



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

ELC CASE NO. E333 OF 2021

AMINA OMAR.....1ST PLAINTIFF

ABDULAZIZ GAKURIA.....2ND PLAINTIFF

-VERSUS-

DAHABO ALI NOOR.....1ST DEFENDANT

CHIEF LAND REGISTRAR.....2ND DEFENDANT

RULING

INTRODUCTION

1. The Applicants herein filed a Notice of Motion Application dated 15th September 2021, whereby same have sought for the following Reliefs;

i.(Spent)

ii. *The Honourable court be pleased to grant a temporary injunction restraining the Respondents by herself, her employees, servants, agents or anybody claiming through them from carrying on operations in the suit property including developing, disposing off, alienating, transferring, advertising for sale or selling by way of public auction, private treaty or in any other manner all that property known as **Land Reference Number Nairobi/Block 104/3** pending the hearing and determination of this application.*

iii. *The Honourable court be pleased to grant a temporary injunction restraining the Defendants by herself, her employees, servants, agents or anybody claiming through them from carrying on operations in the suit property including developing, disposing off, alienating, transferring, advertising for sale or selling by way of public auction, private treaty or in any other manner all that property known as **Land Reference Number Nairobi/Block 104/3** pending the hearing and determination of this suit.*

iv. *The Title issued to the 1st Respondent is null and void and is hereby cancelled.*

v. *The Honourable Court be pleased to declare the 2nd Applicant as the lawful owner of **Land Reference Number Nairobi/Block 104/3**.*

vi. *The honourable court be pleased to issue Eviction orders against the 1st Respondent **from Land Reference Number Nairobi/Block 104/3**.*

vii. *The Respondents do bear the costs of this suit.*

2. The subject Application herein is premised and/or based on the grounds enumerated at the foot thereof and same is further supported by the affidavit of the 1st Applicant sworn on the 15th September 2021, and to which the deponent has attached three annexures thereto.

3. Upon the filing and service of the Plaint and the subject Application, the 1st Respondent duly entered appearance and same has thereafter

filed a Notice of Preliminary Objection dated the 12th November 2021, and to which the 1st Respondent has averred as hereunder;

*i. There is a similar suit pending determination before the environment and land court, namely **ELC CASE NO. E028 OF 2020 (O.S)** hence the suit herein fall short of Section 6 of the Civil Procedure Act, and before its heard and concluded the Plaintiff here has no standing to introduce this matter.*

ii. This matter contravenes the Doctrine of sub judice and hence this honourable court has no jurisdiction to hear and entertain same.

iii. The orders herein offends the mandatory provision of order 40 rule 4(3) of the Civil Procedure Rules 2010, insofar as neither the application nor the orders sought thereunder were served upon the 1st Defendant within the statutory three days from the date of issuance of same

DEPOSITION BY THE PARTIES

4. Vide the supporting affidavit sworn on the 15th September 2021, the 1st Plaintiff/Applicant has averred that same is the lawful wife and/or spouse of the 2nd Plaintiff/Applicant on account and/or by virtue of the marriage solemnized under the Islamic law on the 23rd February 2001.

5. Besides, the deponent has further averred that upon her marriage to the 2nd Plaintiff/Applicant, same commenced to reside and/or live on the property, *known as Land Reference Number Nairobi/Block 104/3* and that by virtue of occupation, the suit became their Matrimonial Property, in accordance with meaning, import and tenor of Section 2 of the Land Registration Act, 2012 and Section 6 of the Matrimonial Properties Act 2015.

6. Nevertheless, the deponent has further averred that on or the 6th May 2020, the 2nd Applicant entered into and/or executed a Land sale agreement over and in respect of the suit property with the 1st Respondent.

7. It is the deponent further averment that following the entry into and/or execution of the Sale agreement, the 1st defendant herein has since entered upon and taken possession of the suit property and similarly evicted the Applicants from the suit property and thereby causing the Applicant great loss.

8. The deponent has further averred that the sale of the suit property to the 1st Respondent was done without her knowledge and/or participation. In this regard, the deponent has averred that the Sale took place without her Spousal consent.

9. Owing to the foregoing, the deponent has thus averred that same is keen to procure and/or obtain orders of temporary injunction, whose purport is to negate and/or cancel the sale and/or transfer of the suit property to and in favor of the 1st Defendant/Respondent.

