



REPUBLIC OF KENYA



**Baobab Diagnostics Limited v Wanja & 3 others (Environment and Land Case E064 of 2024) [2025] KEELC 6406 (KLR) (29 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6406 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT AND LAND CASE E064 OF 2024  
LL NAIKUNI, J  
SEPTEMBER 29, 2025**

**BETWEEN**

**BAOBAB DIAGNOSTICS LIMITED ..... PLAINTIFF**

**AND**

**MARY WANJA ..... 1<sup>ST</sup> DEFENDANT**

**GALUPAEONIA LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**AMINA FUNDI CHIDZUGA ..... 3<sup>RD</sup> DEFENDANT**

**COUNTY LAND REGISTRAR, KWALE ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

**I. Introduction**

1. This Honorable Court was tasked to make a determination unto three [3] the Notice of Motion applications dated 9<sup>th</sup> October 2024; 10<sup>th</sup> March 2025 and 22<sup>nd</sup> April, 2025 respectively. The first application was filed by the Plaintiff herein - Baobab Diagnostics Limited while the second one was by the 2<sup>nd</sup> Defendant, Galupaeonia Limited. And the third one was filed by Plaintiff/Applicant herein.
2. Upon service of the application dated 9<sup>th</sup> October 2024, the Respondents filed responses to the said application. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents responded through filing of the Replying Affidavit sworn on 12<sup>th</sup> November 2024 by the 3<sup>rd</sup> Respondent. In response to the averments raised in the Replying Affidavit, the Plaintiff filed a supplementary affidavit dated 9<sup>th</sup> October 2024 and sworn by its appointed official Jitesh Ramji Mepani. The 1<sup>st</sup> and 4<sup>th</sup> Respondents did not participate in both applications.
3. The application dated 10<sup>th</sup> March 2025 was opposed vide a Replying Affidavit dated 15<sup>th</sup> April 2025 and sworn by the appointed official Jitesh Ramji Mepani.



4. For good order, the Honourable Court shall deal with these three (3) applications though distinctly and separately but simultaneously.

## II. The Notice of Motion application dated 9<sup>th</sup> October 2024 by the Plaintiff/Applicant.

5. The Application was brought under the dint of the provision of Article 40 [1] and 40 [6] of the Constitution of Kenya 2010, Section 13 [5] of the Environment and Land Court Act, Sections 1A,1B,3,3A and 63 [e] of the Civil Procedure Act, Order 40 Rules 1,2,3 Order 51 Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the law.
6. The Applicant sought for the following orders: -
  - a. Spent.
  - b. This Honourable Court be pleased to issue an order of temporary injunction against the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents, their agents, servants and all those claiming under them from entering, accessing, leasing, selling, transferring or in any other way interfering with land Title No. Kwale/Galu Kinondo/27 pending the hearing and determination of this application.
  - c. This Honourable Court be pleased to issue an order of temporary injunction against the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents, their agents, servants and all those claiming under them from entering, accessing, leasing, selling, transferring or in any other way interfering with land Title No. Kwale/Galu Kinondo/27 pending the hearing and determination of this suit.
  - d. Upon hearing interpartes of this application, this Honourable Court be pleased to issue an order directing the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents to demolish the construction and/or developments so far done by themselves on land Title No. Kwale/Galu Kinondo/27
  - e. This Honourable Court be pleased to issue an order that the OCS Diani Police Station do offer security and assistance in ensuring compliance of prayer no 4 above.
  - f. Costs of this application be provided for.
7. The application by the Applicant herein was premised on the grounds, testimonial facts and averments made out under the 21 Paragraphed Supporting Affidavit of – Jitesh Ramji Mepani, the appointed official of the Plaintiff/Applicant herein sworn and dated 9<sup>th</sup> October 2024 with fifteen (15) annexures marked as “JRM - 1 to 15”. The Applicant averred that: -
  - a. He was the Plaintiff/Applicant and the bonafide registered owner of land Title No. Kwale/Galu Kinondo/27 as per an attached title deed.
  - b. The Plaintiff/Applicant was previously known as Baobab Investments Limited whereupon the same changed in the year 1987 to Baobab Diagnostic Limited. That before the change in name the Applicant was registered as the proprietor of the land as a first registration in the year 1984.
  - c. On 20<sup>th</sup> March 2008 a survey report positively confirmed and defined the boundaries of the suit property and a beacon certificate was prepared to that effect. That on 23<sup>rd</sup> May 2008 the beneficial owners of the Plaintiff company Robert Philip Ashworth and Michael Lewis Somen sold the same vide a sale of shares agreement to Murjibhai Lalji Pindolia, Kishor Murji Pindolia and Jyotiprasad Jivrambhai Thakkar and which sale was inclusive of the land at a sum of Kenya Twelve Million Nine Hundred and Eight Thousand Five Hundred and Four (Kshs. 12,908,504/-).



- d. It was averred that a request for change of name of the Plaintiff was made on 9<sup>th</sup> June 2008 and a new certificate was issued on the same date. That searches over the suit property from then had proved that the same was registered in the names of the Plaintiff. Further that all the requisite land rates had always been paid by the Plaintiff.
- e. It was deposed that sometime in August 2024 the Plaintiff discovered that the suit property had been accessed by unknown persons who were infact making developments on the same. That a letter was written to the County Land Registrar on 9<sup>th</sup> August 2024 with a view of knowing the status of the land.
- f. A caution was immediately placed on the land and the Plaintiff was supplied with the fraudulent transfer documents that had been used to make a parallel registration to the suit property. The same revealed that the 1<sup>st</sup> Defendant had effected transfer to the 2<sup>nd</sup> Defendant through a sale at a consideration of a sum of Kenya Shillings Thirty million only (Kshs. 30,000,000/-).
- g. Upon investigations before the Deputy County Commissioner Msambweni County, it was established that the application for land control board consent tabled on 12<sup>th</sup> June 2024 had been rejected.
- h. The Land Registrar followed up on the complaint for the fraudulent transfer and issued notices to the Defendants to surrender the title as well as writing to the relevant ministry for purposes of de gazzettment of the title.
- i. The Plaintiff referred to the transfer of the suit property as effected between the Defendants herein as being fraudulent and particularised the contents of the alleged fraud under paragraph 16 of the supporting affidavit.
- j. The deponent stated that there was ongoing construction on the suit property and unless the same was stopped by the court through the orders sought in the instant application, the Plaintiff was bound to suffer irreparable harm. Further that the Plaintiff had met the threshold set in “the classicus locus case of “Giella - Versus - Cassman Brown”.

### **III. The Response by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents**

8. On 12<sup>th</sup> November 2024, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed a 20 Paragraphed Replying Affidavit sworn by AMINA FUNDI CHIDZUGA, the 3<sup>rd</sup> Defendant herein in opposition of the application together with six (6) annexures marked as “AFC 1 - 6” annexed thereof. She stated as follows that: -
  - a. The affidavit was being sworn in opposition to the Plaintiff’s application dated 9<sup>th</sup> October 2024. That the 2<sup>nd</sup> Defendant/Respondent is the registered proprietor of all that parcel of land known as Kwale/Galu Kinondo/27 as per copies of the Title Deed and Search respectively.
  - b. The 2<sup>nd</sup> Defendant/Respondent purchased the suit property for value from the 1<sup>st</sup> Defendant/Respondent who was then registered proprietor Mary Wanja vide a sale agreement dated 9<sup>th</sup> May 2024.
  - c. The deponent stated that prior to the purchase, the 2<sup>nd</sup> Defendant/Respondent undertook extensive due diligence to ascertain the status, history and ownership of the suit property. Further that the 2<sup>nd</sup> Defendant/Respondent paid all the stamp duty and registration fees, and ensured that the transaction was above board.



