

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

ELC CASE NO E027 OF 2025

KISIMA REAL ESTATE LIMITED.....PLAINTIFF/APPLICANT

- VERSUS -

MARGARET GICIRU KIMANI...1ST

DEFENDANT/RESPONDENT

EDITH MUKAMI MUNGAI.....2ND

DEFENDANT/RESPONDENT

KIWEGU ACACIA BEACH

PROPERTIES LIMITED.....3RD DEFENDANT/RESPONDENT

DOMINIC ICHUGU

GACHANGA.....4TH DEFENDANT/RESPONDENT

LAND REGISTRAR, KWALE

LAND REGISTRY.....5TH

DEFENDANT/RESPONDENT

RULING

I. Introduction

1. Before this Honorable Court for hearing and its determination is the Notice of Motion application dated 31st March, 2025 filed by *Kisima Real Estate Limited*, the Plaintiff/Applicant herein. It was brought it under a Certificate of Urgency under the dint of the provisions of Sections 1A, 1B and 3A of Civil Procedure Act Chapter 21 of Laws of Kenya and Order 40 Rules 1 and 4; Order 51 of the Civil Procedure Rules 2010 and Articles 40 & 159 (2) (b) of the Constitution of Kenya, 2010.
2. Upon service of the application, the 1st and 2nd Defendants/Respondents responded through a Replying affidavit dated 13th June 2025. While the 3rd and 4th Defendants/Respondents on their part filed a joint Replying Affidavit dated 18th June 2025. There was no responses filed by the 5th Defendant/Respondent whom the Court assumed that they opted not to participate in the application whatsoever. The Honourable Court shall be dealing with the matter indepth at a later stage.

II. The Plaintiff/Applicant's case

3. The Plaintiff/Applicant sought for the following orders: -
 - a) Spent.**

b) Spent.

c) Pending hearing and determination of this suit, this honourable court be pleased to issue a temporary injunction restraining the Respondents either by themselves or through their agents, servants, employees or persons acting on their behalf from entering, selling, charging, transferring or otherwise interfering with the Plaintiff's ownership and occupation of all that property known as land reference no Kwale/Kiwegu Jego/672

d) The costs of this application be provided for.

4. The application herein was premised on the grounds, testimonial facts on the face of the application and the averments made out under the 36 Paragraphed supporting affidavit of JOHN MUCHIRA KITHAKA together with several annexures which unfortunately were not marked. The Applicant averred that:

a) He was the Director of the Plaintiff/Applicant's Company herein, hence conversant with the facts giving rise to the suit and duly authorised by the Plaintiff/Applicant to swear this Affidavit.

- b) At all material relevant to the suit the Plaintiff/Applicant was a purchaser of all property known as land reference no Kwale/Kiwegu Jego/672 measuring 64.5 hectare or 160 Acres (Hereinafter referred to as “The Suit Property”) whereas the 1st and 2nd Defendants/Respondents were the Vendors of the said suit property.
- c) On 10th May 2012, the Plaintiff/Applicant entered into a sale agreement with the 2nd Defendant/Respondent for the purchase of the suit property at an agreed consideration of a sum of Kenya Shillings Thirty Eight Million Four Hundred Thousand (Kshs. 38,400,000/-)
- d) Pursuant to the agreement, the Plaintiff/Applicant agreed to pay and duly paid a deposit of a sum of Kenya Shillings Three Million Eight Hundred and Fourty Thousand (Kshs. 3,840,000/-) to the 1st and 2nd Defendants/Respondents Advocates.
- e) The 1st and 2nd Defendants/Respondents duly acknowledged receipt of the deposit payment.
- f) It was important to note the following that:-
- i. at around the same time in the year 2012, the Plaintiff/Applicant was also acquiring two (2)

other separate properties being land reference no Kwale/Kiwegu Jego/45 (measuring 165 acres) and 46 (measuring 130 acres) of which the their respective Vendors were also represented by the same Advocates representing the 1st and 2nd Defendants/Respondents herein.

- ii. The purchase prices for the three (3) parcels were as follows: Kenya Shillings Thirty Nine Thousand Six Hundred (Kshs. 39, 600/=) for Parcel No. 45 and Kenya Shillings Thirty One Thousand Two Hundred (Kshs. 31, 200/=) for parcel no. 46 .
 - iii. The two (2) parcels were duly transferred and the title deeds to these properties were issued.
 - iv. But the suit property had never been transferred to the Plaintiff/Applicant to date.
- g) Immediately thereafter in the year 2012, the Plaintiff/Applicant moved into the suit property and remained in active and quiet possession of the suit property to date.
- h) Clause 4.3 of the agreement provided that:-

“on or before the completion date and in exchange of the completion documents, the purchasers advocate shall give the vendors advocate a professional undertaking to pay the vendor the balance of the purchase price within 7 [seven days] of the duly registered transfer in favour of the purchaser and its nominees.

- i) The completion date contractually was ninety (90) days from the date of signing the agreement or such date agreed upon by the parties in writing.
- j) Later on, the 1st and 2nd Defendants/Respondents through their Advocates informed the Plaintiff/Applicant that the suit property was subject of an ongoing succession and transfer would occur upon issuance of a Grant Letters of Administration.
- k) Consequently, on diverse dates in the year 2013, the Plaintiff/Applicant paid the entire purchase price to the Vendor’s Advocate and it was acknowledged accordingly.
- l) Since the Plaintiff/Applicant was enjoying quiet possession of the suit property and even built structures within it, the Plaintiff/Applicant waited patiently for the succession process to be finalised

and the Grant Letters of Administration to be issued to the 1st and 2nd Defendants/Respondents in order to complete the transfer process.

- m) However, sometime in September, 2023 the Plaintiff/Applicant noticed the agents of the 3rd and 4th Defendants/Respondents surveying the suit property.
- n) Upon the Plaintiff/Applicant's investigation and subsequently conducting an official search at the Kwale Land Registry it was established that the 3rd Defendant/Respondent had been irregularly and unlawfully registered as the proprietors of the suit property.
- o) The search revealed that the 3rd Defendant had acquired the property on 17th May 2022.
- p) The Plaintiff/Applicant averred that they were never notified of the outcome of the succession cause and whether it was completed. Instead, the 1st and 2nd Defendants/Respondents fraudulently connived with the 3rd & 4th Defendants/Respondents and transferred the title of the suit property to the 3rd Defendant/Respondent despite of the Plaintiff/Applicants purchaser's interest.

- q) Subsequently, the Plaintiff/Applicant successfully placed a caution on the suit property on 28th September 2023.
- r) The Plaintiff/Applicant met all the obligations required of it by the duly executed sale agreement for sale dated 10th May, 2012 and thus they were the rightful beneficial owners of the suit property.
- s) In the course of the Plaintiff/Applicant's investigation it realized that the 4th Defendant/Respondent was well known to it having been the Lead Agent and the Coastal representative of its mother company - FEP Holdings Limited. FEP Holdings Limited wholly owned the Plaintiff/Applicant's company.
- t) As the the Lead Agent and the Coastal representative of its mother company - FEP Holdings Limited, the 4th Defendant/Respondent was tasked with the identifying and bringing business to the Plaintiff/Applicant. Indeed, it's the 4th Defendant that introduced the 1st and 2nd Defendants/Respondents to the Plaintiffs/Applicant.
- u) At all material times relevant to this conveyance transaction between the Plaintiff and the 1st & 2nd

Defendants/Respondents, the 4th
Defendant/Respondent acted as a
Liaison/Intermediary between parties.

v) Therefore, it was shocking to the Plaintiff/Applicant when the 4th Defendant had allegedly acquired the suit property through his company.

w) In an effort to conceal the evident fraudulent transaction, the 4th Defendant/Respondent and his Co - Director first acquired the suit property through another company of theirs called Acacia Equipment[K] Limited on 14th March, 2022.

x) On 17th May, 2022, the 4th Defendant/Respondent and his Co - Director fraudulently transferred the suit property to the 3rd Defendant/Respondent. This was barely two (2) months after the initial transfer.

y) The directors of Acacia Equipment[K] Limited were similar to the directors of the 3rd Defendant/Respondent. It was a fraudulent attempt to cloth the 3rd Defendant/Respondent as an innocent purchaser for value without notice.

z) The Plaintiff/Applicant now sought legal protection from the fraudulent and wrongful deprivation of its rights to property.

aa) Since the year 2012 they had been in occupation of the suit property. They had a “*prima facie*” case. Any action by the Defendants/Respondents would cause them irreparable harm that could not be compensated by monetary damage.

bb) Hence, it was necessary for them being granted the injunction orders sought accordingly.

