REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC APPEAL NO. 5 OF 2020

WENSLEY BARASA.....PLAINTIFF/APPLICANT

VERSUS

IMMACULATE AWINO ABONGO.....1ST DEFENDANT/RESPONDENT

SABASTIAN BUBIRU.....2ND DEFENDANT/RESPONDENT

R U L I N G

What calls for my determination in this matter are two issues: -

a. The Notice of Motion by WENSLEY BARASA (plaintiff herein) seeking the main order that IMMACULATE AWINO ABONGO and SABASTIAN BUBIRU (the 1st and 2nd defendants respectively) be stopped from any intermeddling, trespassing, constructing or occupying the land parcel NO EAST BUKUSU/SOUTH KANDUYI/5778 (the suit property) pending the hearing and determination of this suit.

b. The Preliminary Objection taken up by the 1st and 2nd defendants that this suit is: -

1. Res – judicata the following cases: -

- **BUNGOMA ELC CASE NO 181 OF 2014**
- **BUNGOMA CMCC CASE 611 OF 1993,**
- **BUNGOMA CMCC CASE NO 73 OF 2018 and**
- **BUNGOMA ELC NO 93 OF 2011.**

2. Sub – judice the following cases: -

- **BUNGOMA ELC CASE NO 181 OF 2014**
- **BUNGOMA CMCC CASE NO 611 OF 1993**
- **BUNGOMA CMCC CASE NO 73 OF 2018.**

3. That this Court lacks the jurisdiction to hear and determine this suit in view of the decisions in BUNGOMA ELC CASE NO 181 OF 2014, BUNGOMA ELC CASE NO 93 OF 2011(OS) and KISUMU COURT OF APPEAL CASE NO 115 OF 2015.

When the parties appeared before me on 12th March 2020, it was agreed that the plaintiff's application and the defendants' Preliminary objections be canvassed simultaneously by way of written submissions. The plaintiff was also granted leave to file a further affidavit with corresponding leave to the defendants. The matter was then to be mentioned on 26th March 2020 to confirm compliance and take a date for ruling. However, following the onset of the covid – 19 pandemic, it was not until 12th June 2020 that all the parties had complied. That explains the delay in determining the application.

Before I give a background to the application, I wish to confirm that having perused the record herein, I am unable to trace any record in relation to **BUNGOMA CMCC NO 611 OF 1993**. A party pleading res – judicata or sub – judice is enjoined to place before the Court any evidence of previous litigation involving the same parties and subject matter. I can however see from the submissions by counsel that

BUNGOMA CMCC NO 611 OF 1993 was dismissed for want of prosecution. In the absence of the record, I will take those submissions to be the correct position.

Now a background to this suit.

The 1st defendant herein had filed **BUNGOMA H.C.C.C NO 93 OF 2011** against the plaintiff herein seeking his eviction from the suit property. That suit was heard by **MUKUNYA J** and in a Judgment delivered on 28th October 2015, the late Judge found in favour of the 1st defendant herein and ordered the plaintiff herein to vacate from the suit property within 60 days. A decree followed. Aggrieved by that decree, the plaintiff herein filed at the **COURT OF APPEAL KISUMU CIVIL APPLICATION NO 68 OF 2015** seeking a stay of execution of that decree pending appeal. That application was heard on 28th January 2016 and stay orders were issued on 2nd June 2016 pending the hearing and determination of **COURT OF APPEAL KISUMU CIVIL APPEAL NO 115 OF 2015**. That appeal was heard and vide a Judgment delivered on 28th September 2017y, the appeal was allowed and the decree ordering the eviction of the plaintiff herein from the suit property was set aside.

Meanwhile, in 2014, the plaintiff herein filed **BUNGOMA ELC CASE NO 181 OF 2014** against the 1st defendant herein and two other parties being **SIMON WEKESA SIMIYU** and **MAURICE ANDALA NANDWA** seeking orders that he was entitled to the suit property by way of adverse possession. When that case came up for hearing before **MUKUNYA J** on 19th May 2016, the Court was told that counsel for the plaintiff was engaged elsewhere and the plaintiff was not present. The suit was dismissed under **Order 12 Rule 3(1) of the Civil Procedure Rules**. An application seeking to reinstate the dismissed suit to hearing was similarly dismissed vide a ruling delivered on 8th November 2016.