1ST RESPONDENT CASE

10. The 1st Respondent herein has filed and/or relied on the Notice of Preliminary Objection dated the 12th November 2021, and in respect of which the 1st Defendant, has essentially challenged the jurisdiction of the court, to entertain and/or adjudicate upon the subject matter, namely, the suit as well as the Application.

SUBMISSIONS

11. The subject Application was fixed and/or listed for hearing on the 18th November 2021, on which date the parties appeared before the court and indicated that same were ready to canvass the Application and the preliminary objection by way of oral submissions.

12. Pursuant to and in line with the request by the parties, the court proceeded to and allowed same to ventilate the Application and the Preliminary objection orally and in this regard, the parties made their respective submissions.

13. On behalf of the Plaintiffs/Applicants, the submissions were made by the 2nd Plaintiff, who adopted and/or reiterated the contents of the Supporting affidavit sworn by the 1st Applicant. For clarity, it was the 2nd Applicant's case that same entered into and/or executed a Sale Agreement over and in respect of the suit property, between himself and the 1st Defendant/Respondent.

14. It was the 2nd Plaintiff/Applicant's further submissions that pursuant to the Sale agreement, the 2nd Plaintiff herein sold to and in favor of the 1st Defendant/Respondent the entire of the suit property. Consequently, the suit property was transferred and registered in the name of the 1st Defendant/Respondent.

15. On the other hand, the 2nd Plaintiff/Applicant also submitted that after the transfer of the suit property, the 1st Defendant entered upon and took possession of the suit property and thereby evicted the Plaintiffs/Applicants from the suit property.

16. It was further averred that after the eviction of the Plaintiffs from the suit property, the 1st Defendant/Respondent is now keen to commence development and/or construction on the suit property, which is contended, shall affect and/or prejudice the rights of the

Applicants.

17. It was further submitted that arising from the Sale agreement between the 2nd Plaintiff and the 1st Defendant, a dispute has since arisen culminating into the filing of a suit namely, Milimani ELC CASE NO, E028 Of 2020, touching on breach of the terms of the Contract.

18. Finally, it was conceded by the 2nd Applicant that the suit ELC E028 of 2020, involves all the parties herein, insofar as the 2nd Plaintiff is the 1st Respondent, whereas the 1st Plaintiff has been joined as Interested Parties.

19. On his part, the 1st Respondent has contended that the suit herein amounts to an abuse of Due process of the honourable court, as there is another suit namely, **Milimani ELC Civil Suit E028 of 2020**, which concerns the same parties herein.

20. It is the 1st Respondent's further position that the subject matter in respect of ELC NO. 028 of 2020, also involves the same subject matter, which is being litigated in the subject case.

21. In the premises, the 1st Defendant has therefore submitted that the instant suit is an abuse of the Due process of the court and thus same ought to be struck out.

ISSUES FOR DETERMINATION

22. Having evaluated and/or analysed the Plaint dated the 15th September 2020 and the verifying affidavit thereto, dated the 15th September 2015, as well as the affidavit in Support thereof on one hand, and having considered the Notice of Preliminary Objection by the 1st Defendant, the following Issues arise for determination:

- i. *Whether the 1st Plaintiff has the requisite locus standi to commence and/or to maintain the subject suit.*
- ii. *Whether the suit on behalf of the 2nd Plaintiff/Applicant is competent or whether same is legally tenable.*
- iii. *Whether the suit herein amounts to and/or constitute and abuse of the Due process of the court.*
- iv. *Whether the Plaintiffs have established a prima facie case with overwhelming chances of success.*
- v. *Whether the Plaintiffs would suffer Irreparable loss.*
- vi. *In whose favor does the Balance of convenience tilt.*

ANALYSIS AND DETERMINATION

ISSUE NUMBER ONE (1)

23. The 1st Plaintiff/Applicant herein concedes and/or has indicated that the suit property belongs to and/or is registered in the name of the 1st Plaintiff. In this regard, the 2nd Plaintiff has availed and even annexed a copy of the certificate of lease issued to and/or issued in favor of the 2nd Plaintiff/Applicant, which was issued on the 10th December 1998.