III. The Response to the Notice of Motion application

5. The 1st and 2nd Defendants responded to the application through a 33 Paragraphed Replying Affidavit sworn by MARGARET GICHIRU KIMANI the 1st Respondent with four (4) annexures marked as “MK-001-annexed thereto. The deponent averred that:-

a. Together with the 2nd Respondent they are the legal and beneficial owners of the suit property having inherited the same from their late father Asaph Mungai Njihia.

- b. Sometime in the year 2012 the Plaintiff representatives approached the 1st and 2nd Respondents and entered into negotiations with a view of purchasing a suit property. That the 1st and 2nd Respondents executed the agreement but it was never executed by the Plaintiff.
- c. Out of the agreed purchase price the Applicant only paid for Kenya Shillings Three Million Eight Hundred and Fourty Thousand (Kshs. 3,840,000/=).
- d. No amount was ever paid to the 1st and 2nd respondents for more than 12 years and requests for balance of the purchase price were always futile.
- e. The deponent stated that after over 10 years of waiting for the agreement to materialise, they opted to explore other options and sold the property to the 3rd Defendant who duly paid the consideration and the suit property was transferred to them. the said transfer is termed as having been legitimate and lawful.
- f. It was deposed that the Plaintiff had never been in possession of the suit property and has never been allowed to make any developments thereon. Also

that from the plaintiffs own annexures there is no evidence that the balance of the purchase price was paid. The 1st and 2nd Defendants refute any fraud on their parts alleged.

g. Also that the 3rd Defendant currently possesses the title to the suit property and which is considered absolute and indefeasible subject to certain exceptions which the Plaintiff/Applicant has failed to demonstrate.

h. The deponent maintained that the law ought to protect an innocent purchaser for value who in the instant case was the 3rd defendant. According to the deponent, a letter was written to the Plaintiff sometime in the year 2018 withdrawing instructions and rescinding the agreement but it never responded to.

i. The court was urged to decline the reliefs sought.

6. The 3rd and 4th Defendants responded to the application through a 32 Paragraphed Replying Affidavit sworn by Dominic Ichungu Gachanja the 4th Respondent with four (4) annexures marked as “KR - 001 - 004” annexed thereto. The deponent averred that:

- a. At all material times to the suit the 3rd Respondent was the beneficial and legal owner of all that parcel of land known as Kwale/Kiwegu/672 having purchased it from the 1st and 2nd Defendants/Respondents.
- b. Sometime in the year 2022 they approached the 1st and 2nd Defendants/Respondents and entered into negotiations with a view to purchasing the suit property. They entered into a sale agreement and paid full consideration. Later the property was registered in the 3rd Defendants/Respondent's names.
- c. The deponent stated that prior to purchase of the suit property, he carried out due diligence and as at that time there was no encumbrance on the title. At the time of such purchase there was no constructive or actual notice of any defects or infirmities against the seller's title.
- d. That the suit property was purchased without any notice of fraud and the 3rd Respondent possesses a valid title with respect to the suit property. That a purchaser's title is considered absolute and

indefeasible subject to specific exceptions as outlined in the land registration act which the Applicant has failed to demonstrate.

- e. It was deposed that placing any caveats or impediments on the transfer of the property as sought by the applicant was an infringement on the 3rd Defendants/Respondent's rights to quit possession and enjoyment of the suit property.
- f. According to the deponent, the 3rd Defendant/Respondent had demonstrated that it had lawful interest in the property and would suffer irreparably if the orders sought by the Plaintiff/Applicant was granted.
- g. It was further deposed that at no time has the Plaintiff/Applicant been in possession or constructed any structure on the suit property and that the balance to the purchase price was never remitted.
- h. The allegations of the 3rd Defendant/Respondent having been an intermediary between the Plaintiff/Applicant and the 1st and 2nd Defendants/Respondents was refuted.

- i. The court was asked to decline granting of the reliefs sought by dismissing the Plaintiff/Applicant's application dated 31st March 2025.

IV. Further Affidavit by the Plaintiff/Applicant.

7. The Plaintiff/Applicant filed a 43 Paragraphed further affidavit dated 24th October, 2025 and sworn by JOHN MUCHIRA KITHAKA. He averred as follows that:-

a). He was a Director of the Plaintiff/Applicant, duly authorized and competent to swear this Further Affidavit on its behalf in response to the Replying Affidavit of the 1st and 2nd Defendants sworn on 13th June, 2025 and that of the 3rd and 4th Defendants sworn on 18th June, 2025 in opposition to the Plaintiff/Applicant's Notice of Motion Application dated 31st March 2025.

A. Response to the 1st and 2nd Defendants/Respondents' Replying Affidavit

b). In response to the contents of Paragraphs 3, 4 and 5 of the 1st and 2nd Defendants/Respondents' Replying Affidavit, it is admitted that there were negotiations between the Plaintiff/Applicant and the 1st and 2nd Defendants/Respondents with a view to purchase land parcel KWALE/KIWEGU/672, culminating in the Sale Agreement dated 10th May 2012.

c). While the Sale Agreement may not bear the Plaintiff/Applicant's Directors' signatures, it was was a

product of extensive negotiations between the Plaintiff/Applicant and the 1st and 2nd Defendants/Respondents and it represented a binding agreement on the essential terms of the sale. Pursuant thereto, the Plaintiff/Applicant proceeded to pay a deposit of a sum of Kenya Shillings Three Million Eight Hundred and Fourty Thousand (Kshs. 3,840,000/-) being 10% of the agreed purchase price, which deposit the 1st and 2nd Defendants/Respondents had unequivocally acknowledged and retained.

d). The 1st and 2nd Defendants/Respondents acknowledged receipt of the aforestated deposit in Paragraph 5 of their Replying Affidavit.

e). The Plaintiff/Applicant reiterated that a duly signed agreement despite demand by its directors had been unlawfully retained by the Defendant/Respondent's Advocate, Mr. Mwangi Njenga at the Defendant/Respondent's instructions.

f). In response to the contents of Paragraph 6, the balance of the purchase price being a sum of Kenya Shillings Thirty Four Million Five Sixty Thousand (Kshs.34,560,000/=) only was paid to the Defendant/Respondent's advocates, Mwangi Njenga as provided by the Agreement for Sale for forward transmission to the Defendants/Respondents. Their advocate, Mwangi Njenga, had dully acknowledged receipt of the entire purchase price of a sum of Kenya Shillings

Thirty Eight Million Four Hundred Thousand (Kshs. 38,400,000/).

