REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 65 OF 2019

MAPEMA HOLDINGS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

THIKA DAIRIES LIMITED .....1ST DEFENDANT/RESPONDENT

PATRICK KARIUKI MUIRURI .....2ND DEFENDANT/RESPONDENT

JOHN SEBASTIAN MUIRURI.....3RD DEFENDANT/RESPONDENT

CHIEF LAND REGISTRAR CENTRAL REGISTRY.....4TH DEFENDANT/RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....5TH DEFENDANT/RESPONDENT

RULING

There are **two** matters for determination one is the **Notice of Motion Application** dated **5th April 2019,** by the Plaintiff/ Applicant and a **Notice of Preliminary Objection** dated **13th May 2019,** by the 1st to 3rd Defendants/ Respondents. The Plaintiff/ Applicant has sought for orders that;

> ***1. A temporary injunction do issue restraining the Defendants/Respondents whether by themselves, their directors, shareholders, agents and/or servants from leasing, transferring, alienating, developing or in any way dealing with the property L.R No. 4953/2414 located in Thika Municipality pending the hearing of the suit.***
>
> ***2. Cost of this Application be provided for.***

The Application is premised on the grounds that vide a Sale agreement dated **10th March 2008,** the Plaintiff/ Applicant bought the suit property from the 1st Defendant/ Respondent at an agreed purchase price of **Kshs.9,000,000/=** and a transfer was effected in favour of the Plaintiff/ applicant and the Plaintiff/ Applicant was issued with an original Certificate of title. However, on **4th October 2016**, the 4th Defendant/ Respondent working in cahoots with the 1st, 2nd and 3rd Defendants/ Respondents **fraudulently, illegally** and **without** any colour of right, cancelled the transfer of the suit property to the Plaintiff/ Applicant. That subsequently, the 1st Defendant/Respondent misrepresented to the 4th Defendant/ Respondent that the original title of the suit property was lost and caused the same to be advertised vide **Kenya Gazette No**. **4031 of 4th July 2018,** and the 4th Defendant/ Respondent without exercising **due diligence** fraudulently and illegally issued the 1st Defendant/ Respondent with a provisional certificate, yet they were all aware that the original certificate was with the Plaintiff/ Applicant, which act was purely intended to defraud and disenfranchise the Plaintiff/ Applicant over its property.

It was contended that the Plaintiff/ Applicant was a bonafide purchaser for value who acquired an **indefeasible** title. Further that the 1st, 2nd and 3rd Defendants/ Respondents have started sending prospective buyers on site to view the land with intention of selling the same, and unless stopped by an order of Court, they will actualize their intentions. Further that the Plaintiff/ Applicant stands to lose his rights over the suit property

The Application is supported by the Affidavit of **Viktah Maina Ngunjiri,** a Director of the Plaintiff/ Applicant sworn on **5th April 2019,** who averred that pursuant to clause 4 of the agreement, the Plaintiff/ Applicant paid a deposit of **Kshs.2,000,000/=** to the 2nd Respondent upon execution of a sale agreement and the 1st Defendant/ Respondent through the 2nd Defendant/Respondent deposited the original title to the parties Advocate on execution of the said agreement and payment of deposit. Further that the balance of **Kshs. 7,000,000/=** was paid

to the 2nd Defendant/ Respondent, vide bankers cheques on diverse dates as per the terms of the sale agreement to which the 1st Defendant/Respondent through the 2nd Defendant/ Respondent supplied the parties lawyer with all the completion documents and the Plaintiff/Applicant was given vacant possession as per clause 6 of the sale agreement. He alleged that upon completion, their then Advocate **Muriuki Ngunjiri & Co Advocates,** caused the suit property to be transferred to the Plaintiff's/ Applicant's name on **14th March 2012,** and the Plaintiff/Applicant was issued with a certificate of title.