24. On the other hand, the 1st Plaintiff has also averred that same got married to the 2nd Plaintiff/Applicant on or about the 23rd February 2003 and that upon her marriage to the 2nd Plaintiff/Applicant, same commenced to and/or started occupation of the suit premises.

25. As a result of the entry upon and/or occupation of the suit property, on the basis of the marriage, the 1st Plaintiff/Applicant has now averred that the suit property, has become a Matrimonial Property, under the provisions of the **Matrimonial Properties Act, 2015 Laws of Kenya**.

26. Based on the foregoing, the 1st Plaintiff has therefore sought for and/or contended that the suit property could thus not be sold without her spousal consent. However, the crux of the 1st Plaintiff's/Applicant's case is that by virtue of being the Matrimonial property, same thus has an interest and on this account the 1st Plaintiff now seeks the various Reliefs alluded to, both at the foot of the Plaint, as well as the Notice of Motion Application beforehand.

27. Suffice it to say, that the issues as to whether or not the suit property is not a Matrimonial property, is not before this honourable court. For clarity, such a claim can only be attended to and/or be dealt with in appropriate suit and/or civil proceedings commenced in accordance with provisions of the **Matrimonial property Act, 2015**.

28. On the other hand, it is also worthy to note that no decision has since arisen and/or been handed over, to declare the suit property as a Matrimonial property. For clarity, the pronouncement and/or declaration that the suit property is a Matrimonial property, would be a mandatory pre-requisite to a claim that the suit property is Matrimonial property.

29. Notwithstanding the foregoing, it is also worthy to note, the even in the Plaint that has been filed, no such order, namely, an order seeking

to declare the suit property as Matrimonial property, has been sought whatsoever and/or howsoever.

30. To the extent that the 1st Plaintiff/Applicant herein is not the registered owner of the suit property and coupled with the fact that no order has since been made, to pronounce the suit property as Matrimonial property, the 1st Plaintiff herein therefore has no legitimate and/or legal title over and in respect of the suit property, to warrant the filing and/or lodgment of the instant suit.

31. Clearly, the 1st Plaintiff herein has no locus standi whatsoever to commence and maintain the subject suit.

32. In support of the foregoing position, I adopt and subscribe to the decision in the case of **Khelef Khalifa El-Busaidy v Commissioner of Lands & 2 others [2002] eKLR** while canvassing the issue of *Locus Standi* stated thus:

“...for an individual to have a locus standi, he must have an interest either vested or contingent in the subject matter before the court, which interest must be a legal one. Such interest must be above that of other members of the public in general.”

ISSUE NUMBER TWO (2)

33. It is common ground that the subject suit has been filed by and/or on behalf of the two plaintiffs. In this regard, it was incumbent upon the two Plaintiffs to sign and/or execute a joint verifying affidavit, or better still, two verifying affidavits, verifying the correctness of the Plaintiff originating the case.

34. On the other hand, it was also possible and within the law for any of the two Plaintiffs to swear and/or execute the Verifying affidavit, on behalf of the other, but subject to filing and/or lodging the Authority of the other, authorizing the deponent to swear such affidavit.

35. In the event of the verifying affidavit being executed by one of the two Plaintiffs, then the person executing the verifying affidavit, would advert to the authority to swear such affidavit and would by extension file and/or lodge, with the honourable court, the authority duly signed by the authorizing party.

36. For the avoidance of doubt, the necessity to procure and/or obtain such authority for the swearing and/or pleading for another, is prescribed and/or provided for, by dint of the Provisions of **Order 1 rule 13 of the Civil Procedure Rules 2010**, which provides as hereunder;

13. Appearance of one of several plaintiffs or defendants for others [Order 1, rule 13.]

(1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.

37. As pertains to the subject matter, the verifying affidavit has only been sworn by the 1st Plaintiff/Applicant and nowhere has same adverted to and/or alleged that the verifying affidavit is being sworn on her own behalf and that of the 2nd Plaintiff herein. For clarity, such an averment would be necessary, nay, mandatory.

38. Other than the failure to advert to and/or aver that the verifying affidavit has been sworn on behalf of the 2nd Plaintiff as well, the 1st Plaintiff herein has also failed to annex, attach and/or supply a copy of the authority duly signed by the 2nd Plaintiff, to mandate the 1st Plaintiff to sign any affidavit, on behalf of the 2nd Plaintiff, as required by the law.

