

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ELC NO. E041 OF 2024

ANDREA MORETTI & ELENA DARDANELLI & 5 OTHERS
PLAINTIFFS

VERSUS

PASQUALE TIRITO & 3 OTHERS.....
.....DEFENDANTS

RULING

1. There are three motions which have been pending in the present suit have come up for determination in this ruling as per the directions of this court made on 1/12/25. These are the plaintiff's two Motions dated 8/5/2024 and 7/11/2025 and the 1st and 2nd defendants' motion dated 10/4/2025. The first Application dated 8/5/2024 seeks injunctive orders pending hearing and determination of the suit while the second one dated 10/4/2025 seeks striking out of the suit against the 1st Defendant. The third Application dated 7/11/2025 seeks cross examination of various deponents of affidavits filed by the 1st and 2nd defendants. In the directions made on 1/12/25, this court stated as follows:

"This court has delivered itself of what it thinks of the solemnity surrounding the swearing of affidavits in its earlier ruling of 6/12/2025 and should not be seen to depart from that position in this same matter, and it is only proper that the application dated 7/11/2025 be determined on its merits since, as stated by Mr. Murage, it has, in addition, the potential of disposing of the motion dated 10/4/2025... However, perchance the application dated 7/11/2025 does not succeed in dislodging the application dated 10/4/2025, bearing in mind that the stay of proceedings sought therein targeted proceedings brought only after the motion of 10/4/2025 and in connection thereto only and not all

*proceedings, then that motion of 10/4/2025 should be heard before the motion dated 8/5/2024. What I have outlined hereinabove is indicative that the court is capable of hearing all the three motions in a series depending on which ranks 1st or which one affects the other in a certain way, and issue a single ruling in all of them, or issue separate rulings as it may deem fit in the circumstances...
Consequently, this court orders that all the motions shall be heard together and determined together.”*

2. I therefore begin with the last motion dated 7/11/2025, said to have been necessitated by the importance of proper commissioning of Affidavits in legal proceedings.
3. What this court has noted is that the Application dated 7/11/2025 and made by the Plaintiffs, seeks stay of all proceedings in the present matter pending cross-examination of the 1st Defendant as well as Mr. George Joseph Kangethe Advocate who allegedly commissioned the 1st Respondent’s Affidavits dated **10th April 2025, 17th February 2025** and **28th February 2025**; it also seeks cross-examination of Mr. Nicholas Sumba, the Advocate for the 1st and 2nd Defendants, over his swearing of the Affidavit dated **29/10/2025** while he is not a party to the proceedings. It is further sought that the Affidavits sworn by Mr Tirito and Mr. Sumba be struck out and expunged from these proceedings, and that the Forensic Document Examiner’s Report dated 31/10/2025 be deemed as properly filed and admitted as evidence in support of the application.
4. The gist of that motion is that the deponents of the Affidavits dated 10th April 2025, 17th February 2025 and 28th February 2025 for reasons given, could not have appeared before George Joseph

Kangethe, the Commissioner for Oaths named in the document and that the said Affidavits ought to be struck out.

5. The Application dated 7/11/2025 is opposed by way of the replying affidavit of **Pasquale Tirito** dated 14/11/2025. That affidavit itself was objected to by way of a further affidavit of the 4th plaintiff, **Elio Bisi**, dated 20/12/25, on the preliminary ground that it is not an affidavit properly so called because the entire document does not bear the name and or signature of any identifiable Notary Public, his/ her address (for verification purposes), does not bear a stamp in a language understandable by the Court, nor is there an Affidavit proving that the said document was sworn before a Notary Public, that it terminates with a non-commissioned and or non-notarized *jurat*; that it ought to be struck out; that in the absence of a valid response and evidence under oath challenging the evidence filed by the Plaintiffs under oath as contained the Application dated 7th November 2025, the said Application remains unopposed and ought to be allowed as prayed.
6. Therefore, to see whether there is any valid response to the motion dated 7/11/2026, the very preliminary issue the court needs address is whether the affidavit of Pasquale Tirito dated 14/11/2025, said to have been filed in response thereof, ought to be struck out, and if so, whether the motion dated 7/11/25 should be allowed as unopposed.