That on **19th November 2013,** a suit was filed being **ELC 1400 of 2013,** seeking cancellation of the Plaintiff's/ Applicant's title in respect of the suit property which suit was later dismissed on **17th January 2019**. Further that on **19th November 2013**, the Court made an order of injunction in Nairobi **ELC 1400 of 2013,** which order was registered against the suit property on **22nd November 2013**. That subsequently on **9th April 2015,** a caveat was lodged and registered against the suit property by the Registrar of titles. However, on **4th October 2016**, the 4th Defendant/ Respondent illegally cancelled the transfer of the suit property to the Plaintiff/Applicant an on **4th July 2018,** the 4th Defendant/ Respondent issued the 1st Defendant/ Respondent with a provisional Certificate of title. That he has been advised by his Advocates, which advise he believes to be true that the 4th Defendant/ Respondent had no authority to cancel the said transfer unilaterally under **Section 79(2) of the Land Registration Act,** without a valid Court order. That the 1st and 2nd Defendant/ Respondent have pressed criminal charges against the Directors of the Plaintiff/ Applicant, which case is still pending in Court. It was his contention that the Plaintiff/ Applicant paid the full purchase price, which was confirmed by the respective banks, which cleared the cheques drawn in favour of the 2nd Defendant/Respondent. He contended that unless the Court grants the orders sought, the Defendants/ Respondents will continue with illegal and unlawful dealings and the Plaintiff/ Applicant stands to loose all its investments.

The Application is opposed and the 2nd Defendant/ Respondent **Patrick Kariuki Muiruri,** filed a Replying Affidavit sworn on **14th May 2019,** on behalf of the 1st Defendant/Respondent and for himself. He averred that the Application and suit is based on wild allegations and admission of criminal ventures by the Plaintiff/ Applicant purporting to allude that a legitimate transfer of the suit property was ever done, being aware that the 4th Defendant/ Respondent cancelled the transfer upon confirmation that it was a forgery. It was his contention that the sale of the suit property to the Plaintiff/ Applicant did not materialize as the Plaintiff/ Applicant did not pay in full the requisite consideration. He alleged that in an attempt to swindle the 1st Defendant/ Respondent, the Plaintiff/ Applicant and its Advocates forged and fraudulently purported to effect the transfer of the suit property and that the Plaintiff/ Applicant was never granted **vacant possession** of the suit property, and the 1st Defendant/ Respondent rescinded the entire contract and requested the Plaintiff/ Applicant to collect the deposit paid upon execution.

He further averred that the Plaintiff's /Applicant's Directors and its advocates have been charged with several criminal offences. That upon cancellation of the **fraudulent title** over the suit property, and the Plaintiff's/ Applicant's refusal to return the fraudulent title for cancellation, the 1st Defendant/Respondent was issued with a provisional certificate of lease, which is the only legitimate title document at the records of the 4th Defendant/ Respondent. He contended that the issues in this suit have been variously litigated by the Plaintiff/Applicant, who has sought similar orders with the same being unsuccessful. Further that the Plaintiff/ Applicant are misleading the Court as the Ruling dismissing Nairobi **ELC 1400 of 2013,** did not direct restoration of the title of the suit property to the Plaintiff. Further that the orders of reversal of the 4th Respondent's orders of cancellation of the fraudulent title held by the Plaintiff/ Applicant is similar to the orders as sought in the present suit, while there is in existence an Appeal in Nairobi **ELC 1400 of 2013,** which is **Court of Appeal No. 374 of 2017**.

That the Plaintiff/ Applicant filed Judicial Review Proceedings, which were also dismissed. It was his contention that orders being sought in the instant Application and suit are also being actively pursued by the Plaintiff/ Applicant at the **Court of Appeal** and the suit is therefore ***res Judicata*** and that the instant suit should be **stayed,** if not dismissed, as it is an abuse of the Court process. That the Plaintiff's/Applicant's Directors and advocates efforts to stifle the criminal charges were declined in a Judicial Review Proceedings that they had filed. Further that the suit as filed and framed is caught up by limitation of time, as it has been filed **11 years** after the rescinded agreement for sale was entered into and therefore the Court has no jurisdiction to deal with the suit as it has been filed out of time without the requisite leave. Therefore, the Plaintiff/Applicant should not be allowed to benefit from its illegalities and fraud. That the suit should be struck out for not disclosing any cause of action.