- g). The only outstanding step was the transfer of the suit property to the Plaintiff/Applicant, which was awaiting completion of the succession process, as had been communicated to the Plaintiff/Applicant.
- h). He was advised by the Plaintiff/ Applicant's advocates on record, that the payment of the deposit and the subsequent conduct of both parties amounted to part performance of the agreement and gave rise to enforceable equitable rights in favour of the Plaintiff/Applicant.
- i). Contrary to the allegations in Paragraph 7 of the 1st and 2nd Defendants/Respondents' Replying Affidavit, it was a mutual agreement that the said Advocate would act for both parties. In fact, it was the Defendants/Respondents who introduced the Plaintiff/Applicant to this particular advocate and insisted on the advocate as the Defendants/Respondents had complete trust in him being paid through him alone.
- j). In response to Paragraphs 8 and 9, the delays occasioned were not due to any fault or neglect on the part of the Plaintiff/Applicant. The Advocate reassured the Plaintiff/Applicant that since it already had possession, once the succession process was done, he would immediately transfer the land to it.

k). In further response to paragraph 10 of the 1st and 2nd Defendants/Respondents' Affidavit, the Plaintiff/Applicant states as follows:-

- i. The 1st and 2nd Defendants/Respondents had not exhibited any sale agreement to prove the purported sale transaction between themselves and the 3rd Defendant/Respondent; importantly, also not proved was consideration for the purported sale.
- ii. In any event, the Law Society of Kenya Conditions of Sale, which was implied in all land sale agreements unless specifically excluded, require that in the event of default, a party seeking to rescind the contract must first issue a valid completion notice in writing.
- iii. Further, where the Vendor intended to rescind the agreement, any deposit received must be refunded to the purchaser as a precondition.
- iv. To date, no such notice was issued to the Plaintiff/Applicant, and no refund of the Kenya Shillings Three Million Eight Hundred and Fourty Thousand (Kshs.3,840,000/-) deposit had been made.
- v. It was therefore incorrect to allege that the property was sold to the 3rd Defendant as claimed. Instead, records showed that the property was transferred to Acacia Equipment (K) Limited on or about 14th March 2022, which entity was distinct from the 3rd Defendant/Respondent herein.

- l). In further response to the contents of Paragraph 10 of the 1st and 2nd Defendants/Respondents' Affidavit, the sum paid by the Plaintiff/Applicant was never refunded and no notice of rescission of contract or formal repudiation of the agreement was issued to the Plaintiff/Applicant prior to the purported sale to the 3rd Defendant/Respondent.
- m). In response to the contents of Paragraphs 11 and 12, the Plaintiff/Applicant averred that the assertion that there was an ongoing/intended transfer was misleading to this Honourable Court, the transaction was concluded and the title deed issued to the 3rd Defendant/Respondent on 17th May 2022, prior to the institution of these proceedings.
- n). The Plaintiff/Applicant denied the averments in Paragraph 13 and 14 and stated that it was in possession of the suit property pursuant to the agreement and had taken steps in furtherance of its development.
- o). In further response to Paragraph 15 of the 1st and 2nd Defendants/Respondents' Replying Affidavit, the Plaintiff/Applicant denied the same and averred that the 4th Defendant and his co-directors/shareholders orchestrated a scheme whereby the property was first transferred to Acacia Equipment (K) Limited, an entity under their control, and thereafter to the 3rd Defendant, in a deliberate effort to sanitize an otherwise irregular transaction. The particular transaction was fraudulent.

- p). In response to the contents of Paragraphs 16, 17 and 18 of the 1st and 2nd Defendants/Respondents' Replying Affidavit, the Plaintiff avers that the history of the parcel is not clean as alleged. The 1st and 2nd Defendants/Respondents had not placed before the Court any documentation evidencing the agreement for sale or the consideration paid in respect of the purported sale to the 3rd Defendant/Respondent. The purported transfer was in bad faith, was meant to defeat the Plaintiff/Applicant's interest, and never extinguished the Plaintiff/Applicant's prior equitable rights.
- q). The Plaintiff/Applicant denied the averments in paragraph 19 of the 1st and 2nd Defendants/Respondents' Replying Affidavit and reiterated that its equitable interest arising from part performance and payment of the deposit overrides the purported subsequent transfer.
- r). The Plaintiff/Applicant was always ready and willing to complete the transaction having fully paid the purchase price to the Defendants/Respondents through its Advocate as agreed.
- s). In response to paragraph 22, the Plaintiff/Applicant reiterated that the 3rd Defendants/Respondent's possession of title to the suit property was unlawful as the same was obtained through fraud and misrepresentation which the 3rd Defendant/Respondent was an active party to. The 3rd Defendant/Respondent was not an innocent purchaser for value.

- t). In response to paragraph 27 of the 1st and 2nd Defendants/Respondents' Replying Affidavit, he denied the allegations therein. The Plaintiff/Applicant never abandoned the transaction. On the contrary, the Plaintiff/Applicant fulfilled all its obligations under the Agreement for Sale and waited patiently for the Vendors to procure Grand Letters of administration to effect the transfer. Also, the supposed letter withdrawing instructions was never copied to the Plaintiff/Applicant and it was long after the Plaintiff/Applicant had paid full the full purchase price.
- u). The 1st and 2nd Defendants/Respondents' failure to communicate or issue any completion notice was a breach of the Law Society of Kenya (LSK) Conditions of Sale which require the issuance of a twenty one (21) days completion notice and refund of the purchase price before rescission.
- v). Moreover, the Plaintiff/Applicant avers that the 1st and 2nd Defendants/Respondents colluded with the advocate, Mwangi Njenga and the 3rd and 4th Defendants/Respondents to defraud the Plaintiff/Applicant by forging documents and transferring the property behind its back.

B). Response to the 3rd and 4th Defendants/Respondents' Replying Affidavit

- a) In reply to the 3rd and 4th Defendants/Respondents' Replying Affidavit, he reiterated that the

Plaintiff/Applicant's interest in the property had been duly established through full payment of the purchase price.

- b) In response to paragraph 3 and 4 of the Replying Affidavit, he categorically state that the annexed agreement referenced therein pertains to Acacia Equipment (K) Limited, and not the 3rd Defendant/Respondent. It was therefore misleading and false to assert that the 3rd Defendant/Respondent entered into any agreement directly with the 1st and 2nd Defendants/Respondents.
- c) Further, the Green Card annexed in paragraph 4 clearly showed that the suit property was transferred to Acacia Equipment (K) Limited on 14th March 2022, and only two months later, it was transferred to the 3rd Defendant on 17th May 2022. This pattern was indicative of a pre-arranged scheme to disguise the nature and legitimacy of the underlying transaction.
- d) In response to paragraph 5, he stated that the Green Card reflects a suspicious back-to-back transfer of the suit property first to Acacia Equipment (K) Limited and then to the 3rd Defendant/Respondent, both of which share directors and shareholders. This transfer was a fraudulent attempt to clothe the 3rd Defendant/Respondent as an innocent purchaser for value.

- e) In response to paragraphs 6 to 8, he denied that the 3rd Defendant purchased the suit property without notice of the Plaintiff/Applicant's interest. The 4th Defendant, a director of both Acacia Equipment (K) Limited and the 3rd Defendant, was previously an agent and coastal representative of the Plaintiff's parent company and knew or ought to have known of the Plaintiff/Applicant's longstanding occupation and purchaser's interest.
- f) The 3rd and 4th Defendants/Respondents had both actual and constructive notice of the Plaintiff/Applicant's possession, which was open, continuous, and adverse to their purported interest. Their knowledge and involvement vitiate any claim of bona fide acquisition.
- g) In response to paragraph 9, he was advised by the Plaintiff/Applicant's advocates on record, that while the 3rd Defendant/Respondent may possess a Certificate of Title, its acquisition was tainted by fraud and did not override the Plaintiff/Applicant's equitable interest and actual possession, which had been continuous since the year 2012.
- h) In response to paragraphs 10 to 13, the protection under Section 26 (1) (b) of the Land Registration Act provides that a title may be challenged where it was shown to have been acquired through fraud or misrepresentation to which the person is proved to be a party. The Plaintiff/Applicant contends that the 3rd

Defendant/Respondent could not be deemed an innocent purchaser for value without notice.