The plaintiff did not give up. He filed **BUNGOMA CMCC NO 73 OF 2018** against the 1st and 2nd defendants herein and one **MAURICE ANDALA NANDWA**. It is not clear from the material availed if the case involved the suit property. However, by a ruling delivered on 31st January 2020, **HON. J. KING'ORI – CHIEF MAGISTRATE** downed his tools citing lack of jurisdiction to determine the dispute. From the body of the ruling, the Honourable Chief Magistrate refers, inter alia, to the Judgment of the **COURT OF APPEAL IN CIVIL APPEAL NO. 115 OF 2015** and therefore this Court can safely conclude that that suit also involved the suit property. That case was subsequently withdrawn vide a Notice of Withdrawal dated 4th February 2020.

On 16th November 2015, the 1st defendant sold the suit property to the 2nd defendant at a consideration of Kshs. 2,500,000/=. The 2nd defendant immediately commenced the construction of a permanent structure thereon.

The plaintiff has now moved to this Court vide his plaint dated 10th February 2020 and filed on the same date seeking the following remedies against the 1st and 2nd defendants: -

> **1. A declaration that the 2nd defendants holds title to the suit property in trust for him and that the same be cancelled and transferred to the plaintiff.**
>
> **2. That the 2nd defendant be restrained from constructing or occupying the suit property and be forcefully evicted therefrom.**
>
> **3. Any other relief that this Honourable Court may deem fit to grant.**
>
> **4. Costs and interest.**

The basis of the suit is that at all material times, the plaintiff was in occupation of the suit property for over 30 years before the 1st defendant filed **BUNGOMA H.C.C.C NO 93 OF 2011** and obtained orders to evict the plaintiff. The plaintiff appealed and those orders were set aside but as that appeal was pending, the 1st defendant sold the suit property to the 2nd defendant hence this suit.

Simultaneously with the plaint, the plaintiff filed a Notice of Motion grounded upon **Sections 3**, **3A and 63(1) of the Civil Procedure Act** and **Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules** seeking the following orders: -

> **a. Spent**
>
> **b. Spent**
>
> **c. Spent**
>
> **d. The defendants be completely stopped from any intermeddling, trespassing, constructing or occupying the suit property pending the hearing and determination of this suit.**
>
> **e. Costs be provided for.**

The application is premised on the grounds set out therein and is also supported by the affidavit of the plaintiff.

The gravamen of the application is that following his eviction by the High Court, the plaintiff appealed and that decree was set aside and the

Court of Appeal ordered that the suit property reverts to him. However, before he could take possession, the 1st defendant sold the suit property to the 2nd defendant in order to defeat justice. The 2nd defendant is now investing millions of shillings on the suit property in order to occasion hardship and prejudice to the plaintiff. The plaintiff cannot execute the Court of Appeal Judgment against the 2nd defendant who was not a party to the previous proceedings but beseeches this Court to guard her interests so that he can enjoy the fruits of her Judgment. Annexed to the application are the orders of previous litigations involving the suit property and which I have already referred to above.

Both defendants have filed their respective defences to the plaintiff's suit and also responses to the Notice of Motion.

In the defence, the 1st defendant denied that the plaintiff has been in occupation of the suit property for over 30 years or at all. She added that the purchase of the suit property was open, free and between a willing buyer and seller. She admits having sued the plaintiff and obtained orders of eviction but denies that the plaintiff was forcefully evicted. She also denies that the Court of Appeal granted the plaintiff ownership of the suit property adding that in an attempt to have the suit property registered in his names, the plaintiff filed **BUNGOMA H.C.C.C NO 181 OF 2014** which was dismissed. She pleads further that the Court of Appeal did not issue any stay orders and this suit is an abuse of the Court process as it is an attempt to appeal against the decree in **BUNGOMA H.C.C.C NO 181 OF 2014** and **BUNGOMA CMCC NO 73 OF 2018** through the back door. Finally, she pleads that this suit is both sub – judice and res – judicata **BUNGOMA H.C.C.C NO 181 OF 2014**, **BUNGOMA CMCC NO 611 OF 1993** and **BUNGOMA CMCC NO 73 OF 2018** and that a Preliminary Objection would be raised during the hearing.

In resisting the plaintiff's Notice of Motion, the 1st defendant filed both a Notice of Preliminary Objection dated 13th February 2020 and a replying affidavit of the same date.

