Kshs. 21, 500,000/=** but in or about 2019, she discovered that the civil works undertaken by the said Anthony Ngone Waithaka were of poor standard and she engaged another contractor to remedy the poor work done and conclude the works. She averred that the work done by the previous contractor was valued at **Kshs. 16, 388, 667.29** and part of which was inappropriate and required demolition. As a consequence of the above, she deposed that the contractor owes her **Kshs. 5,111,332.71** or thereabouts being the difference between the amount paid and the value of infrastructure works done and determined as aforesaid, hence the claim for **Kshs. 44,669 458/=** is unwarranted and grossly exaggerated.

12. Lastly, she deposed that the applicant claims liquidated damages hence, he cannot suffer irreparable harm, that the application is incompetent because it's not brought under Section **7(1)** of the Arbitration Act, Act No. 4 of 1995, hence the orders sought cannot be granted.

### **Plaintiff's supplementary affidavit**

13. The Plaintiff filed a supplementary affidavit sworn by the said Anthony Ngone Waithaka in reply to the defendant's Replying affidavit. Unfortunately, the Anthony Ngone Waithaka or Hurricane Ventures Limited are not parties to these proceedings. He cannot competently swear a Replying affidavit. The best the Plaintiff could have done is to either seek to join him or the said company in these proceedings either as a co-Plaintiff(s) or a defendant(s) or as interested parties. Alternatively, he had the option of swearing a Replying affidavit and introduce the affidavit of Anthony Ngone Waithaka as an annexure to his affidavit. As matters stand now, Anthony Ngone Waithaka is a stranger to these proceedings. There is no legal basis for me to consider his affidavit because he is not a party to these proceedings.

### **Plaintiff's advocates submissions**

14. The Plaintiff's counsel cited *Giella v Cassman Brown [1973] EA 358* and *Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR* and *Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR* and rehashed the facts giving rise to this case and argued that the Plaintiff has established a *prima facie* case with a high probability of success. He submitted that the Plaintiff has demonstrated that he will suffer irreparable injury if the injunction is refused. To buttress his argument, he relied on *Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] e KLR* in which the Court of Appeal explained that "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." He argued that if the injunctive relief is not granted the extent of works done prior to and during the said period will be unverifiable and unquantifiable if a joint valuation is not done.

15. On the balance of convenience, he argued that the applicant has demonstrated the existence of a contract and performance of the work. He cited *Amir Suleiman v Amboseli Resort Limited [2004] e KLR* for the proposition that the law is not static and that the court should take the course which carries the lower risk of injustice.

### **The Respondent's advocates submissions**

16. The Respondent's counsel argued that clause **15** of the Agreement between the parties provided for arbitration. He submitted that any dispute between the parties with respect to the Agreement ought to be referred to arbitration. He cited Article **159 (1)** of the Constitution and argued that courts and tribunals should promote alternative forms of dispute resolution including arbitration.

17. Further, he cited Section **10** of the Arbitration Act which limits courts' intervention in arbitral cases and argued that the applicant

disregarded the arbitral clause in the agreement. Additionally, he submitted that one of the instances this court can intervene in an arbitration process is under Section 7 of the Act, but argued that the applicant did not invoke the said provision. He submitted that this court is precluded from intervening in the present circumstances and argued the Respondent has already filed an application for stay and referral of the dispute to arbitration. He cited *Monique Oraro v AAR Insurance Co. Ltd [2019] e KLR* which held that the choice of forum manifests the parties dispute resolution mechanism and court proceedings cannot be brought to court on merits of the disputes governed by the Arbitration clause.

18. He submitted that where procedures and processes exist for resolution of disputes, such processes must be exhausted before a party can approach the court. To support his submission, he cited *Speaker of National Assembly v. James Nienga Karume [1992] e KLR* and argued that it will be an abuse of court process and a grave aggravation of the precepts of the Constitution on promotion of alternative dispute resolution if this court acquiesces to the applicant's disregard of the arbitration agreement. He submitted that the jurisdiction of this court having been invoked prematurely, this court ought to immediately down its tools and allow the applicant seek redress in the appropriate forum.

19. Additionally, counsel submitted that the application does not satisfy the tests for grant of injunctive reliefs in *Giella v Cassman Brown & Co. Ltd [1973] EA 358*. He cited *Mrao Ltd v First American Bank of Kenya Ltd & 2 others (2003) e KLR*, which defined a *prima facie* case and argued that the applicant has not demonstrated an arguable case with a likelihood of success.