The 1st Defendant/Respondent also filed a Preliminary Objection dated **13th May 2019** on the grounds that;

> ***1. That the entire suit is time barred and unmaintainable in light of the provisions of section 4 of the Limitation of Actions Act Cap 22 Laws of Kenya.***
>
> ***2. Without prejudice to paragraph 1 above, the entire suit is an abuse of Court process and res judicata, orders sought have been subject of litigation and still in active litigation in the following suits;***
>
> > ***i) Nairobi Court of Appeal Civil Appeal No. 120 of 2018 (UR 102 of 2018) Mapema Holdings Limited vs Registrar of LANDS, Thika Diaries Limited and Patrick kariuki Muiruri) being an Appeal from Nairobi ELC Misc Civil Application No. 6 of 2017 Republic vs Registrar of Lands, Thika Diaries Limited Patrick kariuki Muiruri Ex Parte Mapema Holdings Ltd).***
> >
> > ***ii) Nairobi Court of Appeal Civil Appeal No. 374 of 2017 – Mapema Holdings vs Prudenzio Nicholas Gaitara, Patrick Kariuki Muiruri & Thika Dairies Limited being an Apeal from Nairobi ELC Suit No. 1400 of 2013-Prudenzio Nicholas Gaitar vs Patrick Kariuki Muiruri, Thika Dairies Limited and Mapema Holdings Limited.***

The Plaintiff/ Applicant swore a Supplementary Affidavit through **Viktah Maina Ngunjiri** on **12th September 2019,** and averred that the allegations of fraud and forgery by the Defendants/ Respondents can only be determined at the full hearing, but that to do so, the suit property ought to **be preserved**. He further averred that upon purchase, he took vacant possession and that the Defendants/ Respondents

have never rescinded the contract. It was his contention that the has been advised by his Advocates, that upon cancellation of the transfer, the 4th Defendant/ Respondent ought to have recalled the original title in the Applicant's possession.

He denied that the issues in the instant suit have been litigated and averred that Nairobi **ELC 1400 of 2013** suit, was a derivative action filed by a minority shareholder of the 1st Defendant/ Respondent trying to challenge the actions of the 1st and 2nd Defendant/ Respondent on internal management of their Company, which suit was dismissed. He further averred that the Plaintiff/ Applicant did file **Misc Application 6 of 2017,** against the 1st, 2nd and 4th Defendants/Respondents, wherein in its Ruling, the Court found the Application meritious in that principles of **natural justice** were not followed, but declined to grant the discretionary orders on ground that the orders were not efficacious as the allegations of fraud must be litigated in a Civil suit. He averred that the instant suit is the only **civil suit** which will substantively and conclusively deal with the validity or otherwise of the sale transaction between the parties. Further that the Plaintiff/ Applicant has withdrawn all pending appeals and that in the said suits, there is no interim and or substantive orders against the suit property and there would be no conflicting orders. That the issues in the instant suit are not **res judicata** as they have never been fully litigated before any Court on merits. Further that the suit was filed within time and that the allegations of **fraud** have not been proven.