The Preliminary Objection is predicated on the grounds that this suit is both sub – judice and res – judicata the previous suits referenced to above and also that this Court lacks the jurisdiction to determine this dispute in view of the decisions in **BUNGOMA H.C.C.C NO 181 OF 2014** and **KISUMU COURT OF APPEAL CASE NO 115 OF 2015**.

In her replying affidavit, the 1st defendant avers that she purchased the suit property sometime on 29th December 2010 at a consideration of Kshs. 550,000/= from one **AGGREY MAURICE ANDALA NANDWA** following a search but the plaintiff purported to interfere with the land and so she filed **BUNGOMA H.C.C.C NO 93 OF 2011** which was determined in her favour. The plaintiff appealed to the Court of Appeal which however did not decide on the ownership of the suit property nor order that it be transferred to the plaintiff. That the plaintiff filed **BUNGOMA H.C.C.C NO 181 OF 2014** seeking the suit land by way of adverse possession which suit was dismissed after which he then filed **BUNGOMA CMCC NO 73 OF 2018** but the trial magistrate ruled that he had no jurisdiction. That the plaintiff has no right over the suit property which belongs to the 2nd defendant.

In his defence, the 2nd defendant similarly denied that the plaintiff has been in occupation of the suit property for over 30 years and added that he purchased it from the 1st defendant free from any encumbrances and is now the registered owner free to construct houses on the same. He added that as the registered proprietor of the suit property, he cannot be injuncted and that this suit is not only res – judicata but is also frivolous, scandalous, a sham, incompetent and an abuse of the Court process and should be dismissed with costs.

In response to the plaintiff's Notice of Motion, he too filed both a Notice of Preliminary Objection dated 27th February 2020 and a replying affidavit of the same date.

The Preliminary Objection raises the same grounds of res – judicata and lack of this Court's jurisdiction in view of the cases already cited herein.

In his replying affidavit, he depones, inter alia, that on 16th November 2015, he purchased the suit property from the 1st defendant at a consideration of Kshs. 2,500,000/= having done due diligence and confirmed that there was no encumbrance or any inhibition on the title. He is therefore the absolute registered owner of the suit property enjoying all the privileges and appurtenances belonging thereto. He immediately commenced the construction of a permanent structure costing millions of shillings as per the annexed photographs. It was then that plaintiff filed **BUNGOMA CMCC NO 73 OF 2018** and obtained a restraining order. That suit was however terminated for lack of jurisdiction. The plaintiff then filed **BUNGOMA H.C.C.C NO 93 OF 2011** against the 1st defendant and also another Originating Summons against the 1st defendant and others which was dismissed. That it is false for the plaintiff to allege that the title to the suit property was nullified by the Court of Appeal and this suit is res – judicata and should not be entertained. That the plaintiff has not established the principles set out in the case of **GIELLA .V. CASSMAN BROWN & CO LTD 1973 E.A 358** and this suit and the application should be struck out with costs.

By consent of the parties, it was agreed that the plaintiff's Notice of Motion dated 10th February 2020 and the 1st and 2nd defendants' Preliminary Objections dated 13th February 2020 and 27th February 2020 respectively be canvassed simultaneously by way of written submissions. Those submissions have been filed both by **MR SICHANGI ADVOCATE** for the plaintiff, **MR MAKOKHA ADVOCATE** for the 1st defendant and **MR WANYONYI ADVOCATE** for the 2nd defendant.

I have considered the plaintiff's application, the defendants' Preliminary Objection and the submissions by counsel.

I will first determine the defendants' Preliminary Objections because if I up – hold them, then the entire suit and the Notice of Motion upon which it is founded will be struck out and these proceedings will be terminated forthwith. Before I delve into the Preliminary Objections raised by the defendants, it is important that I establish if they meet the test laid down in the case of **MUKISA BISCUIT MANUFACTURING CO LTD .V. WEST END DISTRIBUTORS LTD 1969 E.A 696** where Sir **CHARLES NEWBOLD** said: -

> **"A Preliminary Objection is in the nature of what used to be a demurer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."** Emphasis added.

In **ORARO .V. MBAJA 2005 eKLR, OJWANG J** (as he then was) described it as follows: -

> **"I think the principle is abundantly clear. A "Preliminary Objection" correctly understood, is now well identified as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it bears factual aspects calling for proof, or seeks to adduce evidence for it's authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed."** Emphasis added.

It is clear therefore that a Preliminary Objection must only be based on pure points of law and if for any reason facts are involved, then they must not be contested.