- d. It was deposed that the 2<sup>nd</sup> Defendant/Respondent thereafter took possession of the suit property after purchase and has undertaken extensive development thereon. That the purchase of the suit property by 2<sup>nd</sup> Defendant/Respondent was above board. Neither 2<sup>nd</sup> Defendant/Respondent nor the deponent were part of any fraud as alleged by the Plaintiff/Applicant.
- e. As the director of the 2<sup>nd</sup> Defendant/Respondent, the 3<sup>rd</sup> Defendant acted in good faith and purchased the property innocently for without any notice of the alleged fraud hence the extensive due diligence conducted by her Advocates on his own behalf and that of the 2<sup>nd</sup> Defendant/Respondent.
- f. It was stated that on 30<sup>th</sup> September 2024, the Kwale Land Registrar wrote to the 2<sup>nd</sup> Defendant/Respondent requiring it to surrender Title Deed to the suit property being Title Deed Serial No. 5080610 for cancellation and rectification of the Register. On the same 30<sup>th</sup> September 2024, the Kwale Land Registrar wrote to the Government Printer forwarding a Gazette Notice titled "Degazettement of Title Deed Kwale/Galu Kinondo/27" indicating that the 2<sup>nd</sup> Defendant/Respondent's Title Deed would stand cancelled and of no effect hence null and void from the date of the notice.
- g. If the Kwale Land Registrar considered the alleged Petition by the Plaintiff/Application then the same was conducted unilaterally without affording the 2<sup>nd</sup> Defendant/Respondent and the deponent an opportunity to be heard contrary to the provision of Article 47 of the Constitution, the Fair Administrative Act and Rules of natural justice.
- h. That on 2<sup>nd</sup> October 2024, persons alleging to be agents of the Plaintiff/Applicant, in the company of DCI officers invaded the suit property and arrested the 2<sup>nd</sup> Defendant/Respondent's construction workers on allegations of trespass. That the said parties have embarked on demolition of the 2<sup>nd</sup> Defendant/Respondent's development and purportedly started constructing a perimeter wall around the suit property.
- i. The 2<sup>nd</sup> Defendant/Respondent immediately instituted a suit under a certificate of urgency against the Plaintiff/Application, DCI Kwale and Kwale Land Registrar being:- "Kwale Mcelc/E055/2024 - Galupaeonia Limited – Versus - Baobab Diagnostics limited and 2 others". The application was certified urgent and the court subsequently issued restraining injunctive orders against the Plaintiff/Application, DCI Kwale and Kwale Land Registrar.
- j. The instant suit was filed after the Plaintiff getting information from the DCI Kwale about the Orders issued in "Kwale Mcelc/E055/2024 - Galupaeonia Limited – Versus - Baobab Diagnostics limited and 2 others", that the Plaintiff/Applicant rushed to this Honourable Court and filed this instant suit and application without disclosing about the pendency of KWALE MCELC/E055/2024.
- k. It was stated that as it stood there were 2 court orders each granting the parties injunctive orders against the other. That the 2<sup>nd</sup> Defendant/Respondent stood to suffer irreparable loss if the orders sought herein was confirmed/granted to the Plaintiff/Applicant. The deponent stated that only an order maintaining the status quo ante would serve the interests of justice and that of all the parties.



#### IV. The Supplementary Affidavit by the Plaintiff

9. On 9<sup>th</sup> October 2024, the Plaintiff filed a 21 Paragraphed Supplementary Affidavit sworn by Jitesh Ramji Mepani, the appointed official of herein in a rejoinder to the averments raised in the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' Replying Affidavit sworn on 12<sup>th</sup> November 2024. He stated as follows that: -
- a. In response to the contents of Paragraph 3 of the Replying Affidavit, the Plaintiff maintained that it was the bona fide registered owner of land Title No. Kwale/Galu/Kinondo/27 and that the alleged ownership by the 2<sup>nd</sup> Defendant was tainted with fraud and illegality.
  - b. It was averred that in as much as the 2<sup>nd</sup> Defendant/Respondent herein purports and alleged to have bought the suit land from the 1<sup>st</sup> Defendant/Respondent, the said sale was null and void ab initio as the said 1<sup>st</sup> Defendant fraudulently, illegally and unlawfully secured registration of the suit land in her name which she later transferred via a sale to the 2<sup>nd</sup> Defendant herein and therefore, no good title and/or valid legal interest could pass from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant or to any other person whatsoever.
  - c. In further response to the contents of Paragraph 4, the Kwale County Land Registrar's observation on his letter dated 30<sup>th</sup> September, 2024 was that the 1<sup>st</sup> Defendant was actually not the bona fide owner of the land and that some ownership documents had been plucked off the record and forged and new ones planted.
  - d. In response to Paragraph 5, it was averred that the 2<sup>nd</sup> Defendant/Respondent did not undertake any due diligence or at all to ascertain the ownership of the property. In particular, the 2<sup>nd</sup> Defendant had failed to produce any land rate clearance certificate that it obtained from the 1<sup>st</sup> Defendant as part of completion documents which document is a mandatory completion document to be supplied by the vendor to the purchaser on the completion date pursuant to Condition 8.4.1 of the Law Society of Kenya (LSK) Conditions of sale, 2015.
  - e. In response to paragraph 6, the deponent stated that the transaction between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant herein was nothing near a transaction that is above board. The 1<sup>st</sup> Defendant's application for Land Control Board consent was rejected by the Msambweni Sub County Land Control Board chaired by the Deputy County Commissioner on 12<sup>th</sup> June, 2024.
  - f. The court was asked to interrogate the question of where the 1<sup>st</sup> Defendant got the Land Control Board consent that was presented to the Kwale County Land Registrar on 4<sup>th</sup> July, 2024 which saw the sanctioning of the illegal and unlawful transfer of the suit land from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant.
  - g. It was deposed that the 2<sup>nd</sup> Defendant's unlawful and illegal occupation and development of the suit land, have violated and continue to violate the proprietary rights of the Plaintiff in the suit land which this Honourable Court should not countenance.
  - h. Also that in order to be considered a bona fide purchaser for value, one must first prove that they acquired a valid and legal title, which the 2<sup>nd</sup> Defendant herein had failed to account for. That the 1<sup>st</sup> Defendant failed to avail a land rate clearance certificate which is a crucial completion document. Therefore, the 2<sup>nd</sup> Defendant should not be heard to allege that it purchased the property innocently without notice of fraud and that its advocates conducted extensive due diligence.



- i. According to the deponent, the Kwale County Land Registrar did afford the Defendant's herein an opportunity to be heard as evidenced in all his correspondences and that the Kwale County Land Registrar acted pursuant to Section 79 (2) of the Land Registration Act.
- j. That whilst the 2<sup>nd</sup> Defendant herein instituted a suit in the Kwale Magistrate's Court, the same was an outright abuse of the process of the Honourable Court and there is since a contestation on the subordinate Court's pecuniary jurisdiction that is pending determination. Also that at the time the Plaintiff instituted the proceedings herein, it was unaware of the Kwale Magistrate Court matter and became only aware when it served the orders herein upon the DCI Kwale since there were pending investigations for fraud over the suit land against the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein.
- k. In response to the issue of two conflicting court orders, it was stated that the Kwale Magistrate Court did not have the requisite pecuniary jurisdiction to hear and determine the matter. The Plaintiff maintained that it had established "a prima facie case" and asked the court to allow its application as had been prayed.
- l. Lastly that orders to maintain status quo ante would be orders confirming the violation of the proprietary rights of the Plaintiff over the suit land and therefore such orders should not issue as they were not in the interest of justice.

**V. The Notice of Motion application dated 10<sup>th</sup> March 2025 by the 2<sup>nd</sup> Defendant/Applicants.**

10. Under the above application, the 2<sup>nd</sup> Defendant/Applicant sought for the following orders before court:-
  - a. Spent.
  - b. That pending the inter partes hearing and determination of this application, this Honourable Court be pleased to restore the status quo ante obtaining prior to the issuance of the order dated 11<sup>th</sup> October 2024 between the parties herein, to wit, that the 2<sup>nd</sup> Defendant/Applicant be in unconditional possession and occupation of Kwale/Galu Kinondo/27
  - c. That pending the inter partes hearing and determination of this suit, this Honourable Court be pleased to restore the status quo ante obtaining prior to the issuance of the order dated 11<sup>th</sup> October 2024 between the parties herein to wit that the 2<sup>nd</sup> Defendant/Applicant be in unconditional possession and occupation of Kwale/Galu Kinondo/27
  - d. That an order do issue permitting the 2<sup>nd</sup> Defendant/Applicant to proceed with undertaking any further construction or development on land title number Kwale/Galu Kinondo/27 as she deems fit/necessary
  - e. That an order do issue compelling the OCS Diani Police Station to enforce the said orders and
  - f. That costs of this application be provided for
11. The application by the Applicant herein was premised on the grounds, testimonial facts and averments made out under the 12 Paragraphed Supporting Affidavit of – Florian Wunderlich, the director of the 2<sup>nd</sup> Defendant herein sworn and dated 10<sup>th</sup> March 2025 with two (2) annexures marked as "FW - 1 to 2". The Applicant averred that: -
  - a. The company is a legal and lawfully registered owner of all that piece of land known as Kwale/Galu Kinondo/27. That before purchase of the said suit property the company conducted due



diligence of the property, followed due process and acquired the property at the value of a sum of Kenya Shillings one hundred and nineteen million (Kshs. 119,000,000/-)