7. Ringera J as he then was in *NBI HCCC NO 966 OF 2000- Pastificio Lucio Garofalo Spa Security & Fire Equipment Co & Another*, held as follows:

“As regards whether the affidavit is taken before a Notary Public, or there is no specific statute in Kenya rules of court dealing with the formalities and admissibility in Court of affidavits taken abroad. However, section 88 of the Evidence Act, Cap 80 of the Laws of Kenya provides that documents which would be admissible in the English Courts of Justice are admissible in Kenyan Courts without proof of the seal or stamp or signature authenticating it or of the judicial or official character claimed by the person by whom it purports to be signed. In England by virtue of order 41 rule 12 of the Rules of the Supreme Court, affidavits taken in commonwealth countries are admissible in evidence without proof of the stamp and seal or the official position of the person taking the affidavit. It accordingly follows that the same position obtains in Kenya. As there is no such presumption in favour of documents made outside the commonwealth, it follows that the affidavit in the instant case which was taken in Napoli, Italy, has to be proved by affidavit or otherwise to have been taken by a Notary Public in Italy and that the signature and seal of attestation affixed thereto was that of such Notary Public. There is no such proof here. It may very well be that the certificates in Italian and the other writing in Italian was meant to do that. However, as there was no translation of the same into English-which is the official language of the High Court-this Court cannot and will not know the position. In the result, I find the verifying affidavit of Emile Viola inadmissible in evidence and I would order the same struck out of the record.”

8. The current provisions of **Section 88** of the **Evidence Act** still reflect the position outlined by Ringera J in the *Pastificio* case. They are as follows:

“88. Documents admissible in England.
When any document is produced before any court, purporting to be a document which, by the law in force for the time being in England, would be admissible in proof of any particular in any Court of Justice in England, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed—

(a)the court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims in such document; and
(b)the document shall be admissible for the same purpose for which it would be admissible in England.”

9. Regrettably so, the court has to deal with the issue of defective affidavits in the interlocutory stages of this matter repeatedly despite clear provisions of the law on affidavits. An affidavit must be properly commissioned or notarized if it is to be used in solemn proceedings of court. In respect of the impugned affidavit, there is not even a commissioner’s stamp or any other marks of the commissioner for oaths or notary on the *jurat* itself. Ordinarily in Kenyan practice such an affidavit is not commissioned and cannot be used in any court proceedings as commissioned affidavit would. Also, whatever documents are attached to it as evidence of notarization are unhelpful to this court, as the first one is in broken English and is unsigned by any person, whereas the second, one though appearing to be signed, is fully in Italian. The impugned affidavit of Pasquale Tirito dated 14th November 2025, clearly is defective, just as the plaintiffs have pointed out. Pasquale Tirito finds himself in the same position as the deponent in the *Pastificio case (supra)* and for the second time, and just like the case of the deponent in the *Pastificio case*, deserves to have his affidavit struck out for vital defects. To show the gravity the courts attach to affidavit evidence, that particular instance of a defective affidavit was not

the only one addressed in the *Pastificio* case. The court proceeded to state as follows in that case:

“The last matter of consideration is whether having ordered the verifying affidavit struck out, the suit should also be struck out. Sub rule (3) of rule 1 of order VII reads: “The Court may of its own motion or on the application of the defendant order to be struck out any plaint which does not comply with sub rule (2) of this rule.” To my mind, the use of the word “may shows the Court has discretion in the matter. In exercising such discretion, the Court should be alive to the principle of justice that procedural lapses, omissions and irregularities unless they go to the jurisdiction of the Court or prejudice the adversary in a fundamental respect which cannot be atoned for by an award of costs are not to be taken as nullifying the proceedings affected. In the instant matter, I am of the opinion that the filing of the defective verifying affidavit is such a procedural lapse. I am aware that this is the second such lapse but I am nonetheless prepared to grant the plaintiff the last chance to redeem its cases on terms I consider just to the defendant. In the result, I order the verifying affidavit of Emile Viola purportedly sworn in Napoli, Italy, on 5th April, 2001 struck out with liberty to the plaintiff to file a fresh and compliant affidavit within 21 days of today.”