The Preliminary Objections raised by the defendants raise the legal issues that the plaintiff's suit is sub – judice, res – judicata and that this Court lacks the jurisdiction to determine the suit. Those are pure points of law. The parties have made reference to previous cases involving the suit property. Those cases are not contested. The test laid down in the case of **MUKISA BISCUIT MANUFACTURING CO LTD** (supra) has been met. I shall now consider the merits or otherwise of the defendants' Preliminary Objections.

SUB – JUDICE: -

This is provided for in **Section 6 of the Civil Procedure Act** in the following terms: -

> **"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 are 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."** Emphasis added.

It is obvious from the above that the sub – judice rule only applies where another ***"suit or proceeding is pending"*** in another Court involving the same parties or their privies over the same subject. I have perused the annextures herein which relate to the suits previously instituted by the parties herein over the suit property and I am satisfied that none of them are pending. They were all either heard and determined **(BUNGOMA H.C.C.C NO 93 OF 2011** and **KISUMU COURT OF APPEAL CASE NO 115 OF 2015)**, or dismissed for want of prosecution **(BUNGOMA H.C.C.C NO 181 OF 2014)** or dismissed for want of jurisdiction **(BUNGOMA CMCC NO 73 OF 2018)**. In his ruling in **BUNGOMA CMCC NO 73 OF 2018**, **HON. J KING'ORI** also makes reference to another suit **NO 61 OF 1993** which was also dismissed. It is not clear whether that is the same suit as **BUNGOMA CMCC NO 611 OF 1993** referred to in the defendants' Preliminary Objection. What is clear however is that all the suits referred to by the defendants to sustain a plea of sub – judice have been terminated in one way or another. They are no longer pending. The bar of sub – judice has not therefore been properly invoked.

RES – JUDICATA: -

This is provided for in **Section 7 of the Civil Procedure Act** as follows: -

> **"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 under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."**

Before a plea of res – judicata can properly be invoked to terminate a suit, the following must be established: -

> **1: The matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suits.**
>
> **2: The former suit must have been between the same parties or parties under whom they claim.**
>
> **3: The parties must have litigated under the same title.**
>
> **4: The Court which decided the former suit must have been competent and; lastly,**
>
> **5: The former suit must have been heard and finally decided by the Court in the former suit.**

There have been divergent views as to whether or not the dismissal of a suit for want of prosecution can amount to res – judicata. In **SALEM AHMED ZAIDI .V. FAUD HUMEIDAN 1960 E.A 92**, the plaintiff's case had been dismissed for non – attendance and a fresh suit was filed. The then East African Court of Appeal held that the latter suit was res – judicata because an order dismissing a suit has the same effect as a dismissal upon evidence and accordingly, the first suit must be deemed to have been heard and determined and therefore, the dismissal of the earlier suit operated as res – judicata. The Court of Appeal took the same view in **THOMAS K. SAMBU .V. PAUL K. CHEPKWONY 2018 eKLR** where it affirmed the reasoning in the case of **SALEM AHMED ZAIDI** (supra) and said that the dismissal of

a suit for non – attendance is in the nature of a final Judgment.

However, in the case of **MICHAEL BETT SIBOR .V. JACKSON KOECH C.A CIVIL APPEAL NO 83 OF 2016 [2019 eKLR]**, the Court took a different view and held as follows: -

> **"We accept that dismissal of a suit for non-attendance or for want of prosecution can amount to a Judgment, however, such a Judgment does not satisfy the requirements of Section 7 of the Civil Procedure Act as the issues raised in the suit has not been addressed and finally determined by the Court, but the Judgment is the result of what may be described as a technical knockout."** Emphasis added.

See also the case of **THE TEE GEE ELECTRICAL & PLASTIC CO .V. KENYA INDUSTRIAL ESTATES LTD C.A CIVIL APPEAL NO 333 OF 2001 [2005 2KLR 97]** where the Court also took the view that res – judicata only applies where a matter has been heard and determined on the merits and not where the matter was disposed of by the Court due to want of jurisdiction. Similarly, in **CANELAND LTD & OTHERS .V. DELPHIS BANK LTD C.A. CIVIL APPEAL NO 20 OF 2000**, the Court held that for res – judicata to apply, the issues must have been heard and decided on merits otherwise that plea cannot be sustained.