- b. Consequently, the Land Registrar issued the 2<sup>nd</sup> Defendant with a clean title to the suit property. The deponent stated that the 2<sup>nd</sup> Defendant was a bona - fide purchaser for value and had taken several reasonable steps to develop the suit property at the tune of over a sum of Kenya Shillings Eight Million (Kshs. 8,000,000/-).
- c. Vide an order dated 11<sup>th</sup> October 2024 a temporary injunction was issued against the defendants from undertaking any further developments on the suit property.
- d. Prior to being served with the said orders the 2<sup>nd</sup> Defendants workers were arrested on 9<sup>th</sup> October 2024 and which amounts to abuse and misuse of power on the part of the plaintiff.
- e. The current official search and green card indicate that the 2<sup>nd</sup> Defendant was the rightful owner of the suit property and should thus not be limited to use of the property.
- f. It was lastly stated that status quo orders were ancillary orders for preserving the situation as it existed pending proceedings and which would provide stability and ensure the Applicant was not harmed. That the balance of convenience tilted towards the applicant to preserve the integrity of its rights.

#### **VI. The response by the Plaintiff/Respondent**

12. The Plaintiff filed a 23 Paragraphed Replying Affidavit sworn by Jitesh Ramji Mepani in opposition of the application together with nine (9) annexures marked as “JRM 1 - 9” annexed thereof.
13. The deponent stated that he had seen, read, understood and where possible the same had been explained to him by the Plaintiff's Advocates on record, Messrs. Echom Asiro & Company Advocates, the true meaning, contents, and purpose of the 2<sup>nd</sup> Defendant's Notice of Motion Application dated 10<sup>th</sup> March, 2025 together with the Supporting Affidavit of Florian Wunderlich, sworn on the even date.
14. The deponent urged the court to place reliance on his Supporting Affidavit and Supplementary Affidavit sworn on 9<sup>th</sup> October, 2024 and 27<sup>th</sup> November, 2024, respectively.
15. It was deposed that the Plaintiff emphasized that it was the bona fide registered owner of land Title No. Kwale/Galu Kinondo/27 hereinafter, the suit property as per the copy of the title deed of Kwale/Galu Kinondo/27 in the name of Baobab Diagnostics Limited.
16. The Plaintiff herein had religiously paid for all the requisite Land rates as deposed at Paragraph 9 of the Supporting Affidavit dated 9<sup>th</sup> October, 2024. Further that the land rate demand notice for the year 2025 had already been issued to its name and the same had been duly paid.
17. The Plaintiff maintained that the 2<sup>nd</sup> Defendant should not be heard to purport that it carried out due diligence before the alleged purchase of the suit property. That in particular, the 2<sup>nd</sup> Defendant had failed to produce at the very least, any land rate clearance certificate that it obtained from the 1<sup>st</sup> Defendant as part of completion documents which document is a mandatory completion document to be supplied by the vendor to the purchaser on the completion date pursuant to Condition 8.4.1 of the LSK Conditions of sale, 2015.
18. That in further opposition to Paragraph 3 of the supporting affidavit, when the 2<sup>nd</sup> Defendant herein started the unlawful constructions on the suit property, the Plaintiff herein reported the matter to the Directorate of Criminal Investigations, Kwale, from which investigations ensued and a number of key



Public Officers recorded their statements thereto, with regards to the transactions between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as follows: -

- a. One Mr. Charles K. Ngetich currently in charge of Kuria Lands Registry and previously in-charge of Kwale Lands Registry, and purported to have signed and issued a title deed of the suit property to the 1<sup>st</sup> Defendant on 12<sup>th</sup> September, 2014, indicated that he was a stranger to such entry.
  - b. That in particular, Mr. Ngetich upon being shown the said title deed and a green card, indicated that the title and the green card were forgeries and the signatures, handwriting and stamp impressions on the documents are not his.
  - c. One Mr. Josphat S. Mutisya, currently the Deputy County Commissioner, Msambweni Sub-County and the chairperson of Msambweni Land Control board meetings, indicated that during the land board meeting of 12<sup>th</sup> June, 2024, an agenda in their business of the day was the suit property herein.
  - d. Mr. Mutisya also indicated that the 1<sup>st</sup> Defendant appeared before the board members as the purported registered owner and that after interrogations, the agenda was rejected by the board members on suspicion of land fraud. He also indicated that the 1<sup>st</sup> Defendant was asked to appear before the board after it carried out due diligence on the suit property but surprisingly, the 1<sup>st</sup> Defendant never went back to the land control board and the application was thereby rejected.
  - e. That surprisingly, the 1<sup>st</sup> Defendant still came up with a Land Control Board consent that was used to transfer the suit land from her to the 2<sup>nd</sup> Defendant. That the question that begged answers was where did the 1<sup>st</sup> Defendant secure an LCB Letter of Consent that was presented at the lands office to facilitate the illegal transfer when in fact, Mr. Mutisya, indicated in his statement, that the said consent dated 12<sup>th</sup> June, 2024 and purportedly signed by himself, was a forgery and that the serial number of the consent booklet does not belong to the Msambweni Land Control Board.
  - f. One Mr. Steve Mokaya, the current Land Registrar at the Kwale Land Registry, indicated that upon receiving a complaint from the Plaintiff herein regarding unlawful constructions on its land by persons unknown to it, Mr. Mokaya perused the parcel file and realized that the file had been tempered with, documents plucked out and the purported green card which he had use to effect the transfer, was actually not the authentic one.
  - g. Mr. Mokaya also indicated that after his analysis of the register, he concluded that indeed the Plaintiff is the bona fide owner of the suit property which fact made him immediately write to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to surrender the title deed issued to the 2<sup>nd</sup> Defendant for immediate cancellation. Mr. Mokaya further indicated that he wrote to the Kenya Gazette for degazettment of the title deed issued to the 2<sup>nd</sup> Defendant herein.
19. It was further deposed that in opposition to the contents of Paragraph 3 of the supporting affidavit, the Plaintiff stated that no clean title deed of the suit property could be issued by the Land Registrar as the said Registrar upon receiving a complaint Petition from the Plaintiff, renounced the titles issued to the 1<sup>st</sup> Defendant and subsequently to the 2<sup>nd</sup> Defendant.
20. The Plaintiff maintained that the strings of transactions as between the 1<sup>st</sup> & 2<sup>nd</sup> Defendants herein remained hotly contested as to the legality and lawfulness, which issue could only be determined by this Honourable Court upon hearing all the parties herein on merit.



21. In response to the contents of Paragraph 4 of the supporting affidavit, in order to be considered a bona fide purchaser for value, one must first prove that they acquired a valid and legal title, which the 2<sup>nd</sup> Defendant herein had failed to account for, even on a prima facie basis.
22. That in further response to Paragraph 4 of the supporting affidavit, the Plaintiff maintained that the dispute herein entails rival parties having rival title deeds to the suit property hence parallel proprietary interests in the land. On that regard, it was thus not question of which party had invested what in the suit property but rather, each party was required to go beyond the instrument and prove the legality of how it acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.
23. It was untrue that the Plaintiff misguided this Honorable Court in seeking the Orders granted on 11<sup>th</sup> October, 2024. The Plaintiff stated that upon learning of the unlawful and illegal construction of the 2<sup>nd</sup> Defendant on the suit land, the Plaintiff reported the matter to Directorate of Criminal Investigations, Kwale and if any arrests were done, the Plaintiff had no mandate and/or control of how the Directorate carried out their mandate. The Plaintiff maintained that the matter was still pending investigation at the Directorate of Criminal Investigations (DCI), Headquarters.
24. The Plaintiff disputed the ownership of the suit land by the 2<sup>nd</sup> Defendant as the Plaintiff equally had a title registered in its name with previous searches showing the Plaintiff as the bona fide owner.
25. That the ex - parte orders granted on 11<sup>th</sup> October, 2024 did injunct the Defendants from undertaking further construction or development on the suit land. Also that Article 65 was to be read in harmony with Article 40 of the Constitution of Kenya, 2010, which Article stipulated that the right to property never extended to property that had been unlawfully acquired, as was the case herein.
26. According to the deponent, the orders of status quo ante as sought by the 2<sup>nd</sup> Defendant, was an ancillary remedy aimed at restoring the position of the parties to how it existed prior to the decision complained of. In essence, it would mean that the 2<sup>nd</sup> Defendant be allowed to continue with construction on a land to which the Plaintiff herein was the bona fide owner. In addition, the Plaintiff herein had maintained from the very onset that the said construction as was started by the 2<sup>nd</sup> Defendant was unlawful, illegal and in contravention of its proprietary rights with regards to the suit land.
27. The deponent stated that orders of status quo ante would essentially mean final determination of the rights of the parties herein with respect to the suit property without hearing the parties on merit, that an order of temporary injunction restraining the Defendants herein from dealing with the suit land whatsoever pending the determination of the suit and/or an order of status quo pending the determination of the suit, would be just and proper to grant as the same was geared towards preserving the substratum of the subject matter and preventing prejudice as between the parties, to a matter pending the hearing and determination of the main suit.
28. It was lastly deposed that the balance of convenience tilted towards issuing a temporary injunction and/or status quo orders so as to preserve the suit property pending the hearing and determination of this matter on merit. The court was urged to dismiss the application as prayed.