Further **Patrick Ngunjiri,** swore an Affidavit on **11th September 2019,** and averred that he acted for both parties in the transaction to which he prepared a sale agreement and on the same day, the Plaintiff/ Applicant paid a deposit o **Kshs. 2,000,000/** to the 2nd Respondent . Further that on **31st March 2008,** the Applicant paid to the 2nd Respondent the balance of the purchase price in three bankers cheques and when he confirmed that the Vendor had received the payment of the full purchase price which the 2nd Defendant/ Respondent confirmed in his presence , the 2nd and 3rd Defendants/ Respondents gave him the completion documents and signed the transfer deed and he lodged the deed of transfer upon payment of stamp duty charges and the Applicant was handed vacant possession. That he was shown a deed of transfer which had different passport size photos and that, that was a result of an inadvertent mistake from his office that the wrong photos and IDs were used. It was his contention that the Plaintiff/ Applicant was the bonafide purchaser for value and that on **9th April 2015,** a caveat was lodged and registered against the suit property.

The **Notice of Motion Application** and the **Notice of Preliminary Objection**, were canvassed by way of written submissions which the Court has now carefully read and considered together with the pleadings of the parties, the annextures thereto and the written submissions and finds that the issues for determination are;

1. Whether the Notice of Preliminary Objection is merited.

2. Whether the suit is Res Judicata

3. Whether the Notice of Motion Application dated 5th April 2019 is merited.

1. <u>Whether the Notice of Preliminary Objection is merited.</u>

The Defendants/Respondents have filed a Notice of Preliminary Objection claiming that the suit is barred by **Section 4 of the Limitations of Actions Act** and that the suit is also Res Judicata. A Preliminary Objection was described in the ***<u>Mukisa Biscuits Manufacturing Co. Ltd… Vs…West End Distributors Ltd (1969) EA 696</u>*** to mean:-

> ***"So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."***

Further Sir ***<u>Charles Nebbold, JA</u>*** stated that:-

> ***"A Preliminary Objection is in the nature of what used to be a demurrer. 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop."***

The above being the description of Preliminary Objection, it is evident that a **Preliminary Objection,** raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts has to be ascertained from elsewhere or the court is called upon to exercise judicial discretion. In the case of ***<u>Quick Enterprises Ltd..Vs..Kenya Railways Corporation, Kisumu HCCC No. 22 of 1999</u>***, the Court held that:-

> ***"When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings."***

In determining a *Preliminary Objection*, the Court will take into account that a **Preliminary Objection** must stem from the pleadings and that it raises pure point of law. See the case of ***<u>Avtar Singh Bhamra & Another…Vs….Oriental Commercial Bank, Kisumu HCCC No.53 of 2004</u>***, where the court held that:-

> ***"A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained."***

Does the Notice of Preliminary Objection as raised herein satisfy the ingredients of a *Preliminary Objection?* The Court will be persuaded by the findings in the case of ***Oraro…Vs…Mbaja (2005) 1KLR 141,*** where the Court held that:-

> ***"Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence."***

In the instant *Preliminary Objection*, the Defendants/Objectors have averred that the Court lacks Jurisdiction to deal with the instant suit as it is barred by **Section 4 of the Limitations of Actions Act Cap 22,** which forbids bringing a suit founded on contract after the expiry of 6 years from the date of the said contract. It is not in doubt that the issue of whether or not the provisions of the law have been complied with before the filing of the suit, goes to the jurisdiction of the Court and does not require the ascertaining of facts.

It is not in doubt that the Court is required to determine what the law says and whether indeed the suit is barred by Limitation of Action will not require the probing of evidence. All that the Court will then need to do is determine what the law says and this would only mean that the same raises a pure point of law.

From the description of Preliminary Objection in the ***Mukisa Biscuits case (supra)*** and given that an issue of whether the suit is barred by the Limitations of time, does not involve ascertaining of facts, then the instant *Notice of Preliminary Objection* as raised by the 1st Defendant/Respondent meets the test of what amounts to a **Preliminary Objection**. It raises pure points of law and it can be determined without ascertainment of facts from elsewhere. Therefore, the Court finds and holds that the first limb of the ***Notice of Preliminary Objection*** as filed by the 1st Defendant/ Objector is a Preliminary Objection as per the ***Mukisa Biscuits case (supra).***