20. He submitted that the balance of convenience tilts in favour of the Respondent and cited *Paul Gitonga Wanjau vs. Gathuthi Tea Factory Company Ltd & 2 others [2016] e KLR* which enumerated what constitutes a balance of convenience. He submitted that the injunction sought seeks to stop ongoing works on the property which amounts to restricting the Respondent's proprietary rights.

21. Additionally, he argued that an injunction is an equitable remedy but the applicant has knowingly withheld crucial facts pertaining to the dispute to mislead the court. He argued that the applicant failed to disclose his relationship with Anthony Ngone Waithaka and Hurricane Ventures Limited and the payment arrangement through transfer of parcels of land in lieu of cash payment. Further, he also failed to disclose the valuation report by M/S Engplan Consulting Engineers or the basis of his grossly exaggerated and unsubstantiated claim of **Kshs. 44, 669,458/=**. He cited *Caliph Properties Limited v Barbel Sharma & Another [2015] e KLR* which held that an injunction is an equitable remedy and a person seeking it must come to court with clean hands.

## Determination

22. Its common ground that on or about 9<sup>th</sup> April 2018, the parties entered into a written agreement. Its uncontested that clause 15 of the agreement provides as follows: -

*"If any dispute or difference shall arise between the Employer and the Contractor either during progress or after completion of the works or after determination of the employment of the Contractor under this Agreement, as to abandonment or breach of contract, other matter or thing arising thereunder or as to the withholding by the Employer of any certificate to which the Contractor may claim to be entitled, then such dispute shall be referred to arbitration by a single arbitrator in accordance with the Arbitration Act (Cap 49 of the Laws of Kenya) or nay statutory modification or re-enactment thereof. "*

23. The above clause prescribes the parties preferred mode of dispute resolution method. Time without a number our courts have held that the court cannot rewrite binding contracts entered voluntarily between parties.

24. The general approach on the role and intervention of the court in arbitration in Kenya is provided in section 10 of the Arbitration Act which provides that except as provided in the Act, no court shall intervene in matters governed by the Act. In peremptory terms, the section restricts the jurisdiction of the court to only such matters as are provided for by the Act. The section epitomizes the recognition of the policy of parties' autonomy which underlie the arbitration generally and in particular the Act. The section articulates the need to restrict the court's role in arbitration so as to give effect to that policy. (See *Sutton D.J et al (2003), Russell on Arbitration (Sweet & Maxwell, London, 23rd Ed.) p. 293*). The principle of party autonomy is recognized as a critical tenet for guaranteeing that parties are satisfied with results of arbitration. It also helps achieve the key object of arbitration, that is, to deliver fair resolution of disputes between parties without unnecessary delay and expense.

25. A literal reading of section 10 leaves no doubt that it permits two possibilities where the court can intervene in arbitration. *First* is where the Act expressly provides for or permits the intervention of the court. *Second*, in public interest where substantial injustice is likely to be occasioned even though a matter is not provided for in the Act. However, the Act cannot reasonably be construed as ousting the inherent power of the court to do justice especially, but as the Supreme Court stated in the *Nyutu case*, this judicial intervention can only be countenanced in exceptional instances.

26. *The Supreme Court in the Nyutu case* at paragraph 57 of the judgment stated that Section 10 of the Act was enacted to ensure predictability and certainty of arbitration proceedings by specifically providing instances where a court may intervene. Therefore, parties who resort to arbitration, must know with certainty instances when the jurisdiction of the courts may be invoked. Under the Act, such instances include, applications for setting aside an award, determination of the question of the appointment of an arbitrator and recognition and enforcement of arbitral awards amongst other specified grounds.

27. Judicial decisions have engraved the extent of court intervention in arbitration, a position best captured in *Ann Mumbi Hinga v Victoria Njoki Gathara (2009) e KLR* which held that there is no right for any court to intervene in the arbitral process or in the award except in the situations specifically set out in the Act or as previously agreed in advance by the parties. One of the permitted interventions under the Act therefore, is the High Court's power to grant interim measures of protection before or during the arbitral proceedings under section 7 of the Act. Interim measures of protection are interim reliefs which are granted before the final award, for the purpose of ensuring that once the final award is rendered, the relief on the disputed matter would still be available. (See *Moses M, The Principles and Practice of International Commercial Arbitration*, (Cambridge University Press, 2010).

28. Essentially, these reliefs protect the ability of a party to obtain a final award. Without them, final arbitral awards will be rendered nugatory as they minimize loss, damage, or prejudice during the arbitral process. (See Gary B. Born, *International Commercial Arbitration: Commentary and Materials* (2<sup>nd</sup> edition, 2001) 920). A party may apply to the High Court for Interim measures of protection and in doing so, will not lose their right to arbitrate as it will not be incompatible with the arbitration agreement. Alternatively, if the parties agree, a party may apply to the arbitral tribunal for interim measure of protection.