## **VII. The Notice of Motion application dated 22<sup>nd</sup> April, 2025**

29. The Notice of motion application dated 22<sup>nd</sup> day of April 2025 was made by the Plaintiff/Applicant. It was under the provision of Sections 1A, IB, 3, 3A, 22, and 63 (e) of the Civil Procedure Act, Cap.



21, Order 1 Rules 10 (2) and Order 51 Rule of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. The Plaintiff/Applicant sought for the following orders that:

- a. Spent.
- b. This Honourable Court be pleased to issue an order that the Directorate of Criminal Investigations, headquarters, be joined as an interested party herein in order to enable this Honourable Court effectually and completely adjudicate upon and settle all questions involved in this suit.
- c. This Honourable Court be pleased to issue an Order that the Directorate of Criminal Investigations, Headquarters do produce as evidence before this Honourable Court, the following documents in their custody, as a result of the criminal investigations into the allegations of fraud and forgery as regards the sale transaction between the 1st and 2nd Defendants herein: -
- d. The certified original witness statement of Mr. Charles K. Ngetich, the immediate former Land Registrar of Kwale Land Registry.
- e. The certified original witness statement of Mr. Josphat S. Mutisya, currently the Deputy County Commissioner, Msambweni Sub-County and the chairperson of Msambweni Land Control board meetings.
- f. The certified original witness statement of Mr. Steve Mokaya, the current Land Registrar Kwale Land Registry.
- g. The green card for land Title No. Kwale/Galu/Kinondo/27 as obtained from the Kwale Land Registry.
- h. The investigation report, if any.
  - i). The document examination report, if any.
  - ii). Any other necessary document in their custody with regards to the aforementioned investigations.
  - ii). Costs of this Application be provided for.

30. The application was premised on the grounds, testimonial facts and averments made out under the contents of the 10 Paragraphed supporting affidavit of Jitesh Ramji Mepani. He averred that:

- a). He was an adult male of sound and an appointed official of the Plaintiff/Applicant duly conversant with the facts attending to this matter, duly authorized and hence competent to depone to this Affidavit.
- b). From his own knowledge that when the 2<sup>nd</sup> Defendant herein started the unlawful constructions on suit land, the Plaintiff herein reported the matter to the Directorate of Criminal Investigations, Kwale.
- c). Thereafter, investigations ensued and the file was later transferred to Directorate of Criminal Investigations, Headquarters for further action.
- d). He also knew that the Directorate of Criminal Investigations, Headquarters, the intended interested party herein, had conducted and/or was continuing with criminal investigations into the allegations of fraud and forgery as regards the sale transaction between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein in relation to the suit land.



- e). Equally, he knew that in the said investigations, a number of key Public Officers recorded their statements thereto, with regard to the transactions between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as follows: -
- i. One Mr. Charles K. Ngetich currently in charge of Kuria Lands Registry and previously in-charge of Kwale Lands Registry, and purported to have signed and issued a title Deed of the suit property to the 1<sup>st</sup> Defendant on 12<sup>th</sup> September, 2014, indicated that he was a stranger to such entry. In particular, Mr. Ngetich upon being shown the said title deed and a green card, indicated that the title and the green card were forgeries and the signatures, handwriting and stamp impressions on the documents were not his. Annexed hereto and marked as "JRM-1" was a true copy of the statement recorded by Mr. Ngetich on 25<sup>th</sup> September, 2024.
  - ii. One Mr. Josphat S. Mutisya, currently the Deputy County Commissioner, Msambweni Sub-County and the chairperson of Msambweni Land Control board meetings. She indicated that during the land board meeting of 12<sup>th</sup> June, 2024, an agenda in their business of the day was the suit property herein. Mr. Mutisya indicated that the 1<sup>st</sup> Defendant appeared before the board members as the purported registered owner and that after interrogations, the agenda was rejected by the board members on suspicion of land fraud. He also indicated that the 1<sup>st</sup> Defendant was asked to appear before the board after it carried out due diligence on the suit property but surprisingly, the 1<sup>st</sup> Defendant never went back to the land control board and the application was thereby rejected. Annexed hereto and marked as "JRM-2" was a true copy of the statement recorded by Mr. Mutisya on 9<sup>th</sup> October, 2024.
  - iii. One Mr. Steve Mokaya, the current Land Registrar Kwale Land Registry, indicated that upon receiving a complaint from the Plaintiff herein regarding unlawful constructions on its land by persons unknown to it. Mr. Mokaya perused the parcel file and realized that the file had been tempered with, documents plucked out and the purported green card which he had use to effect the transfer, was actually not the authentic one. Mr. Mokaya also indicated that after his analysis of the register, he concluded that indeed the Plaintiff/Applicant was the bona fide owner of the suit property which fact made him immediately write to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to surrender the title deed issued to the 2<sup>nd</sup> Defendant for immediate cancellation. Mr. Mokaya further indicated that he wrote to the Kenya Gazette for degazettment of the title deed issued to the 2<sup>nd</sup> Defendant herein. Annexed hereto and marked as "JRM - 3" was a true copy of the statement recorded by Mr. Mokaya on 4<sup>th</sup> October, 2024.
- f). The Plaintiff/Applicant was now apprehensive to use the documents in the custody of the intended Interested Party as a result of the said investigations.
- g). He was advised that the Intended Interested Party herein was a party whose presence before this Honourable Court was necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in this suit.
- h). The Defendants herein would suffer no prejudice if the instant application was allowed as prayed.
- i). Therefore, it was in the best interest of justice that the application was allowed and the orders sought be granted as prayed.



31. However, this application though served upon all parties, it never elicited any responses. Subsequently, by consensus the Respondents indicated that they would not be opposing the application. Therefore, the application was allowed as prayed.

### **VIII. Submissions**

32. On 18<sup>th</sup> March 2025 while all the parties were present in Court, they were directed to have both applications dated 10<sup>th</sup> March 2025 and 9<sup>th</sup> October 2024 be disposed of simultaneously by way of written submissions. Pursuant to that, all the parties complied. Thus, the Court proceeded to reserve the ruling on its merit to be delivered on Notice.

#### **A. The Written Submissions by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants**

33. The submissions were made in support of the 2<sup>nd</sup> Defendant/Applicant's Notice of Motion Application dated 10<sup>th</sup> March, 2025. They were dated 3<sup>rd</sup> April, 2025 and by the Law firm of Messrs. Chimera Kamotho & Company Advocates. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants stated that they would rely on the following pleadings in opposition to the Application:
- a. The 3<sup>rd</sup> Defendant's Replying Affidavit dated 12<sup>th</sup> November, 2024.
  - b. The Supporting Affidavit sworn by Florian Wunderlich dated 10<sup>th</sup> March 2025.
  - c. The 2<sup>nd</sup> Defendant's List of Documents dated 2<sup>nd</sup> April 2025.
  - d. These submissions.
  - e. The List and Bundle of Authorities filed alongside these submissions.
34. The Learned Counsel identified the following issues arise for determination by this Honourable Court:-
- a. Whether the 2<sup>nd</sup> Defendant/Applicant's Application was merited.
  - b. Whether the Applicant was entitled to the orders sought in the Application; and
  - c. Who should bear costs.
35. On whether status quo should be maintained. The Learned Counsel made reference to the Black's Law Dictionary which defines status quo ante to mean: "the state of affairs that existed before a specific event or situation, essentially the previous or last uncontested state". That from the onset, the 2<sup>nd</sup> Defendant/Respondent was and still is the legal, lawfully and the undisputed current registered proprietor of all that piece of land known as Kwale/Galu Kinondo/27 as evidenced by Annexures in the Replying Affidavit of Amina Fundi Chidzuga.
36. That the 2<sup>nd</sup> Defendant is the bona fide purchaser for value having purchased the property from the 1<sup>st</sup> Defendant for the value of a sum of Kenya Shillings One Nineteen Million (Kshs. 119,000,000.00/=) as evidenced by the Sale Agreement dated 9<sup>th</sup> May 2024. That consequently, the 2<sup>nd</sup> Defendant followed due process and the Land Registrar issued a clean title deed of the property and thereafter took reasonable steps to develop the suit property by investing approximately a sum of Kenya Shillings Eight Million (Kshs. 8,000,000.00/-) in construction.
37. The Learned Counsel submitted that status quo ante orders were ancillary orders for preserving the situation as it exceeded pending proceedings which were crucial to maintaining stability and preventing further injustice and ensures that any potential harm to the Applicant was mitigated