I would agree with these latter views because **Section 7 of the Civil Procedure Act** which defines the principle of res – judicata is explicit that before it can apply, the issues in the previous suit ought to have been ***"heard and finally decided."*** **BLACK'S LAW DICTIONARY 10TH EDITION** defines the terms ***"heard and determined"*** as follows: -

> **"of a case, having been presented to a Court that rendered Judgment."**

The term ***"hearing"*** is defined in the same dictionary as follows: -

> **"A judicial session usu open to the public held for the purpose of deciding issues of fact or of law sometimes with witnesses testifying."**

Res – judicata is also defined in the same dictionary as follows: -

> **"An issue that has been definitively settled by Judicial decision."**

A suit that has been dismissed or struck out for non-attendance of a party or for want of jurisdiction or on account of limitation can hardly be said to have been ***"heard and finally decided"*** which is a requirement of **Section 7 of the Civil Procedure Act**. It would also not be in tandem with **Article 50(1) of the Constitution** which provides for fair hearing. The Court must also be alive to the requirements of both **Article 159(2)(d) of the Constitution** and **Section 19(1) of the Environment and Land Court Act** which eschew the determination of disputes on procedural technicalities.

Based on the above, and as I have already found, the only previous litigation that involved the suit property and which was heard and finally decided was **BUNGOMA H.C.C.C NO 93 OF 2011** and which ended up as **KISUMU COURT OF APPEAL CASE NO 115 OF 2015**. That case, as I have already stated above involved the plaintiff and the 1st defendant only. The 1st defendant sought for the eviction of the plaintiff from the suit land and was granted that order. However, on appeal, the Court of Appeal reversed that decision and ordered that by virtue of his occupation and possession of the suit property, the plaintiff enjoyed overriding interests in the land having remained thereon for a period of 17 years. The 2nd defendant was not a party in that suit. Therefore, in the previous suits, the 1st defendant herein was claiming the suit property by virtue of being the registered proprietor. The Appellant Court held that notwithstanding that fact, the plaintiff's occupation having started long before the 1st defendant became the registered owner, the plaintiff had established an interest therein by his long occupation. Therefore, in so far as the ownership of the suit property between the plaintiff and the 1st defendant was concerned, that is a matter that was directly and substantially in issue in **BUNGOMA H.C.C.C NO 93 OF 2011** and **KISUMU COURT OF APPEAL CASE NO 115 OF 2015**. It is now clear that the dispute between the plaintiff and the 1st defendant with regard to the suit property was conclusively determined by the Court of Appeal when it delivered it's Judgment in the appeal on 28th September 2017. There is no other remedy that this Court can possibly award the plaintiff as against the 1st defendant with regard to the suit property. In any case, the 1st defendant relinguished her interest in the suit property on 16th November 2015 when she sold it to the 2nd defendant who is not only the current registered owner but is also developing it. Indeed, in his plaint, the plaintiff does not seek any orders against the 1st defendant. In paragraph 7 of his plaint, the plaintiff pleads as follows: -

> **"The plaintiff now seeks for declaration that the 2nd defendant is holding title to plot namely E.BUKUSU/S.KANDUYI/5778 in trust for the plaintiff and the same be nullified or cancelled to effect transfer to the plaintiff by the Deputy Registrar."**

It is not therefore clear why the plaintiff has impleaded the 1st defendant in these proceedings. What is clear however is that the plea of res – judicata has properly been raised by the 1st defendant. It is well merited. I up – hold it.

The up – shot of the above is that the claim as against the 1st defendant is struck out with costs.

As for the 2nd defendant, the plea of res – judicata cannot be available to him. As I have already stated above and which is clear from the pleadings, he was not a party to **BUNGOMA H.C.C.C NO 93 OF 2011**. There is also no evidence to suggest that any of the parties in that suit were litigating under him or pursuing his interest in the suit property. His name does not even feature in either the Judgment of the trial Court or the Appellate Court. The issues in this suit are very different from those in **BUNGOMA H.C.C.C NO 93 OF 2011** and **KISUMU**

COURT OF APPEAL CASE NO 115 OF 2015. Even by a casual glance, the pleadings in **BUNGOMA H.C.C.C NO 93 OF 2011** and this suit are not the same. It cannot therefore by any stretch of imagination be concluded that the dispute between the plaintiff and the 2nd defendant was considered and judicially determined in the previous litigation. The Preliminary Objection by the 2nd defendant has not been properly raised. It is dismissed.