- i) In response to paragraphs 14 and 15, the injunctive reliefs sought by the Plaintiff/Applicant was not an infringement but a necessary measure to protect its rightful interest, equitable title, and possession, which have been unlawfully interfered with.
- j) In response to paragraph 16, the transaction history in the Green Card contradicted the assertion that the parcel's ownership history was clear. The rapid transfers involving the same individuals and entities was inherently suspicious.
- k) In response to paragraphs 17 to 19, the Plaintiff/Applicant reiterated that the 3rd Defendant/Respondent's alleged ownership was the result of internal transfers orchestrated by the 4th Defendant/Respondent. The transactional documentation did not cure the impropriety surrounding the transfers.
- l) In response to paragraph 20 and 21, he reiterated that the application before this Honourable Court sought equitable reliefs to preserve the status quo and prevent further injustice. The Plaintiff/Applicant had demonstrated a prima facie case with a likelihood of success.
- m) In response to paragraph 22, the transfer to the 3rd Defendant/Respondent was contested as illegitimate and

fraudulent. It could not be legitimized by subsequent acts of registration.

- n) In response to paragraphs 23 and 24, I categorically deny the assertion that the Plaintiff/Applicant had never been in possession of the suit property. The Plaintiff/Applicant took possession of the suit property in the year 2012 and had remained in continuous occupation since.
- o) In response to paragraph 25 and 26, the claim that there was no fraud or connivance was untenable. The transfer to Acacia Equipment (K) Limited, which was then followed by a transfer to the 3rd Defendant/Respondent whose director was the 4th Defendant/Respondent, demonstrates an internal transfer structure that was not open or transparent. The 3rd and 4th Defendants/Respondents were aware or ought to have been aware of the Plaintiff/Applicant's longstanding interest.
- p) He denied the averments in paragraphs 27 and 28 by reiterating that the 4th Defendant/Respondent was the key liaison and coastal representative of the Plaintiff's mother company, FEP Holdings Ltd, and played a central role in the initial introduction of the vendors to the Plaintiff.
- q) The statements in paragraphs 29 to 31 alleging hardship to the 3rd and 4th Defendants/Respondents was misplaced and unsupported. The Plaintiff/Applicant had demonstrated a strong prima facie case and the balance

of convenience tilted in favour of preserving the status quo.

- r) The Plaintiff/Applicant had an equitable interest, was in possession, and acted in part performance of the Agreement for Sale dated 10th May 2012. The 3rd and 4th Defendants'/Applicants' claim to the suit property was tainted by fraud and collusion.

- s) The Plaintiff/Applicant stood to suffer irreparable harm unless the status quo is maintained, as the 3rd Defendant/Respondent has no superior claim to the land against the Plaintiff's prior equitable interest.

t) The Plaintiff/Applicant was entitled to the equitable reliefs sought including protection of its interest and cancellation of the impugned title issued to the 3rd Defendant/Respondent in circumstances that point to bad faith.

u) He urged this Honourable Court to grant the injunctive reliefs sought in the Notice of Motion Application dated 31st March 2025.

V. Submissions

8. On 24th June 2025 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 31st March 2025 be disposed of by way of written submissions. by the time of penning down this decision, the Honourable Court had not had a chance to access the written submissions if at all they were filed or not. Nonetheless, being governed by the set out timeframe, the Honourable Court had proceeded to reserve a ruling on 27th October 2025.

A. Written submissions by the Plaintiff/Applicant

9. The Plaintiff/ Applicant through the Law firm of Messrs. Owino Mc Dowell Advocates filed their written submissions dated 24th October, 2025. Mr. Owino Advocate submitted that there were the Written Submissions of the

Plaintiff/Applicant in support of the Notice of Motion Application dated 31st March, 2025.

10. On the background the Learned Counsel informed the Court that the Plaintiff /Applicant had entered into an Agreement for Sale dated 10th May 2012 with the 1st and 2nd Defendants for the purchase of land parcel KWALE/KIWEGU/672. The Plaintiff/Applicant had paid a deposit of a sum of Kenya Shillings Three Million Eight Hundred and Fourty Thousand (Kshs. 3,840,000/=) being 10% of the purchase price and had taken possession of the suit land.
11. Thereafter, in the year 2013, the Plaintiff/Applicant had paid the remaining balance of the purchase price of a sum of Kenya Shillings Thirty Four Million Five Sixty Thousand (Kshs.34,560,000/= to the 1st and 2nd Defendants/Respondents through their advocate, as demanded by the Agreement. The transfer of the land had been delayed pending succession by the 1st and 2nd Respondents. Despite this, the Plaintiff/Applicant had remained and still remained in occupation of the land, had undertaken preparatory development works, and had

waited for the 1st and 2nd Defendants/Respondents to complete their part of the transaction. The Plaintiff/Applicant had fenced the property and had constructed farm and security houses in it.

12. According to the Learned Counsel in a surprising turn of events, the suit property had been transferred on 14th March 2022 to Acacia Equipment (K) Limited, and thereafter on 17th May 2022 to the 3rd Defendant/Respondent, Kiwegu Acacia Beach Properties Limited, both companies linked to the 4th Defendant. The Plaintiff/Applicant had not received any rescission/completion notice or refund of the deposit prior to these transfers.

13. The 4th Defendant/Respondent, being a former representative of the Plaintiff/Applicant's parent company, FEP Holdings, had been fully aware of the Plaintiff/Applicant's equitable interest and possession of the property. The two-step transfer had been clearly orchestrated to defeat the Plaintiff/Applicant's interest. The 1st and 2nd Defendant/Respondents had not disputed the

existence of an agreement to sell the suit property and had acknowledged receipt of the deposit, at least.

14. The Plaintiff/Applicant had filed the present suit and the Notice of Motion application dated 31st March 2025 seeking a temporary injunction to restrain the Respondents either by themselves or through their agents, servants, employees or persons acting on their behalf from entering, selling, charging, transferring, or otherwise interfering with the Plaintiff/Applicant's ownership and occupation of all that property known as Land Reference Number KWALE/KIWEGU JEGO/672, pending the hearing and determination of the substantive suit.
15. On the issues for determination the Learned Counsel relied on the following issue on whether the Plaintiff/Applicant had been entitled to the orders of temporary injunction sought, the learned Counsel submitted that the Plaintiff/Applicant had moved this Honourable Court under the provisions of Order 40 of the Civil Procedure Rules seeking temporary injunctive orders to preserve the suit property and prevent interference with its current possession. The principles guiding the grant of interlocutory injunctions had been

settled in the case of ***“Giella - Versus - Cassman Brown & Co Ltd [1973] EA 358”***, as adopted by Kenyan courts, including ***“Nguruman Limited - Versus - Jan Bonde Nielsen & 2 Others [2014] eKLR”***, where the Court of Appeal had reiterated that:

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

16. The principles governing the grant of an interlocutory injunction had been well established in the above-mentioned case, namely:

- a. The Applicant must establish a prima facie case with a probability of success.
- b. The Applicant must demonstrate that he will suffer irreparable harm if the injunction is not granted.
- c. If in doubt, the court should determine the matter on a balance of convenience.

17. The first step had been to establish whether a prima facie case had been established. A prima facie case had existed where the Plaintiff/Applicant had demonstrated an arguable case, supported by evidence that his rights had been

violated or had been under imminent threat. In the case of: **“Mrao Ltd - Versus - First American Bank of Kenya Ltd & 2 Others [2003] eKLR”**, Justice Bosire had defined a prima facie case 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.”

18. The Plaintiff/Applicant had submitted that it had established a prima facie case warranting protection under the equitable doctrine of constructive trust. The Plaintiff/Applicant had taken possession of the suit property in 2012, had remained in continuous, quiet occupation for over a decade, and had made full payment of the purchase price pursuant to the Agreement for Sale dated 10th May 2012.

19. Further, in the case of:- **“Yaxley - Versus - Gotts & Another (2000) Ch 162”**, the Court had held that even where an agreement for sale of property had been void or unenforceable as a contract, it could still have given rise to equitable interests under a constructive trust or proprietary estoppel. The court had emphasized that where a

purchaser had been put in possession with the understanding that title would follow, equity would have intervened to prevent the seller from acting unconscionably. This principle had been applicable herein as the Plaintiff/Applicant had been placed in possession, had paid the purchase price, and had acted in reliance on the promise of transfer of title.