29. Section 7 of the Arbitration Act is silent on types of interim measures, the conditions for granting these measures and the scope of measures that can be granted leaving courts with a wide discretion in determining the tests for allowing applications under the said provision. In *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others {2010} e KLR, para 14* the Court of Appeal laid down the tests to be followed. The court distinguished interim measures from injunctions and went further to state that the factors that the court must take into account before issuing the interim measures of protection are: - (a) the existence of an arbitration agreement, (b) whether the subject matter of arbitration is under threat, (c) what is the appropriate measure of protection after an assessment of the merits of the application? (d) For what period must the measure be given as to avoid encroaching on the tribunal's decision-making power as intended by the parties? It is important to mention that the Court of Appeal faulted the High Court's application of Civil Procedure requirements for the grant of injunctions in a matter filed under section 7 of the Act.

30. I note that the applicant approached the court under the Civil Procedure Rules as opposed to section 7 of the Arbitration Act. Its not clear why the applicant invoked the Civil Procedure Rules in the circumstances of this case, yet the applicability of the Civil Procedure Rules has been the subject of numerous court decisions. In *Anne Mumbi Hinga v Victoria Njoki Gathara* (Supra) the Court of Appeal observed that: -

“...All the provisions including the Civil Procedure Act and Rules do not apply to arbitral proceedings because Section 10 of the Arbitration Act makes the Arbitration Act a complete code and Rule 11 of the Arbitration Rules cannot override Section 10 of the Arbitration Act...”

31. I can also profitably refer *Diocese of Marsabit Registered Trustees v Technotrade Pavilion Ltd [2014] eKLR* which held: -

“.....the requirement in Section 6(1) of the Arbitration Act is not a mere technicality which can be diminished by Article 159(2) (d) of the Constitution as claimed by the applicant. It is a substantial legal matter which aims at promoting and attaining efficacious resolution of disputes through though arbitration...”

32. A reading of the cited provisions of the Arbitration Act leaves no doubt that the provisions of the Civil Procedure Rules cited by the applicant are inapplicable. This being the position, I find and hold that the applicant's application is fatally incompetent for offending the express provisions of the Arbitration Act. On this ground alone, the application is dismissed with costs to the defendant.

33. Notwithstanding my above finding, I will nevertheless consider the merits of the application. The purpose of an interlocutory injunction is to preserve the subject matter of a dispute and to maintain the *status quo* pending the determination of the parties' rights. In granting such an injunction, the court is concerned both with: (a) the maintenance of a position that will most easily enable justice to be done when its final order is made; and (b) an interim regulation of the acts of the parties that is the most just and convenient in all the circumstances.

34. The jurisdiction to grant injunctions is discretionary and very wide. However, this does not confer the court unlimited power to grant injunctive relief because regard must still be had to certain prerequisites. These are the existence of a legal or equitable right which the injunction protects against invasion or threatened invasion, or other unconscientious conduct or exercise of legal or equitable rights.

35. In an application for an interlocutory injunction the onus is on the applicant to satisfy the court that it should grant an injunction. The jurisdiction to grant an injunction may be exercised “if it is just and convenient to do so.” In *Giella v Cassman Brown and Co. Ltd{1973} E A 358* the court set out the principles for Interlocutory Injunctions. The principles laid down in the said case are: -

- a. *The Plaintiff must establish that he has a **prima facie** case with high chances of success;*
- b. *That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages;*
- c. *If the court is in doubt, it will decide on a balance of convenience.*

36. The Canadian case of *R. J. R. Macdonald v Canada (Attorney General) {1994} 1 S.C.R. 311*.laid down three-part test of granting an injunction as follows: -

- a. *Is there a serious issue to be tried?*
- b. *Will the applicant suffer irreparable harm if the injunction is not granted?*
- c. *Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called "balance of convenience").*

37. In *Mbuthia v Jimba Credit Corporation Ltd {1988} KLR 1* Platt JA echoed the “serious question to be tried” test enunciated by Lord Diplock in *American Cyanamid {1975} AC 396 at 407* and stated that in an application for interlocutory injunction, the court is not required to make final findings of contested facts and law but only needs to weigh the relative strength of the party's cases. The seriousness of the question, like the strength of the probability, depends upon the nature of the rights asserted and the practical consequences likely to flow from the interlocutory order sought. How strong that probability (or likelihood) needs to be depends, no doubt, upon the nature of the rights

the plaintiff asserts and the practical consequences likely to flow from the order he seeks.