The 2nd defendant also raised the objection with regard to the jurisdiction of this Court to determine the dispute herein. The jurisdiction of this Court is clearly spelt out in **Section 13 of the Environment and Land Court Act**. Nothing has been placed before this Court suggesting that this suit contravenes that provision. If the lack of jurisdiction that the 2nd defendant was referring to hinges on the fact of the previous litigation over the suit property, and that would appear to be the case because in paragraph 3 of his Notice of Preliminary Objection he mentions **BUNGOMA H.C.C.C NO 181 OF 2014** and **BUNGOMA HC.C.C. NO 93 OF 2011**, it must be clear by now that those previous cases are not a bar to the plaintiff's case.

The Preliminary Objection questioning this Court's jurisdiction is similarly not well founded. It is dismissed.

Having determined the Preliminary Objection by the defendants, I shall now consider the plaintiff's Notice of Motion which will of course now be only in respect to the 2nd defendant. The only prayers remaining in that application are to restrain the 2nd defendant from intermeddling, trespassing, constructing or occupying the suit property pending the determination of this suit and an order that costs be provided for. This is a prayer for temporary injunction and indeed the Notice of Motion is premised on **Order 40 Rules 1, 2,** and **3 of the Civil Procedure Rules** and **Section 63 of the Civil Procedure Act**.

The principles upon which a Court grants a temporary injunction were set out in the case of **GIELLA .V. CASSMAN BROWN & CO LTD 1973 E A 358** as follows: -

> **"First, an Applicant must show a prima facie case withy a probability of success.**
>
> **Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.**
>
> **Thirdly, if the Court is in doubt, it will decide an application on a balance of convenience."**

As to what amounts to a prima facie case, this was defined in **MRAO .V. FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL NO 39 OF 2002** as follows: -

> **"A prima facie case in a civil application is not confined to a "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 from the latter."**

Such a remedy is also discretionary and as was held in the case of **FILMS ROVER INTERNATIONAL .V. CANNON FILMS SALES LTD 1986 3 ALL. E.R 776**, the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been ***"wrong"***. The main objective should be to preserve the property in dispute as the respective rights of the parties are determined.

It is the plaintiff's case that he is the legal owner of the suit property following the decision by the Court of Appeal yet the 2nd defendant has taken possession and is investing millions of shillings in putting up a construction. The 2nd defendant's response, however, is that he is the absolute registered owner of the suit property holding a title thereto. That he is a bona fide purchaser entitled to all the rights and privileges belonging thereto. It is clear that while the 2nd defendant holds the titles to the suit property, issued to him following a purchase in 2015, the plaintiff, as per the Judgment in **KISUMU COURT OF APPEAL CASE NO 115 of 2015** enjoyed overriding interests having been in possession since 1987. The plaintiff's case is based on trust and it is the law under **Section 25(2) of the Land Registration Act** under which the 1st defendant's title is issued that such registration does not relieve him of any obligation to which he is subject as a trustee. That will of course be an issue to be determined at the trial and this Court must be cautious not to make any findings on contested issues at this stage. However, guided by the decision in **MRAO .V. FIRST AMERICAN BANK OF KENYA** (supra), I am satisfied that there exists a right which appears to have been infringed and therefore a prima facie case is established.

On whether the plaintiff will suffer irreparable injury that cannot be compensated by an award of damages, the plaintiff has averred, and the 2nd defendant confirms, that millions of shillings are being invested in developing the suit property. That is likely to change the character of the said property even before this suit is heard and determined. It is therefore important that the suit property is preserved especially bearing in mind that it has changed ownership before. The balance of convenience would also tilt favour of the plaintiff if there was any doubt. The prayer for a temporary injunction pending trial is therefore well merited and I would allow it.

Ultimately therefore and having considered all the issues herein, I make the following orders: -

> **1. The suit against the 1st defendant is struck out with costs.**
>
> **2. An order of temporary injunction is issued restraining the 2nd defendant from intermeddling, trespassing, constructing on or occupying the suit property pending the hearing and determination of this suit.**
>
> **3. Costs shall be in the cause.**

4. The parties are directed to comply with all the pre – trial directions so that this suit is heard and determined within 12 months from the date of delivery of this ruling as provided in Order 40 Rule 6 of the Civil Procedure Rules.

Boaz N. Olao.

J U D G E

26th June 2020.

Ruling dated, delivered and signed at Bungoma this 26th day of June 2020. To be delivered by electronic mail with notice to the parties in light of the practice directions following the **COVID – 19** pandemic.

Boaz N. Olao.

J U D G E

26th June 2020.