The 2nd point raised by the Defendants/Respondents is that the suit is ***Res Judicata***. In the case of ***Henry Wanyama Khaemba… Vs… Standard Chartered Bank Ltd & Another (2014) eKLR***, the Court held that:

> ***"That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly".***

Further in the case of ***George Kamau Kimani & 4 Others…Vs…County Government of Trans Nzoia & Another (2014), eKLR***, the Court held that:-

> ***"I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection".***

For the Court to determine whether the issues herein were directly and substantially in issue with the other suits, the Court finds that it will have to ascertain facts and probe evidence. Therefore, the Court finds and holds that what has been raised by the 1st Defendants/ Respondents on the issue of *Res Judicata* does not amount to a Preliminary Objection and the same is therefore merited.

The Court is now left to determine whether the objection is merited in terms of failing under the Limitations of Actions Act. It is the 1st to 3rd Defendants/ Respondent's contention that the Plaint is time barred as it is hinged on an agreement dated **10th March 2008,** being **11 years** since the contract. However, the Plaintiff/ Applicant has submitted that its case against the Defendants is that of fraud, fraudulent, illegal and unlawful cancellation of the transfer and title of the Plaintiff's suit property.

In the case of ***Edward Moonge Lengusuranga …Vs… James Lanaiyara & another [2019] eKLR*** the Court held that

> ***"A cause of action, is a set of facts sufficient to justify a right to sue to obtain money, property, or the enforcement of a right against another party. The term also refers to the legal theory upon which a plaintiff brings suit. According to Section 26 of the Limitation of Actions Act the cause of action accrues when the fraud is discovered. In the present scenario therefore I find that the alleged fraud was discovered on the 13th January 2015 and a period of three years ended on 13th January 2018. These proceedings were filed on the 20th August 2018 which period was beyond the 3 years from the date the fraud was discovered."***

Persuaded by the above case, it is not in doubt that a cause of action is a set of facts to justify a right to sue. What then in this case are the sets of facts that the Plaintiff / Applicant used to justify its rights to sue?

The Court having carefully perused the Plaint herein is satisfied that the suit is hinged on the actions of the 4th Defendant/ Respondent cancelling TH Plaintiff's title over the suit property and the alleged of misrepresentation of the 1st to 3rd Defendants/ Respondents and therefore resulting in them being issued with a provisional Certificate of title. It is evident that the suit herein is hinged on alleged fraud by the Defendants and also on illegality and irregularity. ***Section 4 (1)*** of the **Limitation of Actions Act** provides:

"4 (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued:

(a) actions founded on contract;

(b)……...…

(c)……...

(d)……...

(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law."

However, ***Section 26 (c)*** of the **Limitation of Actions Act** provides:

"Where, in the case of an action for which a period of limitation is prescribed, either:

(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it."

Given that the cause of action is hinged on the alleged fraud by the Defendants/Respondents and given that the alleged fraud allegedly occurred on **4th October 2016,** and this suit having been filed on **5th April 2019,** it is the Court's considered view that the suit is not caught up by limitations of actions as the Limitations for cases involving fraud is 3 years. Therefore, the Court finds and holds that the Preliminary Objection is not merited and the same is dismissed.

2. Whether the suit is Res Judicata

Even though the Court has held that the issue of Res Judicata cannot be raised as a Preliminary Objection, in his Replying Affidavit, **Patrick Kariuki Muiruri** raised the said issue of Res Judicata and the Court must therefore determine the same

In opposing the Application, it has been the Defendants/ Respondents contention that the suit is **Res Judicata** being that the Court had already heard and determined **Misc 6 of 2017** and **ELC 1400 of 2013**. The principle of *res judicata* is found in Section 7 of the Civil Procedure which provides that:

"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."

Further In the case of ***The Independent Electoral and Boundaries Commission …Vs… Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR),*** *the Court of Appeal held that:*

"Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disinjunctive but conjunctive terms;

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

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

c) Those parties were litigating under the same title.