pending a full hearing on the merits. The Learned Counsel humbly submitted that the status quo ante obtaining prior to the issuance of the Order dated 11<sup>th</sup> October 2024 be restored. To buttress its point, reference was made to the holding in the case of “Nyutu Agrovet Limited – Versus - Kahawa Nyumu Estate Limited [2003] eKLR”, where the court emphasized that status quo ante orders are crucial to maintaining stability and preventing irreversible harm pending the resolution of disputes.

38. Further, in the case of “Kenya Airline Pilots Association (KALPA) – Versus - Co-operative Bank of Kenya Limited & another [2020] eKLR”, it was stated as follows:

“...By maintaining the status quo, the court strives to safeguard the situation so that the substratum of the subject matter of the dispute before it is not so eroded or radically changed or that one of the parties before it is not so negatively prejudiced that the status quo ante cannot be restored thereby rendering nugatory its proposed decision.”

39. Towards the same legal position, the Learned Counsel cited several other authorities as listed here below:-

- a. Fatuma Abdi Jillo – Versus - Kuro Lengesen & another [2021]
- b. Republic – Versus - National Environment Tribunal, Ex-parte Palm Homes Limited & Another [2013] eKLR
- c. TSS Spinning & Weaving; Company Limited – Versus - NIC Bank Limited & Another [2020] eKLR;
- d. Wangui & Another – Versus - Home Plus Realtors Limited & Another (Environment and Land Appeal E079 of 2023) [2024] KEELC 3459 (KLR).

40. The parties submitted that the grant of the Order dated 11<sup>th</sup> October 2024 was done in violation of the 2<sup>nd</sup> Defendant/Respondent’s right to own property as envisioned under the provision of Article 65 of the Constitution of Kenya 2010 and limitation of access of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to the suit property is illegal and therefore there is need to restore the 2<sup>nd</sup> Defendant back to its initial position to ensure that the loss already suffered by the 2<sup>nd</sup> Defendant/Applicant is capable of being remedied before it was late and became irreparable.

41. Further, that the Order dated 11<sup>th</sup> October 2024 was obtained ex parte through misinformation and concealment of material facts, to wit, prior to obtaining and service of the Order dated 11<sup>th</sup> October 2024 upon the 2<sup>nd</sup> Defendant/Applicant, the 2<sup>nd</sup> Defendant’s workmen on the site were arrested on 9<sup>th</sup> October 2024.

42. According to counsel, it is trite that when an Applicant approaches Court vide an ex-parte application, there is a compelling duty on the Applicant to make a full and fair disclosure of all material facts. The Court was invited to seek guidance from the case of:- “Bahadurali Ebrahim Shamji – Versus - Al Noor Jamal & 2 Others Civil Appeal No. 210 of 1997” where the Court of Appeal while dealing with the gravity of non-disclosure expressed itself thus:-

“It is perfectly well settled that a person who makes an ex parte application to the Court- that is to say, in the absence of the person who will be affected by that which the Court is asked to do - is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage



he may have already obtained by him. That is perfectly plain and requires no authority to justify it.”

43. Also that the Orders dated 11<sup>th</sup> October 2024 issued Ex - Parte were on the basis of allegations of fraud by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein. It was stated that all the material presented before the Court indicated that the Plaintiff/Respondent had neither possession nor ownership of the suit land. That it was the 2<sup>nd</sup> Defendant/Applicant who had both ownership and possession of the suit land.

44. The Learned Counsel asserted that it is trite that fraud is a serious charge which must be strictly proved and allegations of such fraud as made by the Plaintiff/Respondent in this interlocutory stage must pass on to the stage of full trial, for proper proof. Reference was made to the holding in the case of:- “Soy Developers Limited & 5 Others – Versus - Cyrus Shakhhalaga Khwa Jirongo & 7 Others; Soy Developers Limited & 4 Others (Interested Parties) [2019] eKLR” where the Court of Appeal at Nairobi while dealing with the issue of proving fraud stated that:-

“In principle, fraud is not proved by documentary evidence, viva voce evidence tested through cross-examination is a critical component in proving or disproving an allegation of fraud. It is not the duty of a court to evaluate veracity of the contents of disputed documentary evidence that has not been tested through cross-examination.”

45. It was the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent’s contention that Plaintiff/Respondent prior to the issuance of the orders dated 11<sup>th</sup> October 2024 had not certified itself of a prima facie case as it was their assertion that where there are competing titles over a parcel of land, the issue of which is valid is to be decided at full trial, and that in such circumstances no prima facie can be established in terms of the decision in “Giella – Versus - Cassman Brown & Co Limited (1973)”.

46. That the balance of convenience tilted in the favour of the 2<sup>nd</sup> Defendant/Applicant to preserve its rights pending the final determination of this Suit as she had actual possession and occupation of the suit property. It was submitted that the Orders dated 11<sup>th</sup> October 2024 should be set aside and orders of status quo ante obtained prior to the issuance of the Order dated 11<sup>th</sup> October 2024 be restored.

47. On whether the applicant was entitled to the orders sought in the Application. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendant/Respondents submitted that the Applicant was not deserving of Orders sought for the following reasons:

The Applicant had not demonstrated that there was a prima facie case with probable success; Failure to grant the orders would not cause irreparable harm to the Applicant that could not be compensated by payment of damages if anything the 2<sup>nd</sup> Respondent stood to suffer irreparable harm that could not be compensated by damages; and the balance of convenience tilted more in favour of the 2<sup>nd</sup> Defendant/Respondent and not the Plaintiff/Applicant in not granting the injunctive reliefs sought.

48. On who should bear costs. It was submitted that the general rule is that costs follow event and the successful party would be awarded costs unless the court for good reason orders otherwise. The court was referred to the provision of Section 27 of the Civil Procedure Act, Cap. 21 which provides for costs as follows:-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to



what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

49. It was submitted that the position of costs as above referred is settled in Kenya's jurisprudence as articulated in various cases by courts. For instance, in the case of "Republic – Versus - Rosemary Wairimu Munene, Ex - Parte Applicant Ihururu Dairy Farmers Co - operatives Society Ltd, Judicial Review No. 6 of 2014" which was cited with approval in the case of "Cecilia Karuru Ngayu – Versus - Barclays Bank of Kenya & another (2016) eKLR" the Court held as follows with regard to costs:

"The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event.... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case."

50. It was prayed that costs be awarded to the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants/Applicants and the application dated 10<sup>th</sup> March 2025 thus be allowed with costs.

#### **B. The 1<sup>st</sup> Written Submissions by the Plaintiffs**

51. In support of the Notice of Motion Application dated 9<sup>th</sup> October, 2024, the Plaintiff through the Law firm of Messrs. Echom Asiro & Co. Advocates filed written submissions dated 4<sup>th</sup> March, 2025. The Learned Counsel submitted that on 11<sup>th</sup> October, 2024 the court issued ex parte orders of temporary injunction against the said Defendants which orders are subsisting.
52. That the 1<sup>st</sup> Defendant had never entered appearance despite substituted service by dint of leave granted by this Honourable Court on 17<sup>th</sup> October, 2024. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants entered appearance and opposed the said Application vide a Replying Affidavit sworn by one Amina Fundi Chidzuga on 12<sup>th</sup> November, 2024. Consequently, the Plaintiff had since filed a Supplementary Affidavit sworn by one Jitesh Ramji Mepani on 27<sup>th</sup> November, 2024.
53. The Plaintiff identified the only issue for determination as whether the Plaintiff had met the threshold for the grant of temporary injunction as laid down in "the locus classicus case" of "Giella – Versus - Cassman Brown & Co. Ltd (Supra). It was submitted that the conditions precedent for the grant of an interlocutory injunction is now well settled in the said case where the Court expressed itself thus:-

"The Conditions for the grant of interlocutory injunctions are now well settled in East Africa. First an 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 harm which would not be adequately compensated by an award of damages and thirdly, if the court is in doubt, it will decide an application on a balance of convenience."