20. Similarly, in the case of:- ***“Maina & 87 Others - Versus - Kagiri (Civil Appeal Nos. 6, 26 & 27 of 2011 (Consolidated)) [2014] KECA 880 (KLR)”***, the Court of Appeal had held that where a purchaser had been granted possession and had paid part or full consideration, a constructive trust had arisen by operation of law, binding even a registered proprietor. The Court had emphasized that equity would not have allowed a vendor or third party to use statutory formalities to defeat the purchaser's equitable rights.

21. In the present case, the 1st and 2nd Defendants/Respondents, after having received full payment of the purchase price and having allowed possession, had fraudulently transferred the property to the 3rd Defendant, a company associated with the 4th Defendant, who had acted as the Plaintiff/Applicant's

intermediary. The Plaintiff/Applicant's full payment and long-term possession had constituted an equitable interest enforceable under law. This position had been expounded in ***“Mwangi & another - Versus - Mwangi [1986] KLR 328”*** which had held that such equitable claims bound registered title.

22. The Plaintiff/Applicant had demonstrated that the property had first been transferred to Acacia Equipment (K) Ltd in March 2022, and then to the 3rd Defendant/Respondent in May 2022, the companies linked through common directors/shareholders. The 4th Defendant/Respondent had been a representative of the Plaintiff/Applicant's parent company and had been aware of the Plaintiff/Applicant's possession.

23. In the case of:- ***“Arthi Highway Developers Limited - Versus - West End Butchery Ltd & Others [2015] eKLR”***, the Court had held that title acquired through fraud had not been indefeasible. The Plaintiff/Applicant had therefore urged this Honourable Court to preserve the status quo and restrain the Respondents from interfering with its possession, pending full hearing and determination of the

substantive suit, to prevent further violation of its constitutionally protected rights under Article 40 of the Constitution of Kenya, 2010.

24. Secondly, the Court in ***“Pius Kipchirchir Kogo - Versus - Frank Kimeli Tenai [2018] eKLR”*** had held:

“Irreparable injury means that the injury must be one that cannot be adequately compensated in damages. The remedy by damages comes in only when the injury complained of is capable of compensation.”

25. The Learned Counsel submitted that unless restrained, the Respondents/Defendants had threatened to unlawfully evict the Plaintiff/Applicant from land it had occupied, developed, and maintained for over a decade. Such dispossession would have caused irreparable harm not capable of being compensated by damages.

26. Lastly, the ***“Giella test”*** had required the court to weigh the inconvenience likely to have been suffered by either party if the injunction had been granted or denied. The Learned Counsel relied on the case of ***“Kenleb Cons Ltd - Versus - New Gatitu Service Station Ltd & Another [1990] eKLR”***, Bosire J had stated:

“To succeed in an application for injunction, the applicant must show he has a legally enforceable right, has a genuine and arguable case and that if the injunction is

not granted, he will suffer loss that cannot be compensated. The balance of convenience should also favour him.

27. The balance of convenience had tilted in favour of preserving the status quo. The Plaintiff/Applicant had been in possession for over ten years, had made financial investments, and had placed a caution on the title. The 3rd and 4th Defendants had been latecomers and perpetrators of a fraudulent transfer.

28. On the other hand, if the injunction had been denied and the Plaintiff/Applicant had been evicted from land parcel KWALE/KIWEGU/672, it would have stood to lose possession of property it had occupied since 2012. The Plaintiff/Applicant would have suffered undue hardship, including disruption of development plans and potential loss of its equitable interest. In contrast, the Defendants/Respondents, particularly the 3rd and 4th Defendant/Respondent, would have stood to suffer no prejudice, having acquired title in questionable circumstances and with full knowledge of the Plaintiff/Applicant's long-standing occupation and legitimate interest.

29. The Defendants/Respondents should have been ordered to bear the costs of that Application.
30. In conclusion, the Learned Counsel submitted that the Plaintiff/ Applicant had demonstrated with clarity that it had a legally recognized equitable interest in the suit property. The Plaintiff/Applicant's continuous possession since the year 2012, having made payment of the full purchase price through an Advocate called Mwangi Njenga, him having acknowledged receipt of it and subsequent developments undertaken on the land had all pointed to a legitimate proprietary claim deserving of protection by that Honourable Court.
31. It had been in the interest of justice and equity that the status quo had been preserved pending the full determination of the main suit. The Plaintiff/Applicant had laid out a prima facie case with a likelihood of success, had demonstrated that it would have suffered irreparable harm absent protection, and that the balance of convenience had favoured the grant of the orders sought.
32. They respectfully urged the Court to allow the Application.

B. The Written submissions of the 1st to 4th

Defendants/ Respondents

33. The 1st, 2nd, 3rd and 4th Defendants/ Respondents through the Law firm of Messrs. H & K Advocates filed their written submissions dated 17th November, 2025 . Mr. KipKorir Advocate submitted that before the Court for determination had been the Plaintiff's Notice of Motion Application dated 31st March, 2025. In the main, the Plaintiff/Applicant had sought a temporary injunction restraining the Respondents from entering, selling, charging, transferring or otherwise interfering with the Plaintiff's ownership and occupation of all that parcel of land known as Land Reference No. Kwale/Kiwegu Jego/672.
34. The Application had been opposed. The 1st and 2nd Defendants/Respondents had filed a Replying Affidavit sworn by Margaret Giciru Kimani, the 1st Defendant/Respondent, on 13th June, 2025. The 3rd and 4th Defendant/Respondent had filed a replying affidavit sworn by Dominic Ichugu Gachanja on 18th June, 2025. The Applicant had subsequently filed a further affidavit sworn by John Muchira Kithaka on 24th October, 2025.

35. On the background the Learned Counsel submitted that it had been common ground that the 1st and 2nd Respondents had been the legal and beneficial owners of the parcel of land having inherited it from their father, the late Asaph Mungai. The Applicant had contended that it had entered a sale agreement with the 1st and 2nd Respondents for the sale and purchase of the suit property, at an agreed consideration of Kenya Shillings Thirty-Eight Million and Four Hundred Thousand Only (Kshs. 38,400,000/=) and the Applicant had paid Kenya Shillings Three Million Eight Hundred and Forty Thousand (Kshs. 3,840,000/=) to the 1st and 2nd Defendants/Respondents as deposit, which had been done through their advocates.

36. The Applicant had alleged that sometime in the year 2023, it had noticed agents of the 3rd and 4th Defendants/Respondents surveying the suit property and upon investigations and subsequent official searches of the property, the Applicant had discovered that the 3rd Defendant/Respondent had been registered irregularly and unlawfully as the legal proprietor of the suit property. In response, the 1st and 2nd Defendant/Respondents had

maintained that the Applicant had paid the deposit of Kenya Shillings Three Million Eight Hundred and Forty Thousand Only (Kshs. 3, 840, 000/=) as part of the agreed purchase price but had failed to complete the payment of the purchase price for more than 10 years. The 1st and 2nd Respondents had stated that they had executed the sale agreement, while the Applicant had failed, neglected and/or refused to execute the said agreement and hence the same had not materialized.

37. Consequently, the agreement for the sale had been rescinded after the Respondents' attempts to follow up with the remainder of the purchase price had proved futile. As a result of those frustrations, the 1st and 2nd Defendants/Respondents had sold off the property to the 3rd and 4th Defendants/Respondents who had paid the agreed consideration and the property had been transferred to them.

38. The 3rd and 4th Defendants/Respondents in their response had contended that they had conducted proper due diligence and had established that the suit property had been free of any encumbrances. Additionally, there had

been neither constructive nor actual notice of any defects or infirmities against the 1st and 2nd Respondents' title.

39. On the issues for consideration, the Learned Counsel relied on the following: -

a. Whether the Applicant had met the threshold for grant of a temporary injunction?

b. Who had borne the costs of the Application?