39. In the absence of such authority in writing, which must ordinarily be signed by the person giving the authority, it is evident that the Plaintiff and/or claim by and/or on behalf of the 2nd Plaintiff has not been verified by the requisite verifying affidavit.

40. Owing to the foregoing, it is my finding and holding that both the Plaintiff and the Notice of Motion Application dated the 15th September 2021, are fatally defective and thus incompetent, as pertains to and/or concerns the 2nd Plaintiff.

41. In a nutshell, the subject suit as well as the Application are therefore not properly verified and/or anchored on any affidavit. Consequently, the 2nd Plaintiff suit, is *null and void*.

42. In support of the foregoing observation, it is imperative to take cognizance of the provisions of **Order 4 Rule 1 (2) and (3) of the Civil Procedure Rules** thereof, which provides as hereunder;

(2) The plaintiff shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1)(f) above.

(3) Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others.

ISSUE NUMBER THREE (3)

43. It has been contended by and/or on behalf of the 1st Respondent herein that there exists another suit, namely, **Milimani ELC Case N. E028 of 2020**, which touches and/or concerns the subject matter herein and which, similarly involves the same parties and/or substantially the same parties herein.

44. It was pointed out, that in **ECL 028 of 2020**, the 1st Defendant herein, is the Plaintiff whilst the 2nd Plaintiff herein is the 1st Respondent.

45. On the other hand, it was similarly pointed out that the 1st Plaintiff herein, is a party to the said proceedings and it was clarified that the 1st Plaintiff, is indeed a party to the said suit.

46. For the avoidance of doubt, the 2nd Plaintiff herein conceded and confirmed the existence of Milimani ELC Civil Case No. E028 of 2020, and same did not dispute that the said suit involves the same parties and touched on the said subject matter.

47. To the extent that the said parties herein are also litigating **vide Milimani ELC Civil Case No. E028 of 2020**, which concerns the same subject dispute, all the issues that are being raised and ventilated in the subject matter, ought and should have been raised in the existing suit and not otherwise.

48. Never the less, the Plaintiffs herein, in their wisdom and/or lack of it, have chosen to file a separate and distinct suit and the purpose of the filing of new suit is to lodge a collateral attack on the issues in dispute and most probably, to obtain favorable orders, which may have been declined in the previous suit.

49. Whatever the purpose that informed, the filing and/or commencement of the subject suit, one thing is obvious. And this the fact that the Plaintiffs herein have indulged in the filing of a plethora of suits/cases and such conduct, whereby a party files several suits, which are meant to clog the wheels of justice, amounts to an abuse of the Due Process of Court.

50. In support of the foregoing position, I adopt and rely in the decision in the case of **Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 Others (2009) eKLR**, where the honourable court held as hereunder;

... In our view he, knowingly and dishonestly used the legal process to accomplish an ulterior purpose to that of the court process, which is to protect the interests of justice. We are of course aware that we cannot comprehensively list all possible forms of abuse of court process and that we cannot formulate any hard and fast rule to determine whether in any given facts, abuse is to be found or not, but in the circumstances of this case we do think that since the Originating Summons was instituted in the face of the admission of tenancy, this, in our view, does constitute an abuse of the court process. The 1st respondent and Mr Church did manifestly exploit the process whereas it was in our view clear to them that they lacked good faith in instituting the Originating Summons thereby causing prejudice and delay. The action was also wanting in bona fides and was oppressive to the appellant. All these in our view constitute abuse of process.

To re-inforce the point, abuse of process has been defined in WIKIPEDIA, the free encyclopedia:

“The person who abuses process is interested only in accomplishing some improper purpose that is collateral to the proper object of the process, and that offends justice.”

In BEINOSI v WIYLEY 1973 SA 721 [SCA] at page 734F-G a South African case heard by the Appeal Court of South Africa, Mohomad CJ, set out the applicable legal principle as follows:-

“What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of “abuse of process.” It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.”

The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it.

In the Nigerian Case of KARIBU-WHYTIE J Sc in SARAK v KOTOYE (1992) 9 NWLR 9pt 264) 156 at 188-189 (e) the concept of abuse of judicial process was defined:-

“The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice ...”