54. It was the Plaintiff's submission that it had established a prima facie case with a probability of success. That a prima facie case was defined in the case of "Mrao – Versus - First American Bank of Kenya



Limited and 2 others C.A. Civil Appeal No. 39 Of 2002 [2000] eKLR as 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.

55. Learned Counsel submitted that the crux of the Plaintiff's case was it being the bona fide registered owner of the suit land. That on or about 23<sup>rd</sup> May, 2008, the beneficial owners of Baobab Diagnostics Limited, Robert Philip Ashworth and Michael Lewis Somen sold the company vide a sales of shares agreement to Murjibhai Lalji Pindoria, Kishor Murji Pindolia, and Jyotiprasad Jivrambhai Thakkar which sale was inclusive of the suit land at a consideration of a sum of Kenya Shillings Twelve Million Nine Thousand and Eight Five Hundred and Four (Kshs. 12,908,504/=). That the Plaintiff then requested to have the change of name effected on the title document and the same was lodged on 9<sup>th</sup> June, 2008 whereupon a new certificate was issued in this regard on the even date.
56. It was the Plaintiff's submission that over the years, it had since conducted a number of official searches on the suit land. The said searches had always revealed that the suit land was duly registered in the name of Baobab Diagnostics Limited with a freehold tenure.
57. In addition, over the years, the Plaintiff/Applicant had from the very onset undertaken to pay all the requisite Land rates as required by law to the defunct County Council of Kwale and the now County Government of Kwale.
58. The Plaintiff averred that the genesis of this dispute was birthed on or about August, 2024 when the Plaintiff/Applicant discovered that someone unknown to them and without their consent whatsoever, had gained access to the land, raised a boundary wall and is now undertaking construction and/or development on the said suit land. The Plaintiff/Applicant in a bid to protect its proprietary interests in the suit land, on 30<sup>th</sup> August, 2024, wrote to the Land Registrar of the County of Kwale, with a view of knowing the status of the suit land.
59. That the County Land Registrar immediately issued a notice to place a caution on the suit land and supplied the Plaintiff/Applicant with all transfer documents that were used to secure a parallel registration. These set of documents revealed that the 1<sup>st</sup> Defendant/Respondent did transfer the suit land to the 2<sup>nd</sup> Defendant/Respondent through a sale. Additionally, the Plaintiff/Applicant also inquired from the Deputy County Commissioner, Msambweni Sub-County on the suspicious transactions amongst the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein with regard to the suit land and learnt that, the application for land control board consent tabled on 12<sup>th</sup> June, 2024 was rejected pending investigation.
60. That still on acting upon the Plaintiff's/Applicant's letter dated 30<sup>th</sup> August, 2024, the Kwale County Land Registrar did follow up on the Plaintiff's complaint and issued notices to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents to return the title deeds issued in their names as well as writing to the Government Printer for de-gazettement of the same.
61. That the trail of transactions between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant, on a prima facie basis, depict transactions that were fraudulent and illegal thus attracting an action from the Kwale County Land Registrar for the titles issued to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants be degazetted. That the parallel registration as secured by the 1<sup>st</sup> Defendant was later transferred to the 2<sup>nd</sup> Defendant. That in a bid to justify their transaction, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants through the Replying Affidavit sworn by the 3<sup>rd</sup> Defendant, allege that the 2<sup>nd</sup> Defendant purchased the suit land for value from the 1<sup>st</sup> Defendant and that allegedly the 2<sup>nd</sup> Defendant undertook extensive due diligence to ascertain the status of the suit land. The 2<sup>nd</sup> Defendant had alleged that it was the registered proprietor of the suit land.



62. It was contended that no good title passed from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant as the said 1<sup>st</sup> Defendant fraudulently, illegally and unlawfully secured registration in her name which she later transferred to the 2<sup>nd</sup> Defendant and therefore no good title could pass from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant.
63. That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants had attempted to fault the actions of the Kwale County Land Registrar following the Plaintiff's/Applicant's letter dated 30<sup>th</sup> September, 2024 when it was very clear from the Registrar, being the custodian of the Land Register, that the 1<sup>st</sup> Defendant was actually not the bona fide owner of the land and that some ownership documents had been plucked off the record and forged ones planted.
64. The Learned Counsel opined that it is trite law that for one to be considered a bona fide purchaser for value without notice, as the 2<sup>nd</sup> Defendant seeks to be considered, one needed to first prove that they acquired a valid and legal title which the 2<sup>nd</sup> Defendant herein had failed to account for, at least on a prima facie basis. To buttress on this point, reference was made to the Court of Appeal in the case of:- "Samuel Kamere – Versus - Lands Registrar, Kajiado Civil Appeal No 28 of 2005 [2015] eKLR" which case stated as follows:-
- “.....in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property...”
65. Further reference was made to the Court of Appeal when it had an opportunity to deal with the issue of competing titles in the case of "Munyu Maina – Versus - Hiram Gathiha Maina Civil Appeal No 239 of 2009 [2013] eKLR", where it held:-
- “where the registered proprietor's root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register”.
66. The Learned Counsel submitted that the 2<sup>nd</sup> Defendant should not be heard saying that it undertook due diligence to ascertain the status of the suit land and that the alleged sale was above board when in real sense, the 2<sup>nd</sup> Defendant has at the very least, failed to produce any land rate clearance certificate that it obtained from the 1<sup>st</sup> Defendant as part of completion documents.
67. Further that the allegations that the 2<sup>nd</sup> defendant's workers had been attacked and arrested were unsubstantiated allegations and could not vouch for correctness or otherwise of the same. The Plaintiff asked for the court to grant a temporary injunction for prevention against a further and continued violation pending the hearing and determination of this suit on merit. That a prima facie case had been established.



68. On irreparable harm reference was made to the case of:- “Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others [2014] KECA 606 (KLR)” where the Court of Appeal while delving into the second limb on grant of temporary injunctions opined that:-

“If the Applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the Respondent will suffer, in the event the injunction is not granted, will be irreparable.

69. That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents after securing the fraudulent and illegal transfer from the 1<sup>st</sup> Defendant herein, started construction and/or development on the suit land. The Plaintiff maintained that these constructions were illegal and unlawful as no good title passed from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant as urged herein above.

70. That these unlawful and illegal constructions on the suit land had threatened and continue to threaten the proprietary interests of the Plaintiff/Applicant in the suit land. It was submitted that should the Honourable Court refuse to grant an order of temporary injunction pending the hearing of the suit and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants embark on their illegal constructions; the Plaintiff herein would have been deprived of its property which loss cannot be adequately compensated by an award of damages.

71. Lastly, the Learned Counsel submitted on balance of convenience. He stated that in the event that the Court would be in doubt on whether to grant the injunction as sought then the inconvenience to the applicant if interlocutory injunction was refused would be balanced and compared with that of the Respondent, if it is granted. Reference was made in the case of “Paul Gitonga Wanjau – Versus - Gathuthis Tea Factor Company Limited 2 others (2016) eKLR”, where the court while dealing with the issue on balance of convenience expressed itself thus: -

“Where any doubt exists as to the applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance on convenience lies”.

72. It was the Plaintiff’s submission that the balance of convenience tilted in favour of granting the injunction as sought. That the Plaintiff had shown it had a strong case on the merits and that it would suffer irreparable harm, as already urged above. The Plaintiff had thus shown that the inconvenience caused to it would be greater than that which may be caused to the Defendants if the injunction sought would not issue. It was submitted that the Plaintiff’s application was at best meritorious and that the same ought to be allowed.

### **C. The 2<sup>nd</sup> Written Submissions by the Plaintiff.**

73. The Plaintiff filed their 2<sup>nd</sup> Written submissions in opposition to 2<sup>nd</sup> Defendant’s Application dated 10<sup>th</sup> March, 2025. The Plaintiff identified one issue for determination and which was whether an order to restore status quo ante obtaining prior to the issuance of the order dated 11<sup>th</sup> October, 2024



and an order permitting the 2<sup>nd</sup> Defendant to proceed with undertaking any further construction or development on the suit property, should issue.