40. According to the Learned Counsel, the conditions for grant of an injunction had been well set out in the celebrated case of **“Giella Case (Supra)”** as follows:-

a. An applicant must establish a prima facie case with probability of success.

b. The Applicant will suffer injury which will not be compensated in damages if the injunctions is not granted.

c. If the court is in doubt, it will decide the application on a balance of convenience.

41. The conditions set out in the **“Giella case (supra)”** had been conjunctive and sequential in that the second condition could only have been addressed if the first one had been satisfied. See **“Kenya Commercial Finance Co. Ltd - Versus - Afraha Education Society (2001) EA 86”**.

42. On whether the Applicant had established a prima facie case with probability of success, the Learned Counsel submitted that prima facie had been one which, on the

material presented, a tribunal properly directing itself would have concluded that there had existed a right which had apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. See ***“Mrao Case (Supra)”***.

43. The provision of Section 26 of the Land Registration Act 2012 had established that a Certificate of title or lease had been the conclusive evidence of proprietorship. That had been what had vested indefeasible rights and interests in land and properties in the proprietor. (***“Mburu - Versus - Magulu (Environment & Land Case E005 of 2022) [2025] KEELC 4868 (KLR) (26 June 2025) (Judgment)”***).

44. The Learned Counsel asserted that the Plaintiff/Applicant herein had predicated its claim on an agreement, which admittedly had been rescinded for non-performance on its own part, thereby divesting it of any recognizable proprietary interest warranting protection in equity or at law. The Plaintiff/Applicant's failure to complete the payment of the agreed consideration had amounted to a fundamental breach of the contract between the 1st and 2nd Defendants/Respondents and the Applicant, a fact which the Plaintiff/Applicant herein had admitted. Consequently,

the Plaintiff/Applicant had lacked an enforceable interest against the Defendants/Respondents on account of non-performance and fundamental breach from its part.

45. According to the Learned Counsel, the Plaintiff/Applicant had neither completed payment of the purchase price. Thus, it followed that no registrable or equitable interest had ever been vested in the Plaintiff/Applicant. In any case, as the Plaintiff/Applicant had maintained that it had been in possession for more than a decade, mere possession, even if proven, could not in itself have created proprietary rights capable of protection by injunction against the true owners or subsequent bona fide purchasers.

46. The 1st and 2nd Defendants/Respondents had demonstrated that they had been registered proprietors of the suit property, up until the lawful sale to the 3rd Defendant/Respondent in 2022. The 1st and 2nd Defendants/Respondents had demonstrated that they had executed the sale agreement and had been ready and willing to complete the transaction, but the Applicant had failed to execute the agreement and had failed to complete payment more than ten years after the deposit had been

paid. That being the case, they had been entitled to rescind the agreement and had been at liberty to dispose of the suit property in a manner they had deemed fit, being the legal owners of the property.

47. The Learned Counsel held this basis that in 2018, six years after the sale processes had started, the 1st and 2nd Defendants/Respondents had written a letter to the Plaintiff's advocates withdrawing the sale of the suit property and rescinding the said agreement. It had been with this basis that in the year 2018, six years after the sale processes had started, the 1st and 2nd Defendants/Respondents had written a letter to the Plaintiff/Applicant's Advocates withdrawing the sale of the suit property and rescinding the said agreement, citing non-performance on the part of the Applicant.
48. It had been well established that a party who had not performed its essential contractual obligations such as payment of the consideration had fundamentally breached the contract and could not have asserted rights or sought remedies premised on their fundamental breach. See the

holding of the court in the case of:- **“Kihuba Holdings Limited - Versus - Charo Karisa Ngulu [2021] KEELC 2830 (KLR)”**.

49. As a consequence of the breach, the Defendants/Respondents had been entitled to treat themselves as discharged from further liability under the agreement and parties ought to have been returned to the positions they had been in before entering into the sale agreement in view of the fundamental breach of the terms of the sale agreement by the Plaintiff/Applicant. See **“Christine Nyanchama Oanda - Versus - The Catholic Diocese of Homa Bay Registered Trustees, Civil Appeal No. 208 of 2018”**.

50. Further, the courts had also held that the rescission of a contract to sell land could only have arisen where the party in default had been notified of the default, and given an opportunity to rectify the same. Despite having been given so much time to remedy their default, the Plaintiff/Applicant had never taken any steps. Reliance had been placed on the case of:- **“Edward Mugambi - Versus - Jason Mathiu Civil Appeal No. 286 of 2002 (2007) eKLR”** and **“Njamunyu - Versus - Nyaga (1993) KLR 282”**.

51. In the case of ***“Sisto Wambugu - Versus - Kamau Njuguna [1983] eKLR”*** it had been held that the vendor's right to rescind an agreement for sale for non-payment at the appointed time had only been exercisable where time had been of essence or where the innocent party had issued a notice to the defaulting party making time of essence. The 1st and 2nd Defendants/Respondents had made several attempts to follow up with the payment of the balance but to no avail.

52. Subsequently, the suit property had been sold and transferred to the 3rd and 4th Defendants/Respondents as the bona fide purchasers for value without notice of any irregularities or fraudulent dealings on the suit property.

53. The Supreme Court in the case of:- ***“Dina Management Limited - Versus - County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR)”*** upheld the dicta on bona fide purchasers in the case of ***“Samuel Kamere - Versus - Lands Registrar, Kajiado”***, and stated that:

“ ...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....”

54. The Learned Counsel averred that the Plaintiff/Applicant pleaded fraudulent transfer of the suit property to the 3rd and 4th Defendants/Respondents. It is trite law that whoever alleges fraud must specifically prove it. In the instant case, the Applicant has not tendered any evidence in support of the allegations of fraud to show that the Respondents took part in any fraudulent activity in the sale, transfer and registration of the suit property in the name of the 3rd Respondent.

55. Further the Learned Counsel relied on the case of ***“Eunice Grace Njambi Kamau and Another - Versus - The Hon. Attorney General and 5 Others ELC Civil Suit No. 976 of 2012”*** where the Court cited the decision of Tunoi JA (he then was) in ***“Vijay Morjaria - Versus - Nansingh Madhusingh Darbar & another [2000] eKLR”***, thus:-

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

56. According to the Learned Counsel, aside from mere speculations and unprecedented apprehensions, the Applicant had failed to establish any form of irregularity, fraud or non - performance of the Defendants/Respondents in dealing with the suit that would impeach the 3rd Defendants/Respondent's title or the acquisition thereof. The upshot of this was that there was no discernible right in favour of the Plaintiff/Applicant that had been violated. The Plaintiff/Applicant had therefore failed to demonstrate the existence of a prima facie case with a probability of success.

57. On whether the Plaintiff/Applicant would have suffered injury which could not have been compensated in damages if the injunction had not been granted. The Learned Counsel submitted that irreparable had been explained in the case of ***"Pius Kipchirchir Kogo - Versus - Frank Kimeli Tenai (2018) eKLR"*** as follows:

"Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages."

58. The Applicant's alleged loss, if any, had been purely monetary in nature, having been founded on the refund or recovery of sums paid as deposit under an aborted

agreement for sale. It had been trite that such monetary claims had been compensable through damages, and therefore had not met the threshold of irreparable harm contemplated in ***“Giella - Versus - Cassman Brown (supra)”***.

59. On the other hand, the 3rd and 4th Defendants/Respondents had stood to suffer greater prejudice if restrained from dealing with land lawfully acquired and registered in their names. The Plaintiff/Applicant's apprehension of loss had neither been irreparable nor incapable of being remedied by grant of damages had they succeeded eventually.

60. The irreparable injury or harm had not been speculative. It had had to have been real, actual and substantial, which the Plaintiff/Applicant had had to demonstrate. Mere apprehension, which had been unfounded, had not sufficed to benefit from the grant of an equitable remedy of a temporary injunction. See the case of:- ***“Nduati & 2 others - Versus - Chemutai & 3 others (Environment & Land Case E080 of 2024) [2025] KEELC 3550 (KLR) (6 May 2025) (Ruling)”***.