The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process:-

(a) “Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.

(b) *Instituting different actions between the same parties simultaneously in different courts even though on different grounds.*

(c) *Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.*

(d) *(sic) meaning not clear*

(e) *Where there is no loti of law supporting a Court process or where it is premised on frivolity or recklessness."*

51. Other than the filing of the subject suit during the lifetime and/or existence of **Milimani ELC Civil Case No. E028 of 2020**, it is also worthy to note that the Plaintiff herein, also failed to disclose the existence of the previous suit in the body of the Plaint, either as required by the law or at all.

52. For clarity, the Applicants herein averred as follows;

"paragraph 15. The Plaintiffs aver that there is no suit pending in this court and no proceedings have previously been taken between the Plaintiffs and the Defendants over the subject matter herein"

53. Clearly, the Plaintiffs herein were alive to the existence of **Milimani ELC Civil Case No. E028 of 2020**, between the same parties and touching on the same subject matter. But nevertheless, still same had the audacity to state that there was no pending suit.

54. In my humble view, the Plaintiffs herein were being dishonest and same concealed material facts, which had same been disclosed, the Honourable court would have treated the Plaintiffs, in a different manner and most probably, would not have granted the Interim Orders, that it did. Clearly, this is yet another instance of abuse of the Due process of the Court.

55. In support of the foregoing, I invoke and rely in the decision in the case of **Madara Evans Okanga Dondo v Housing Finance Company of Kenya [2005] eKLR**, where the honourable court observed as hereunder;

*The plaintiff concealed the existence of the previously determined suit from this court. This court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. As was stated by the Authors of **Halbury's Laws of England, 4th Edition Volume 37 Para 14** under the heading "**Inherent Jurisdiction of the Court**" at Page 23;*

"The jurisdiction of the court which is comprised within the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise (i) control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

56. From the forgoing, it appears that the subject suit was filed for purposes other than the proper use of the court process. Its filing, thus amounted to and/or constituted an abuse/misuse of the court process.

57. Similarly, on this account, I would be constrained to Strike out the Plaintiffs suit.

ISSUE NUMBER FOUR (4)

58. Notwithstanding the fact that I have already found and held that the Plaintiffs case amounts to an abuse of the Due process of the court, nevertheless I am still enjoined to address the issues, as to whether temporary injunction can issue in the circumstances.

59. In this regard, the starting point is to discern whether the Plaintiffs has disclosed and/or established a prima facie case, with overwhelming chances of success, to warrant the granting of an Order of temporary Injunction.

60. Suffice it to say, that I have already found and held, that the 1st Plaintiff herein, has no legal interests and/or rights to the suit property, to warrant the filing and/or lodgment of the suit.

61. On the other hand, the 2nd Plaintiff herein voluntarily entered into and/or executed a Sale Agreement with the 1st Defendant, whereby the 2nd Applicant, undertook to transfer the title to and/or in respect of the suit property to the 1st Defendant.

62. Subsequently, it has been indicated that the suit property was indeed transferred to and registered in the name of the 1st Defendant, who thereafter proceeded to and took possession of the suit property.

63. On the other hand, it has also been conceded that following the execution of the Agreement and registration of the suit property in favor

of the 1st Defendant, same has since entered upon and taken possession of the suit property. For clarity, the deponent of the supporting affidavit, has conceded that the 1st Defendant indeed evicted her and the children of the family from the suit property.

64. In my humble view, if the 1st Defendant has breached and/or violated the terms of the Sale agreement, (*which the court has not been told*), then the remedies for such breach are obtainable from the Sale Agreement/Contract.

65. Taking into account the foregoing, coupled with the illegalities that were pointed out in issues number 1, 2 and 3 hereof, it is my finding that the Plaintiffs herein, have not laid down and/or established a prima facie case, to warrant the grant of the orders of Temporary Injunction.

66. In support of the foregoing holding, it is imperative to restate the position of the court in the decision in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR**, where the Court stated as hereunder:

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

ISSUE NUMBER FIVE (5)

67. As pertains to the issues of Irreparable loss, it is worthy to note that the 2nd Plaintiff herein, freely entered into and executed the Sale Agreement, over and in respect of the suit property and thereafter proceeded to and effected transfer in favor of the 1st Defendant herein.