74. The Learned Counsel for the Plaintiff continued to emphasize that it is the bona fide registered owner of the suit property and that the sale transaction between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was tainted with forgery, fraud, illegality and unlawfulness.
75. Reference was made to Mr. Wunderlich's supporting affidavit where he averred that the 2<sup>nd</sup> Defendant was the registered owner of the suit property and that had taken reasonable steps in developing the property. Against these allegations, the Plaintiff maintained that it is the bona fide registered owner of the suit property as evidenced by a copy of its title deed marked as annexure "JRM-1" and that in addition, the Plaintiff had religiously paid for all the requisite Land rates as deponed at Paragraph 9 of Jitesh's Supporting Affidavit dated 9<sup>th</sup> October, 2024.
76. The Plaintiff further submitted that the land rate demand notice for the year 2025 had already been issued to its name and the same had been duly paid for as evidenced by invoice/demand notice dated 18<sup>th</sup> January, 2025 and a payment receipt dated 14<sup>th</sup> March, 2025 marked as annexure "JRM - 2".
77. The Plaintiff submitted that following the alleged sale transaction between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, no clean title deed of the suit property could be issued by the Land Registrar as the said Registrar upon receiving a complaint Petition from the Plaintiff, renounced the titles issued to the 1<sup>st</sup> Defendant and subsequently to the 2<sup>nd</sup> Defendant as duly evidenced by copies of letters by the Land Registrar marked as annexure "JRM - 8". Moreover, a number of key Public Officers had since recorded their statements with the Directorate of criminal Investigation, Kwale (DCI) with regards to the transactions between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, which statements revealed elements of fraud and forgery. The Plaintiff reiterated the statements made by the said public officers as had been captured in the affidavit in opposing the application dated 10<sup>th</sup> March 2025 by Jitesh Menah.
78. The Plaintiff further submitted that the dispute in this suit entails rival parties i.e. the Plaintiff and the 2<sup>nd</sup> Defendant, having rival title deeds to the suit property hence parallel proprietary interests in the suit property. In that regard, the Plaintiff contended that it was thus not a question of which party had invested what in the suit property but rather, each party was required to go beyond the instrument and prove the legality of how it acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.
79. Reference was made to the Court of Appeal while dealing with competing titles in the case of "Munyu Maina – Versus - Hiram Gathiha Maina (Supra) held: when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.
80. The Learned Counsel submitted that amongst the grounds in support of the Application, the 2<sup>nd</sup> Defendant had alleged at ground number 3 that the Plaintiff misled this Honourable Court in seeking the orders of 11<sup>th</sup> October, 2024 as the 2<sup>nd</sup> Defendant employees were allegedly arrested on 9<sup>th</sup> October, 2024 before the issuance of the said orders. That against these unsubstantiated claims, the Plaintiff has deponed through Mr. Jitesh's Replying Affidavit at Paragraph 12 and submits herein that upon learning of the unlawful and illegal construction of the 2<sup>nd</sup> Defendant on the suit land, the Plaintiff reported the matter to Directorate of Criminal Investigations (DCI), Kwale and if any arrests were done, the Plaintiff has no mandate and/or control of how the Directorate carries out their mandate.



81. The Plaintiff maintained that the matter was still pending investigation at the DCI, Headquarters. In furtherance, the Plaintiff had annexed a number of witness statements recorded with the DCI by former Land Registrar of Kwale County, current Land Registrar of Kwale County and Deputy County Commissioner, Msambweni Sub - County, as annexures “JRM - 3”, “JRM - 4” and “JRM - 5” respectively. These witness statements, the Plaintiff submitted, formed the basis of the Plaintiff’s subsequent Application dated 22<sup>nd</sup> April, 2025 slated for inter partes hearing on 8<sup>th</sup> July, 2025.
82. On whether this Honourable Court should issue an order to restore status quo ante obtaining prior to the issuance of the order dated 11<sup>th</sup> October, 2024, the Plaintiff submitted that orders of status quo ante is an ancillary remedy aimed at restoring the position of the parties to how it existed prior to the decision complained of. Indeed, the court in the case of “In re Estate of Owour Onyango Omoka (Deceased) (Miscellaneous Succession Cause 26 of 2021) [2023] KEHC 3359 (KLR) (25 April 2023) (Ruling) has defined status quo ante to mean: ‘Status quo ante’ in Black’s Law Dictionary means: - “the state that existed before something else (being discussed) occurred”.
83. Therefore, in essence, the orders of status quo ante would mean that the 2<sup>nd</sup> Defendant be allowed to continue with construction on a land to which the Plaintiff herein was the bona fide owner. The Plaintiff herein had maintained from the very onset that the said construction as was started by the 2<sup>nd</sup> Defendant was unlawful, illegal and in contravention of its proprietary rights with regards to the suit land. In addition, the Plaintiff at Pages 6 to 8 strongly opposed the Orders of status quo ante which would essentially mean final determination of the rights of the parties herein with respect to the suit property without hearing the parties on merit, to the detriment of the Plaintiff.
84. It was the Plaintiff’s humble submission that in the unlikely event this Honourable Court grants the status quo ante orders, then there would be nothing left to litigate upon in this sense, if the 2<sup>nd</sup> Defendant was allowed to continue with construction on a land that was owned by the Plaintiff, what would remain of the main suit? In other terms, what more would remain for this Honourable Court to determine in the main suit?
85. The Learned Counsel while implored the Court to allow the Plaintiff’s Application dated 9<sup>th</sup> October, 2024 but urged it to dismiss the one by the 2<sup>nd</sup> Defendant Application dated 10<sup>th</sup> March, 2025 with costs.

#### **D. Analysis and Determination**

86. I have carefully read and considered all the filed pleadings herein, the evidence adduced by the said pleadings, the written submissions on record, the cases cited herein by parties, the relevant provisions of the *Constitution* of Kenya, 2010 and statutes.
87. This Honourable Court will still examine the facts [as they currently are] of the case and in order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has three [3] issues for its determination. These are: -
- a. Whether the application dated 10<sup>th</sup> March 2025 is merited for grant of the status quo orders sought
  - b. Whether the Plaintiff has met the threshold for grant of the injunctive orders sought in the application dated 9<sup>th</sup> October 2024
  - c. Who bears the costs of both applications?



**Issue No. a). Whether the application dated 10<sup>th</sup> March 2025 is merited for grant of the status quo orders sought**

88. In determination of the first issue for determination as listed above, I wish to point out that it has been brought to the attention of the court that there exists a similar suit over the same subject matter and parties in the lower court. The said case is designated as “Kwale MC ELC /E055/2024 Galupaeonia Limited – Versus - Baobab Diagnostics Limited and 2 Others”. Fortunately, none of the parties herein have disputed the existence of the said suit.
89. It is further noted that the Plaintiff herein is contesting the pecuniary jurisdiction of the lower court to handle the dispute as has been stated above herein. This court is meant to understand that the lower court did issue injunctive orders against the Plaintiff and which are presumably still in place. The suit before the lower court was instituted by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein.
90. The application dated 10<sup>th</sup> March 2025 is similarly brought before court by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. They seek that this court does issue status quo orders against the Plaintiff and are specifically seeking for unconditional possession and occupation of the suit property. From the pleadings before court, the court has been able to gather that there are ongoing developments on the suit property, infact the 3<sup>rd</sup> Defendant has made it clear that at the time of instituting this suit, the ongoing developments had already used a sum of Kenya Shillings Eight Million (Kshs. 8,000,000/-) only.
91. The court is has considered all the material placed before it and is alive to the fact that a suit similar to what is before it is also before the lower court. I believe that in the event that this court indulges further in giving the Respondents audience, then the same will be against the principles of the sub-judice doctrine. The sub - judice principle is captured under the provision of Section 6 of the Civil Procedure Act, cap. 21 which provides as follows: -
- “6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title.”
92. The Supreme Court of Kenya in the case of:- “Kenya National Commission on Human Rights – Versus - Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR”, had occasion to pronounce itself on the subject of subjudice. It aptly stated: -
- “The term ‘sub-judice’ is defined in Black’s Law Dictionary 9<sup>th</sup> Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives”