10. I therefore strike out the affidavit of **Pasquale Tiritto** dated 14th November 2025 due to its defects.
11. However, I hardly think that the application dated 7/11/2025 is one that should be shooed past and granted as unopposed simply due to the striking out of the only document that would have afforded a response, especially due to the comprehensive directions given by court on 1/12/25 which do not accommodate the filing of any replacement affidavit by the 1st defendant, and the concerns over the excessive tarrying of these proceedings at the interlocutory stages, and the yearning that the main suit do proceed to the substantive hearing and disposal. Also, the rule in our jurisprudence as espoused in the oft quoted *Moi v Muriithi &*

- another [2014] KECA 642 (KLR)* is that regardless of the failure to file any defence in a suit, the claimant must nevertheless prove his claim to the required standard.
12. The second issue the court therefore needs examine is the issue of stay of proceedings sought in order to enable cross-examination in respect of the other affidavits. The prayer of stay of proceedings is, again, closely linked with the propriety of the other affidavits filed by Pasquale Tiritto but which this time round, were apparently sworn here in Kenya.
 13. The issue is also closely linked to the prayer for the admission of the Forensic Document Examiner's report dated 31st October 2025, commissioned by the plaintiffs, which states that the signatures on the questioned affidavits said to have been sworn by Pasquale Tiritto are not authored by him and bear no agreement or similarity to his known signatures. On a very preliminary basis therefore I need examine the merits of the issue of admitting the Forensic Document Examiner's report dated 31st October 2025 for it is intended to be relied on in discrediting the impugned affidavits.
 14. Ordinarily, a court ought to receive an expert report attached to an affidavit in support of a motion and rely on it with trust in the determination of the application. However, while Forensic Examination Reports are critical in determining the authenticity of documents, great care must be taken so that such vital reports are not unnecessarily called for in respect of documents for which

their purported authors are readily available and who continue to participate in the proceedings without querying those documents. The necessary question that arises is: by which compulsion, even under cross-examination, can this court obtain confession from the deponents that the signatures on the affidavits filed on their behalf by their own trusted legal counsel, are not theirs? The dictates of adversarial legal warfare demand that where litigants remain silent spectators or claim authorship as their opponents cast aspersions on the authenticity of the signatures attributed to them by their own filings, this court can not wade into the arena of conflict to compel them to express denial of those signatures. Perchance they are truly not theirs - and this court is not usually privy to what happens between advocate and client - it is obvious that there would really have to be a great disconnect between counsel and client for them to disown those documents. While the foregoing discourse accentuates the futility of challenging documents whose professed authors are present and owning up to having executed them, it also spotlights the opposite side of the coin: perchance the impugned signatures are truly not theirs today, the present acquiescence may in this very round world haunt them in the future with much grief and peril, where they may cry "*wolf*" in vain regarding similar signatures. Owing to what I have stated herein before, I admit the forensic report, as urged by the plaintiffs as part of the court record and in support of the application dated 7/11/2025, but with reservations stated.

The foregoing discourse suffices to dispose of the **prayer no 6** of the application. That prayer reads as follows:

“That the forensic document examiner’s report dated 31st October 2025 by Mr. Emmanuel Kenga, be deemed properly filed and admitted as evidence in support of this application.”

15. Back to the impugned affidavits, **Section 109** of the **Evidence Act** provides for the evidentiary burden of proof and states as follows: -

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

16. *Mumbi M’Nabea v David M.Wachira [2016] KECA 773 (KLR)* stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.”