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

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

With the above in mind, the Court will then proceeds and determines whether the suit is **Res Judicata**. It is the 1st, 2nd and 3rd Defendants/ Respondents submission that except for interchanging of parties, the subject matter of the suit and the orders sought variously all are similar to orders and prayers being sought in the current suit. It is important to note that **Res Judicata** requires that the suit must have been heard and finally determined. The Court has gone through the proceedings produced in **ELC 1400 of 2013,** and notes that the Plaintiff in the

said suit was disputing the transfer of the suit property by the Defendants/ Respondents. Further the Defendants/ Respondents filed a Counter claim seeking for the cancellation of the transfer registered and a declaration that the suit property belonged to the 1st Defendant/ Respondent herein.

From the pleadings, it is clear that the issue of fraud as alluded by the Plaintiff/Applicant were not in dispute at that time. Further the illegal cancellation was not in dispute and that the issue came in later on as noted by the Court in its ruling dated **17th January 2019,** which struck out the suit when the Plaintiff in the said suit sought leave to bring a derivative suit. In its ruling the Court stated;

> ***"As was pointed out by the defendants in their response to the application, the plaintiff's application for leave was filed more than two (2) years after the filing of the suit. While the suit was pending, some developments took place which had direct effect on the plaintiff's claim. It was common ground that the Land Registrar cancelled the transfer of the suit property to the 3rd defendant on 4th October, 2016. With the cancellation of the transfer of the suit property by the 2nd defendant to the 3rd defendant, the plaintiff's claim against the defendants in respect of the property falls by the way. This court cannot grant to the plaintiff leave to continue with a claim which is spent.***
>
> ***the final analysis and for the foregoing reasons, I find no merit in the plaintiff's Notice of Motion application dated 14th January, 2016. The application is dismissed. Consequently, the plaintiff's suit is also struck out."***

From the above findings of the court, it is not in doubt that the issues of cancellation and transfer of the suit property were never heard and finally determined in that suit.

Further in **Misc 6 of 2017**, the Court notes that the same was a Judicial Review and Judicial Review proceedings never go to the merit of the case as they only deal with process. Vide the Judgment delivered on **9th April 2018,** the Court held that;

> ***" still parties have to litigate in the pending civil suit on whether there was fraud or not. The remedies of Judicial Review will not be effective in the circumstances.***

The above once again evidencing that the issue of fraud was never litigated. It is not in doubt that the Appeals have since been withdrawn and even when the same was still pending, it would have been that the issue was subjudice but not res Judicata.

Having analyzed the facts as above, the Court finds that the instant suit is not **Res Judicata.**

3. Whether the Notice of Motion Application dated 5th April 2019 is merited

The Applicant has sought for temporary injunctive orders and is only entitled to either grant or denial of the same at this stage. The Court notes that there are various disputed facts and allegations of fraud that have been raised , However, the Court is not supposed to deal with the merits of the case at this stage. See the case of ***Airland Tours and Travel Ltd…Vs…National Industrial Credit Bank, Milimani HCCC No.1234 of 2003***, where the Court held that:-

> ***"In an Interlocutory application, the Court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law".***

In determining whether to grant or not to grant the orders sought, the court will be guided by the principles set out in the case of ***Giella … Vs… Cassman Brown Co Ltd (1973)EA 358***, and which were reproduced in the case of ***Kibutiri…Vs…Kenya Shell, Nairobi High Court, Civil Case No.3398 of 1980 (1981) KLR***, where the Court held that:-

> ***"The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. See also E.A Industries ...Vs...Trufoods (1972) EA 420."***

Firstly, the Applicant needed to establish that it has a *prima-facie* case with probability of success. A *prima-facie* case was described in the case of ***Mrao Ltd…Vs…First American Bank of Kenya Ltd & Others (2003)KLR***, to mean:-