93. From the foregoing it is safe to state that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are forum shopping or rather abusing the process of the court in engaging in filing of multiple applications bearing in mind that the lower court suit is still alive. In the words of E. K Makori Judge in the case of:- “Kinuthia – Versus - Kanyi & another (Environment & Land Case E007 of 2023) [2024] KEELC 1625 (KLR) (20 March 2024) (Ruling) the said actions amount to proliferation and convolution of suits.
94. I wish to add that the practice of filing new and separate cases/applications despite the existence of a similar case relating to the same subject matter amounts to an abuse of the court process. This kind of practice leads to unnecessary backlog of cases and a waste of the precious judicial time. In the case of “Muchanga Investments Limited – Versus - Safaris Unlimited (Africa) Limited & 2 others Civil Appeal No. 25 of 2002 (2009) eKLR 229”, the court of appeal stated as follows:-
- “The term abuse of court process has the same meaning as abuse of judicial process. 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 bonafides and frivolous, vexatious or oppressive’.
95. This court opines that there is a nexus between the lower court case in “Kwale MC ELC /E055/2024 Galupaeonia Limited – Versus - Baobab Diagnostics Limited and 2 Others” and the instant suit. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have already benefited from the same by virtue of the injunctive orders granted before the lower court. However, the same were superseded by the injunctive orders granted on 11<sup>th</sup> October 2024 by this court.
96. With all the above in mind, the court is of the opinion that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have not convinced the court in terms of having its audience given that they already have approached the lower court in the same matter.
97. The court while deliberating on what orders would be proper to issue at this point bears in mind that the issue of abuse of the court process is deliberate through the 1<sup>st</sup> and 2<sup>nd</sup> Respondents actions of seeking for status quo orders. However, the said Respondents actions and the consequences that come with them cannot be imposed upon the Plaintiff herein.

**Issue No. b). Whether the Plaintiff has met the threshold for grant of the injunctive orders sought in the application dated 9<sup>th</sup> October 2024**

98. The Plaintiff did approach the court separately seeking injunctive orders against the Respondents herein. In cementing its case several issues have come to light and which include the two title deeds over the suit property herein and the alleged fraud in the 2<sup>nd</sup> registration/ title held by the Respondents.
99. It is noted that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had initially in the application for status quo sought to be allowed to continue with the developments on the suit property. The court is not only cautious but conscious of the fact that the suit property holds two separate titles with the plaintiff’s title coming first in line. However, this does not automatically mean that they are the legitimate/lawful proprietors of the suit property. This are issues that can only be established after a full hearing.
100. However, pending that hearing, the court sees the need to protect the property which is the substratum of the suit. the court will therefore delve into determination of the second issue and which was with regards to the application dated 9<sup>th</sup> October 2024.



101. The substantive law on this matter is Order 40 Rule 1(a) of the Civil Procedure Rules 2010 which provides: -

“Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree ... the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

102. It is trite that temporary injunctions are granted upon the satisfaction of tripartite conditions to wit: whether the Applicant has established a prima facie case; whether upon examination of the prevailing circumstances it becomes clear that the Applicant stands to suffer irreparable loss that the Respondent would be hard pressed to assuage by an award of damages and finally, where there was still doubt, it would be in order to consider in who's favour the balance of convenience tilted. These principles were established in “Giella – Versus - Cassman Brown (Supra).

103. While discussing the conditions precedent to obtaining an Order of injunctive relief, the Court of Appeal in the case of: “Nguruman Ltd – Versus - Jan Bonde Nielsen & 2 Others, [2014] eKLR” observed that:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to: a). establish his case only at a prima facie level, b). demonstrate irreparable injury if a temporary injunction is not granted, and c). ally any doubts as to (b) by showing that the balance of convenience is in his favour.

104. Bearing the above in mind, the first port of call for this court is to determine whether the Applicants have established a prima facie case. A prima facie case was defined in the case of:- “Mrao Ltd – Versus - First American Bank of Kenya Ltd (Supra), where Bosire, JA stated as follows:-

“So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court 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.”

105. The Court of Appeal deliberating what amounted to a prima facie case in Nguruman (Supra) made the following comments:- “We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.”

106. The court notes that the Plaintiff has attached a copy of the title deed to the suit property in its name. The Plaintiff has given a chronology of events of how it came into possession of the property and the court has keenly gone through the same annexures. However, it is noted that among the key issues of contention in this matter is the ownership of the suit property and the validity of the title and



documents produced in support of the allegations of ownership presented by the 2<sup>nd</sup> Respondent. It has also been deponed that the Respondent is also claiming ownership of the suit property as a bonafide purchaser for value. With these facts in mind, a prima facie case has been established.

107. On the second aspect of irreparable damage and loss, the Plaintiff has confirmed that indeed there are ongoing developments on the suit property. This has been confirmed by the 2<sup>nd</sup> Respondent and the 3<sup>rd</sup> Respondent in the affidavits sworn before court. As to whether the plaintiff is bound to suffer irreparable damage and loss in the event that the orders sought are not granted, I first wish to reiterate the dictum of the court in the case of:- “Robert Mugo Wa Karanja – Versus - Ecobank (Kenya) Limited & Another [2019] eKLR” where the court in deciding on an injunction application stated:-

“circumstances for consideration before granting a temporary injunction under Order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts.....”

108. The Plaintiff is apprehensive that in the event that the Respondents actions are not stopped, it is probably going to lose its property. I have seen photographs annexed by the Plaintiff herein showing the ongoing construction, further I am reminded of the averments by the 3<sup>rd</sup> Respondent that so far a sum of Kenya Shillings Eight million (Kshs. 8,000,000/=) has been spent in developing the suit property, I believe that the second threshold for grant of the orders sought has been made. It is imperative of the court to protect the plaintiff from lose and to further preserve the suit property pending the hearing and determination of the suit.

109. From the foregoing, the balance of convenience automatically tilted towards the applicants. The case of:- “Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (2018) EKLR” defined the concept of balance of convenience as:

“The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer. In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.

110. I am guided further by the holding in the case of “Amir Suleiman – Versus - Amboseli Resort Limited [2004] eKLR” where the Learned Judge offered further elaboration on what is meant by balance of convenience and stated:-

“The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”



### **Issue No. c). Who will bear the costs of the applications**

111. It is trite law that the issue of costs is at the discretion of the Court. Costs mean the award that is granted to a party at the conclusion of any legal action or proceedings in any litigation. The provision of Section 27 of the *Civil Procedure Act* provides: -

27 (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.

112. In the case of: “Republic – Versus - Rosemary Wairimu Munene;, Ex - Parte Applicant – Versus - Ihururu Dairy Farmers Co-operative Society Limited Judicial Review application no 6 of 2014” court held as follows: -

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

113. It is trite that the same follow an event. However, based on the circumstances of the case, the court opines that the same be in the cause.

### **E. Conclusion & Finding**

114. Before penning of, I wish to point out that at this point, the court cannot grant orders that may seem to have some kind of finality in their nature as the suit is still at an interlocutory stage parties having not been heard. I say this in reference to the order sought for demolition of the structures already put up by the respondents. In my opinion orders of demolition can only suffice after both parties have been heard.

115. The court therefore proceeds to make the following orders; The application dated 9<sup>th</sup> October 2024 is hereby allowed in the following terms;

- a. That this Honourable Court be and is hereby pleased to issue an order of temporary injunction against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents, their agents, servants and all those claiming under them from entering, accessing, leasing, selling, transferring or in any other way interfering with land Title No. Kwale/Galu Kinondo/27 pending the hearing and determination of this suit.
- b. That the Notice of Motion application dated 10<sup>th</sup> March 2025 be and is hereby dismissed for lack in merit.
- c. That by the consensus of the parties herein the Notice of Motion application dated 22<sup>nd</sup> April, 2025 to have the Director of Criminal Investigation (DCI) headquarters be joined as parties in this matter be and is hereby allowed as prayed and the orders sought granted accordingly.



- d. That for expediency sake, there be a mention on 12<sup>th</sup> November, 2025 for purposes of conducting a Pre – Trial Conference pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010. There shall be the hearing of the matter on 24<sup>th</sup> February, 2026.
- e. That costs of both applications shall be in the cause.

It is ordered accordingly.

**RULING DELIVERED THROUGH THE MICRO - SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2025**

.....

**HON. MR. JUSTICE L.L NAIKUNI,  
ENVIRONMENT & LAND COURT AT KWALE**

Ruling delivered in the presence of: -

- a. Mr. Daniel Disii, the Court Assistant.
- b. M/s. Echom Advocate for the Plaintiffs/Applicants.
- c. Mr. Bulowa Advocate for the 1<sup>st</sup> Defendant.
- d. M/s. Bosire Advocate holding brief for Dr. Ekuru Aukot Advocate for the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants.