61. On the issue of who is favored by the balance of convenience, the Learned Counsel submitted that where the Court had entertained doubt as to the first two conditions, the matter had had to be determined on a

balance of convenience. In the instant case, the balance had tilted decidedly in favour of the Respondents. The decision of **“Amir Suleiman (Supra)”** where the learned judge had offered further elaboration on what had been meant by “balance of convenience” had stated;

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

62. The 3rd and 4th Defendants/Respondents had been the registered proprietors under the provision of Section 26(1) of the Land Registration Act, whose titles had been protected unless acquired through fraud or misrepresentation to which they had been parties. The Plaintiff/Applicant had not tendered any credible evidence to impeach that title. It would have been inequitable and disruptive to have restrained the Defendants/Respondents from exercising rights appurtenant to lawful ownership while the Plaintiff/Applicant had merely asserted an unperfected interest.

63. In the case of **“Kidbrooke Investment Ltd - Versus - Isaac Mwangi 2016 KEELC 1276 (KLR)”**, while on the balance of convenience, the Court had declined to issue a temporary

injunction and had opted to maintain the position that the Defendant had been in at the time of the suit until it had finally been heard and determined. In the instant case, the Respondents had remained in ownership, possession and control of the suit property. It had therefore been a lower risk to maintain the status of the suit property as it had been, as the balance of convenience had lain with the Defendants/Respondents.

64. In any case, the Plaintiff/Applicant had been in fundamental breach of the sale agreement it had sought to rely on, and therefore could not have claimed the balance of convenience had tilted in its favour. The Court in ***“Samuel Mwihia Gitau - Versus - John M. Ng'ang'a & 2 others [2015] KEHC 6316 (KLR)”*** had declined to issue an injunction to the Plaintiff/Applicant who had been found to have breached the contract for sale of the property to the Defendants/Respondents.

65. The balance of convenience, therefore, had militated against the grant of injunctive relief and in favour of maintaining the status quo in which the Defendants/Respondents had remained in possession and control of the property.

66. In conclusion, the Learned Counsel argued that the grant of temporary injunctions, being an equitable remedy had usually been discretionary and the Court should only grant it on well-established principles. On the strength of their submissions above and the authorities they had relied on, they humbly beseeched the court to dismissed the Application herein with costs.

VI. Analysis and Determination

67. The Honourable Court has carefully read and considered the pleadings herein and the relevant provisions of the Constitution of Kenya, 2010 and the statutes.

68. In order to arrive at an informed, just, fair and Equitable decision, the Honorable Court has three (3) framed issues for its determination. These are: -

a) Whether the Notice of Motion dated 31st March 2025 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.

b) Whether the parties are entitled to the reliefs sought?

c) Who will bear the Costs of Notice of Motion application 31st March 2025.

ISSUE No. a). Whether the Notice of Motion dated 31st March 2025 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.

69. Under this sub - heading, the Honourable Court shall examine whether the Plaintiff/Applicant has made out a case for the grant of temporary injunction.

70. The application herein is premised under the provision of Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst the provisions of the law. Which provides as follows: -

Order 40, Rule 1 Where in any suit it is proved by affidavit or otherwise—

- a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b. that the Defendant threatens or intends to remove or dispose of his property in circumstances according reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, 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.

71. The text “**Commercial Injunctions Sixth Edition**” by Steven Gee QC published by Sweet & Maxwell at Pg. 36 explicates an injunction as: -

“a discretionary remedy granted or refused in accordance with principles elucidated by the courts, and which can be enforced through proceedings of contempt. For the remedy to be available, there must be proceedings about to be commenced before the court, which have been served on the Defendants, or there must be procedural machinery under which the

proceedings can be served on the defendant, which the claimant is about to utilise so that the court has territorial jurisdiction over the Defendant in respect of those proceedings under its own domestic rules”.

72. The principles applicable in an application for an injunction were laid out in the celebrated case of **“Giella (Supra)”**, where it was stated: -

“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 injury which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

73. The three (3) conditions set out in **“Giella (supra)”**, need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of: - **“Nguruman Limited - Versus - Jan Bonde Nielsen & 2 others [2014] eKLR”**, where the Court opined that: -

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the Applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Limited - Versus - Afraha Education Society [2001] Vol. 1 EA 86. 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. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between”.

74. In dealing with the first condition of prima facie case, the Honorable Court guided by the definition melted down in ***“Mrao Limited (Supra)”***,

“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 or a tribunal properly directing itself would 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”

75. Now turning to the issues under the instant application.

The Plaintiff/Applicant contends that it is the rightful beneficial owner of the suit property having purchased it from the 1st and 2nd Defendants. According to them, at the time of the said purchase, it had made the full payments of the full consideration. Although, the fact that indeed they had initially entered into an agreement with the Plaintiff/Applicant over sale of the suit property, whether the full payment was done or not has been vigorously refuted by the 1st and 2nd Defendants/Respondents. According to the Defendants, after paying part of the consideration, the Plaintiff/Applicant went silent and did not pursue the terms as agreed. It was now precisely 10 years which had lapsed with no communication from the Plaintiff/Applicant and which action led to the sale of the property to the 3rd Defendant/Respondent who paid the

consideration in full and had the suit property transferred into his name. These are weighty and triable issues best left for full trial.

76. Luckily, the Court has had the benefit of interrogating the agreement alluded to by the Plaintiff/Applicant, which is dated 10th May 2021. At clause 1.1[d] of the agreement, it is confirmed that indeed a total sum of Kenya Shillings Three Million Eight Hundred and Fourty Thousand (Kshs. 3,840,000/-) was paid to the 1st and 2nd Defendants/Respondents at the time of executing the agreement. The total purchase price was Kenya Shillings Thirty Eight Million Four Hundred Thousand only (Kshs 38,400,000/-).

77. From the documentation on record and which includes bank statements attached by the Plaintiff/Applicant, I can see that that the account has several transactions of money paid out but the problem is the same does not indicate the recipient. The bank statement is not conclusive proof or evidence that the money out was indeed being transacted between the Plaintiff/Applicant and specifically the 1st and 2nd Defendants/Respondents in

order to cater for the balance of the purchase price. The Plaintiff/Applicant also confirmed that other than the suit property, he acquired two separate properties and all the transactions were carried out by his advocate on record, the payment vouchers to a Law firm Messrs. Mwangi Njenga & Co Advocates indicate money transmitted to the said firm, the purpose is indicated as land purchase, but which land specifically? Also, I don't see any proof of onward transmission of this sums to the 1st and 2nd Defendants/Respondents. I also have not come across any communication between the parties in confirmation of full payment of the purchase price as alleged. By all means, there are too many grey areas which can only easily be unrivalled during the full trial.

78. However, all said and done, the Honourable Court is very cautious while making an analysis of these facts with regards to whether the full purchase price was paid or not. The Court strongly believes this are among the main issues to be dealt with while trying to make conclusive findings as to the ownership of the suit property to be determined in a full trial. In saying this, I seek refuge

from the case of: ***“Mbuthia -Versus- Jimba Credit Corporation Limited 988KLR1”***, the court held that: -

“In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the party’s cases.”

79. Similarly, in the case of ***“Edwin Kamau Muniu - Versus - Barclays Bank of Kenya Limited”*** the court held that: -

“In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria.”

80. In the present case, the suit property are under severe contest by two different parties - the Plaintiff/Applicant and the 1st, 2nd & 3rd Defendants/Respondents. On one hand, the Plaintiff/Applicant has produced before this Honourable Court a copy of the sale agreement confirming that he paid part of the purchase price to the vendors and alleges ownership of the suit property. While on the other hand, the 3rd Defendant/Respondent has produced a copy of the title deed registered in its name. In my view, as of

now the property legally belongs to the 3rd Respondent unless proven otherwise which can only be after full hearing of the matter.