68. Having voluntarily, entered into the Sale Agreement, it is obvious that the sale agreement/contract, had clauses and/or stipulations relating to breach and/or violation. Consequently, in the event of Breach of the Contract, the Victim ought to take refuge in the Default Clause, if any.

69. Without belaboring the point, breach of contract, if any, would lead to compensation on account of Damages, which are quantifiable and/or ascertainable in nature.

70. On the other hand, it is also common ground that such Damages, which are quantifiable and/or ascertainable, can easily be reckoned and/or computed with reasonable precision and thereafter be compensated in Monetary terms.

71. Owing to the foregoing, I am not persuaded that any Irreparable loss, would arise and/or accrue, to warrant the grant of orders of temporary Injunction.

72. For the avoidance of doubt, it is therefore imperative to take note of what amounts to and/or constitutes Irreparable loss and in this regard, it suffices to rely on and/or restate the decision in the case of **Nguruman Limited v Jan Bonded Nielsen (2013) eKLR, where the honourable court observed as hereunder:**

On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.

73. Taking the cue from the foregoing decision, I come to the conclusion that whatever loss that the Plaintiffs herein, may suffer, arising from denial of the orders of injunction, are quantifiable, ascertainable and thus payable, in the same manner in which the Purchase price, was computed and/or arrived upon.

ISSUE NUMBER SIX (6)

74. As pertains of issue of balance of convenience, it is worthy to take note that the suit property has admittedly been sold and transferred to and is now registered in the names of the 1st Defendant/Respondent. For clarity, that is why the plaintiff seeks for an order of cancelation of the title deed issued to the 1st Defendant herein.

75. Secondly, it is also common ground that the 1st Defendant has since entered upon and taken possession of the suit property, indeed the Plaintiff at paragraph 13, concedes and/or acknowledges that the Plaintiffs have since been evicted from the suit property and that the 1st Defendant have since taken possession of the suit land.

76. By virtue of being the proprietor of the suit property and having taken possession thereof, the 1st Defendant/Respondent herein, has thus accrued the rights and/or privileges that vests in the Registered Proprietor of the suit property.

77. Consequently, the 1st Defendant is entitled to Protection under the law in line with the provisions of

Section 24 and 25 of the Land Registration Act, which provides as hereunder;

24. Interest conferred by registration Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. Rights of a proprietor

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

78. Notwithstanding the foregoing, there would also be need for a strong and exceptional situation, to warrant an order of injunction being issued against the Registered proprietor of the parcel of land herein.

79. Unfortunately, no such strong and exceptional grounds have been proven. In this regard, to issue an order of temporary injunction against the 1st Respondent, who is already in occupation and who is the registered proprietor of the property, would be tantamount to negating the title, in any event before a plenary hearing.

80. In short the balance of convenient tilts in favor of the 1st Defendant and not otherwise.

FINAL DISPOSITION

81. Having considered and/or addressed all the issues serialized herein before, I come to the conclusion as hereunder;

i. The 1st Plaintiff herein is devoid of the requisite locus standi to commence and maintain the subject suit.

ii. The Complaint by and/or on behalf of the 2nd Plaintiff is fatally defective and violates the Provision of Order 4 Rule 1(2) of the Civil Procedure Rules 2010.

iii. At any rate, the entire suit amounts to an abuse of the due process of the court.

82. In the premises, the Complaint dated 15th September 2021, be and is hereby struck out with costs to the 1st Defendant.

83. **Without prejudice to the foregoing**, the Notice of Motion Application dated 15th September 2021, is similarly Devoid of Merits and would thus be a candidate for Dismissal.

84. Having found and held that the subject suit amounts to an abuse to the Due process of the court, the costs of the subject Application, as well as the Suit, be and are hereby awarded to the 1st Defendant.

85. It so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER 2021.

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIROMENT AND LAND COURT.

MILIMANI.

In the Presence of;

Ms. June Nafula

M/S Lusweti H/B for Mr. Mohammed for the 1st Defendant

Mr. Abdulaziz Gakuria – 2nd Defendant

N/A for the 2nd Defendant