17. It is noteworthy that they are said to have been sworn before Mr. Kangethe whose affidavit gives states that he commissioned the 1st Respondent’s two affidavits dated 10th April 2025 at his Malindi Office; that though he commissioned the aforesated affidavits while in his Malindi office on 10th April 2025 he used the stamp inscribed “*NAIROBI*” as he has one standard Commissioner for Oath's stamp that he uses whether he is in Malindi or in Nairobi since “*a Commissioner is NOT divisible geographically.*”

18. The face of the affidavits of Pasquale Tirito also seem to corroborate Mr Kangethe’s statements that commissioning was

done in Malindi. The same thing is stated by Mr. Sumba in his affidavit in reply to the application dated 7/11/2025. It has not been controverted by the plaintiffs that Mr Kangethe has legal chambers in Malindi. Mr. Sumba states as much and so do his clients in their replying affidavits.

19. I find that the Commissioner's stamp is not sufficient to establish where the affidavit was sworn. It is *more probable than not* - and as stated earlier, it is trite that this is the standard we apply in our legal jurisprudence to weigh the possible merits of a civil claim - for a Commissioner of Oaths to carry with him only one commissioning stamp wherever he goes and to commission documents away from the address borne by his commissioning stamp, and it is also inconceivable to have numerous commissioning stamp in a bag, one bearing the name and address in each of the towns in Kenya. One is at liberty to use the stamp they have at the moment of commissioning. That is exactly what Mr Kangethe states he did with respect of his commissioning of the 1st defendant's **2** impugned affidavits.

20. I think the address on the commissioner's stamp - and this court takes judicial notice that many stamps of that kind do not even bear the physical address but only the postal address - is only to identify his address by which he can be contacted in any eventuality. I am ready to accept Mr Kangethe's explanation.

21. The upshot of the foregoing discourse is that there would then be no need to have the 1st defendant, the swearer of the impugned

affidavits, cross-examined on the issue of venue of deposition, and neither would there be need to have Mr Kangethe, the commissioner, cross-examined. This court therefore declines the prayer for stay of proceedings pending cross-examination of Mr Tiritto and Mr Kangethe.

22. With respect to Mr Sumba's affidavit dated 29th October 2025, I find that the contents of the grounds in the application dated 7/11/25 and the contents of **paragraphs 7 and 8** of its supporting affidavit are insufficient to support issuance of summons for his cross-examination on the merits of his affidavit. Those paragraphs dwell only on his *locus standi* to depone to the matters therein, the more expeditious cure of which, if he has none, would be to apply for their striking out on that ground or for the expunging of the matters of factual substance in the case which Mr Sumba is not intimate with and can not swear to, a fact that the 4th plaintiff has recognized in his further affidavit in support of the present application dated 20/12/2025. No specific issue or content having been identified for the focus of cross examination; this court is unable to accede to the request for stay of proceedings pending his intended cross-examination. **Prayer no 4** of the application is granted only to the extent that only Mr. Pasquale Tiritto's affidavit dated 14/11/2025 is hereby struck out while the rest of his affidavits as well as Mr. Sumba's Affidavit dated 29/10/2025 remain on the record.

23. The second motion to be addressed is that dated **10/4/25** seeking orders striking out the 1st defendant from the suit and the vacating of interim orders granted in the suit. The orders were issued while the 1st defendant was still a party and so the issue of striking out commends itself as the starting point in determining that application.

24. The prayer for striking out is premised on two principal grounds as follows:

- *“That the 1st defendant’s applicant cannot suffer double jeopardy of being joined in the suit and proceedings herein yet every undertaking he made in the transactions, the subject of cause of action herein was purely in his capacity as a director of the 2nd defendant applicant and not in any other capacity.*
- *That the 2nd defendants /applicant being a person capable of suing and being sued, the 1st defendant applicant cannot again be joined in the suit as a party yet the lease agreements executed herein were purely between the 2nd defendant and the plaintiffs/respondents.”*

25. An examination of the response to the application dated 10/4/2025 may yield the answer as to why the 1st defendant should be retained as a party in the suit.

26. The response was originally by way of grounds of opposition dated 11th November 2025 which do not address the issue. This default is simply because they were filed before the application was orally amended by Mr Sumba on to state that the striking out was in respect of the 1st defendant and not the 2nd defendant. To cure the default, the plaintiffs later filed the sworn affidavit of **Elio Bisi** the 4th plaintiff, dated 20th December 2025.