38. Lord Hoffman's exposition of the law in *Films Rover International Ltd v Cannon Film Sales Ltd* {1987} 1WLR 670 at 680-681 is illumination in determining whether to grant an interlocutory injunction. He stated that a court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong," in the sense of granting an injunction to a party who fails to establish his or her right at trial (or would fail if there was a trial) or in failing to grant an injunction to a party who succeeds (or would succeed at trial). In determining which course carries the lower risk of injustice, the court is informed by, among other things, the well-established interrelated considerations of whether there is a serious question to be tried and whether the balance of convenience or justice favours the grant.

39. To justify the imposition of an interlocutory injunction, the plaintiff must be able to show a "sufficient likelihood of success." The plaintiff's prospects of succeeding at trial will always be relevant "as a necessary part of deciding whether there is a serious question to be tried" and as an almost invariable factor in evaluating the balance of convenience. The assessment of the strength of the probability of success is an essential factor in deciding which course - whether or not relief should issue and, if so, on what terms - carries the lower risk of injustice. While this is the case, it is suggested that there will be other factors which are relevant having regard to the nature and circumstances of the case.

40. The *prima facie* case test represents the law in relation to the grant of interlocutory injunctions. A *prima facie* case in a civil application includes but not confined to a genuine and arguable case. It is sufficient that the plaintiff shows a sufficient likelihood of success to justify in the circumstances the preservation of the *status quo* pending the trial rather than demonstrating that it was more probable than not that the plaintiff would succeed at trial. In *Mbuthia v Jimba Credit Corporation Ltd* (supra) Platt JA stated that in an application for interlocutory injunction, the court is not required to make final findings of contested facts and law but only needs to weigh the relative strength of the parties cases.

41. Turning to the facts of this case, before me are two accounts presented by the parties. There are allegations that the subject works were undertaken by another person. There are allegations that payment was effected to a different person who undertook the works. There are allegations of poor performance and allegation of over payment. These accusations and counter accusations will require to be proved at the trial. The import of this is that it cannot be said that the applicant has surmounted the *prima facie* case test.

42. The other test is whether the applicant has demonstrated irreparable harm. The following excerpt from *Halsbury's Laws of England Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352* is relevant. It reads: -

"It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question"

43. In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. The applicant has pleaded a liquidated amount. He cannot turn around and state that his loss cannot be quantified. His claim is pegged on an alleged breach of a contract. If the court finds that the other party is in breach, it can award damages.

44. The third test is balance of convenience. Where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right. (See *Halsbury's Laws of England, Third Edition, Volume 21, paragraph 766, page 366*). The burden of proof that the inconvenience which the applicant will suffer if the injunction is refused is greater than that which the respondent will suffer if it is granted lies on the applicant.

45. Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If an applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the *status quo* in determining where the balance on convenience lies.

46. If the court is satisfied that there is a serious question to be tried, (or that the plaintiff has made out a *prima facie* case) and that damages are not an adequate remedy, it must go on to consider whether the balance of convenience or justice favours the grant of an injunction. The balance of convenience is the course most likely to achieve justice between the parties pending resolution of the question of the applicant's entitlement to ultimate relief, bearing in mind the consequences to each party of the grant, or refusal, of the injunction. The strength of the applicant's case is relevant in determining where the balance of convenience lies. Where an applicant has an apparently strong claim, the court will more readily grant an injunction even when the balance of convenience is evenly matched. A weaker claim may still attract interlocutory relief where the balance of convenience is strongly in favour of it. The assessment of the likelihood of the plaintiff being successful at trial is critical in determining the first element. I have carefully applied the foregoing tests to this case. It is my conclusion that the balance of convenience is in favour of refusing the injunction.

47. An injunction is a discretionary remedy. As was held in *Kenleb Cons Ltd v New Gatitu Service Station Ltd & another* {1990} K.L.R 557, "to succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction. In my view, the applicant has not established any wrong on the part of the defendant to warrant protection by an injunction. As was held in *Njenga v Njenga* {1991} KLR 401 "an injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles." From

my analysis of the facts and the law discussed above and the conclusions arrived at, it is my finding that the applicants' application is unmerited. The applicants have failed to established the tests for granting the injUNCTION sought.

48. I find that the applicants' application dated 4<sup>th</sup> December 2020 is unmerited. I dismiss the said application with costs to the Respondent.

Orders accordingly. Right of appeal

**DATED, SIGNED AND DELIVERED VIA E-MAIL AT NAIROBI THIS 6TH OF JULY 2021**

**JOHN M. MATIVO**

**JUDGE**