> ***"A case in 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".***

It is the duty of the Applicant herein to establish that it has a *prima-facie* case. It is not in doubt that the parties entered into a sale agreement, while the Plaintiff/ Applicant contends that it paid the full consideration and the Defendants/ Respondents signed the transfer documents allegations which have been corroborated by the parties Advocate who acted for both parties, the Defendants/ Respondents have denied the said allegations. Though these are disputed facts as to whether the transfer was **valid** and **cancellation** was proper, it is the Court's considered view that at this juncture it is not called upon to deal with the disputed facts as already held above. Parties are bound by the terms of their contract and if indeed the Court is to find that there was fraud and illegalities in cancellation of the Plaintiff's/ Applicant's title, it would not be in doubt that then the Plaintiff's/ Applicant's rights over the suit property would have been infringed upon. The Plaintiff/ Applicant has interest over the suit property and any actions going against the said interest are therefore a breach of its rights. The Court therefore finds and holds that the Plaintiff/ Applicant has established a prima facie case.

On whether the Plaintiff/ Applicant will suffer irreparable loss, the Court finds that ***'Irreparable loss'*** was described in the case of ***Paul Gitonga Wanjau…Vs…Gathuthi Tea Factory Co. Ltd & 2 Others, Nyeri HCC No.28 of 2015***, as ***simply injury or harm that cannot be compensated by damages and would be continuous.***

The Plaintiff/ Applicant has claimed that when it bought the suit property, it was given vacant possession. However, the Defendants/ Respondent have denied this allegations. There has been no evidence by either side to support their allegations and the Court cannot therefore conclusively at this stage make a finding .In the case of ***Niaz Mohammed Janmohammed …Vs… Commissioner for Lands & 4 Others (1996) eKLR,*** where the Court held that:-

> ***"It is no answer to the prayer sought, that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such right or atone for transgression against the law, if this turns out to have been the case. These considerations alone would entitle the Applicant to the grant of the orders sought."***

Further in the case of ***Olympic Sports House Ltd…Vs…School Equipment Centre Ltd (2012) eKLR***, the Court held that:-

> ***"a party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction there must be evidence of immediate danger to property or sale or other disposition."***

The Court finds that if the Applicant's rights are infringed, no amount of money can compensate such infringement. Therefore, the Court finds that the Plaintiff/Applicant has established that it is likely to suffer irreparable loss and/or injury which cannot be adequately compensated by an award of damages.

On the third limb, if the Court is to decide on a balance of convenience, the same will tilt in favour of maintaining the *status quo*. The Court cannot authoritatively say who is in possession and therefore the *status quo* herein is directing the Defendants/Respondents to desist from carrying out any dealings with the suit properties until the suit is heard and determined. Thus the *status quo* herein should remain what was in existence before the Respondents allegedly unlawful actions. See the case of ***Agnes Adhiambo Ojwang....Vs.... Wycliffe Odhiambo Ojijo, Kisumu HCCC No.205 of 2000***, where the Court held that:-

> ***"the purpose of injunction is to preserve the status quo and the status quo to be preserved is the one that existed before the wrongful act".***

Having now carefully considered the available evidence, the Court finds and holds that the **Notice of Preliminary Objection** dated **13th May 2019,** is **not** merited and the same is dismissed with costs.

However, Plaintiff's/Applicant's ***Notice of Motion Application*** dated ***5th April 2019,*** *is* found to be **merited.** Consequently, the Court allows the said Application entirely in terms of prayers **no. 2 and 4**. The Plaintiff/Applicant is also entitled to costs of the Application.

It is so ordered.

Dated, signed and ***Delivered*** at ***Thika*** this **22nd day** of **October 2020**

L. GACHERU

JUDGE

22/10/2020

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Ayieko for the Plaintiff/Applicant

Mr. Tumu for the 1st, 2nd and 3rd Defendants/Respondents

Mr. Mwambonu holding brief for M/s Ndundu for the 4th and 5th Defendants/Respondents

L. GACHERU

JUDGE

22/10/2020