81. By their action of placing a caution over the land, the Plaintiff/Applicant, there is no doubt it has threatened the alienation of the suit property which will be prejudicial to the 3rd Defendant/Respondent being the Legal proprietors of the suit land. From the foregoing, the Plaintiff/Applicants have failed to demonstrate a prima facie case with a probability of success at the trial as enunciated in the case of "**Giella-Versus - Cassman Brown & Co. Ltd (Supra)**".

82. As was stated above herein within the contents of this ruling, the three conditions for grant of injunctions are disjunctive and not conjunctive. This means that in the event that one condition is not met then the application automatically fails. However, looking at the veracity of the claim in terms of the monetary value of the suit property, the court will take its time to discuss all the three elements to the satisfaction of both parties as to why the orders sought can simply not be granted.

83. The court has further considered the evidence on record against the second principle for the grant of an injunction, that is, whether the Applicants might suffer irreparable injury which cannot be adequately compensated by an award of monetary damages. With regards to the second limb of the Court of Appeal in **“Nguruman Limited (supra)”**, held that:-

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a

nature that monetary compensation, of whatever amount, will never be adequate remedy.”

84. On the issue whether the Plaintiff/Applicant will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Applicants must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. The Plaintiff ought to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of ***“Pius Kipchirchir Kogo - Versus - Frank Kimeli Tenai (2018) eKLR”*** provides an explanation for what is meant by irreparable injury and it states;

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

85. It has already demonstrated so far that the title for the suit land is in the name of the 3rd Respondent, it has also

been alleged but not proved by the applicant that he is in occupation of the suit property. I have perused the pleadings as filed and I have not come across any documents or evidence that points towards the use and occupation of the suit property by the Plaintiff/Applicant. The Applicant has therefore not satisfied the second condition as laid down in **“Giella’s case”**

86. Thirdly, the Plaintiff has to demonstrate that the balance of convenience tilts in their favour. In the case of **“Pius Kipchirchir Kogo - Versus - Frank Kimeli Tenai (Supra)”** which 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 Plaintiff’s, 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 Plaintiff’s 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”.

87. In the case of ***“Paul Gitonga Wanjau - Versus - Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR”***, the court dealing with the issue of 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 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 of convenience lies.”

88. The balance of convenience tilts in the favour of the 3rd Defendant/Respondent as opposed to the Plaintiff/Applicant. The decision 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.”***

89. I am convinced that there is a lower risk in not granting orders of temporary injunction than granting them, as I wait to hear the suit on its merits. As indicated above, this is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the registration of title in the name of the 3rd Defendant/Respondent. I have also not had the opportunity to interrogate the annexures attached by the applicant herein to being a position to decipher the issues raised by it majorly the completion in payment of the purchase price.

ISSUE No. b). Whether the parties herein were entitled t the reliefs sought.

90. Under this Sub - heading, notwithstanding the above legal position taken arising from the filed application by the Plaintiff/Applicant the Honourable Court will be examining the other possible reliefs available to the parties in the given circumstances.

91. The Honourable Court cannot hide its head in the sand as the desert ostrich to the empirical facts adduced from the filed pleadings. In as much as the Plaintiff/Applicant may not be having "*Prima Facie case*" and only holding on the argument of being a beneficial owner to the suit property based on the equitable doctrine of Constructive trust and that they took possession in the year 2012 and have been in continuous occupation from then. According to them, they made full payment of the purchase price being in strict adherence with the terms and condition of the Sale Agreement duly executed on 10th May, 2012. It is instructive to note that It is noted that the ownership of the suit property is vigorously contested by the parties herein.

92. Subsequently, on 28th September 2023 they lodged a caution on the land claiming purchasers' interest and on allegation that the 1st, 2nd, 3rd and 4th Defendants/Respondents unlawfully and unlawfully connived to have the land registered in their names and the issuance of the Certificate of Title Deed to the land. The issue of the title, rights and interest of the suit land has been challenged on ostensible grounds of fraud. Ideally, these are pertinent issues to be interrogated keenly during the full trial and a determination.

93. Additionally, based on the Principles of "*Lis Pendens*" anchored under the provision of Section 52 (1) of the Indian Transfer of Property Act and the decisions of "**George Kadenge - Versus - Azzuri Limited (Malindi ELC No.....) and Mawji - Versus United States International University (USIU) by H.A. Madan JA**" there will be need to preserve the suit properties by the Caution already registered by the Plaintiff/Applicant. The provision of Sections 71 (1), (2) & (3), 72 and 73 of the Land Registration Act, No 3 of 2012 makes provisions on lodging, the Notice and the withdrawal/removal of a caution.

Section 73 stipulates thus:

(1) A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection

(2), by order of the Registrar. (2) The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.

(3) If a cautioner has not raised any objection at the expiry of the time stated, the Registrar may remove the caution.

(4) If the cautioner objects to the removal of the caution, the cautioner shall notify the Registrar, in writing, of the objection within the time specified in the notice, and the Registrar shall, after giving the parties an opportunity of being heard, make such order as the Registrar considers fit, and may in the order provide for the payment of costs.

(5) After the expiry of thirty days from the date of the registration of a transfer by a chargee in exercise of the chargee's power of sale under the law relating to land, the Registrar shall remove any caution that purports to prohibit any dealing by the chargee that was registered after the charge by virtue of which the transfer has been effected.

(6) On the withdrawal or removal of a caution, its registration shall be cancelled, and any liability of the

cautioner previously incurred under section 74 shall not be affected by the cancellation.'

94. In the interest of natural justice, Conscience and Equity this court opines that it will be proper for the suit property to be preserved by the caution to avoid any further dealings on the same pending the final determination of this case on who the rightful proprietor is. This Court bears the full discretion on to the suit land. I need not say more.

ISSUE No. c). Who will bear the Costs of Notice of Motion application dated 31st March 2025

95. It is now well established that the issue of Costs is at the discretion of the Court. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 Laws of Kenya holds that Costs follow the events. By the event, it means outcome or result of any legal action. Thus costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation.

96. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of ***“Harun Mutwiri - Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers - Versus - Bidco Africa Limited & Another***

[2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise.

97. In the case of “**Hussein Muhumed Sirat - Versus - Attorney General & Another [2017] eKLR**, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

98. In the present case, taking that this matter is still on going for full trial as is directed herein below, the Honourable Court elects to have the costs in the cause.

99. **Conclusion and Disposition**

100. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to the Preponderance of Probabilities and the balance of convenience. Clearly, the Plaintiff/Applicant has failed to make out a case against the Respondent.

101. I proceed to order the following: -

a) THAT the Notice of Motion application dated 31st March 2025 be and is hereby dismissed for lack of merit.

b) THAT in order to preserve the suit property and unless stated otherwise, based on “*the Doctrine of Lis Pendants*” to be applicable and the caution registered against the suit property by the Plaintiff/Applicant on 28th September, 2023 pursuant to the provision of Sections 71, 72 and 73 of the Land Registration Act, No. 3 of 2012 to be sustained in order to preserve the property pending the hearing and final determination of the suit.

c) THAT for expediency sake there be a Pre - Trial Conference conducted on 20th April, 2026 on case management in accordance with the provision of Order 11 of the Civil Procedure Rules, 2010. There be a hearing on 22nd September, 2026.

d) THAT costs of the Notice of Motion application dated 31st March 2025 to be borne by the Plaintiff/Applicant herein to be in the cause.

IT IS ORDERED ACCORDINGLY.

RULING DELIVERED THROUGH THE MICRO - SOFT TEAMS

VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS.....

18TH DAY OFDECEMBER.....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. Chepkerui Advocate holding brief for Jack Owino Advocate for the Plaintiff/Applicant.
- c) Mr. KipKorir Advocate holding brief for Mr. Kiplangat Advocate for the 1st, 2nd, 3rd & 4th Defendants/Respondents.
- d) No appearance for the 5th Defendant/Respondent.