27. The deponent Elio Bisi in that affidavit refers to the plaint in this suit and points out that prayers numbers 2, 3, 4, 6, 7, 9, 12 and 14 are directed at the 1st defendant. This court has perused that plaint and found that is the case. The plaintiffs excuse the joinder of the 1st defendant on the ground that a court of law cannot issue orders against a party who has not been brought before it hence the joinder of the 1st defendant is proper in order for him to be ordered not interfere with the plaintiff's quiet use and possession of their properties, to account for money physically corrected from the plaintiffs, and to provide ETR receipts for such money, to be further ordered to cease acting unilaterally as the property manager and allow for a registered and acceptable management company to take over the management in order to stop the deteriorating state of security he has allegedly weaponized against the plaintiffs. It is also stated that the 1st defendant has not shown how he stands to suffer in a prejudice if he remains as a party to the suit; it is pointed out that in any event, he did not deny their averments made by the interested party under oath in its application dated 23rd August 2024 in relation to his direct involvement in the affairs of the subject property, and that he is the one who manages the suit property in his personal capacity.
28. A suit can be struck out as against a defendant if there is no pleading made against it or prayers sought against it as in the recent case of *Malindi ELCLC NO. E146 OF 2018- Clifford George*

Rook Vs Ruth Nyawira Wambui & 10 Others where the court stated as follows:

“19. In the present case, if it was indeed necessary to join the 11th defendant there must have been facts that prompted the plaintiff to consider that joinder. Without pleading those facts against it, the further amended plaint is incomplete; it cannot aid the plaintiff in respect of his claim against 11th defendant. 20. Having regard to Order 10 Rule 10(1)(a), that further amended cannot be allowed to stand because it would otherwise render the 11th defendant to be a mere spectator in a case where he has been named as a defendant without requiring him to tender in the evidence to dispute any statement of fact leveled against him, as there is none, and waste much of his time. 21. I therefore find that the further amended plaint dated 7th March 2025, as drawn, has violated Order 10 Rule 1 of the Civil Procedure Rules and that the claim against the 11th defendant ought to be struck out, and it is hereby struck out with costs to the 11th defendant.”

29. It should be noted that it is not for a court to craft a pleading for a plaintiff and direct him on who to sue for whatever cause of action or who to strike out, and the issue of court's specific directions on joinder of certain parties occurs in situations of extreme necessity. In the present case the plaintiffs joined the 1st defendant from the inception of the suit and they appear to know and have pleaded and prayed, what they need of him. If this court were to order that the 1st defendant be struck out, it would be in effect ordering the plaintiffs to forfeit their claims against him which is improper in practice, and which may embarrass the process at the hearing stage. Having examined the magnitude of allegations and prayers made against the 1st defendant in the plaint, I find that he should not be struck out of the proceedings, but he should be retained in order for him to participate and

answer them the allegations made against him as well as the prayers. In any event, this court does not detect any prejudice in so retaining him as he still has to participate in these proceedings through his company which is the 2nd defendant, of which he is principal witness.

30. The last prayer to address in the application dated 10/4/2025 is that seeking that the interim orders granted on 27th February 2025 reinstating the orders given on 19th June 2025 be vacated, discharged or set aside. That prayer cannot be dealt in isolation in view of its relation to and the pendency of the application dated 8th May 2025 seeking an assortment of interim and mandatory orders as follows:

1. *THAT this application be certified urgent and heard ex-parte in the first instance.*
2. *THAT pending the hearing and final determination of the application herein the honourable court be pleased to issue an order against the 1st and 2nd and 3rd Defendant/ Respondents restraining them from selling, marketing for sale and or lease (short term or otherwise), leasing and or letting the Plaintiff/ Applicants' properties being Villa Numbers 5, 6, 11, 12, 13 and 14 (including the common areas, the Swimming Pool and Club House) and any other Villa constructed on Land Reference Number: Chembe/Kibabamshe/ 2091 being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 1114, being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 387.*
3. *THAT pending the hearing and final determination of the application herein the honourable court be pleased to issue an order against the 1st and 2nd and 3rd Defendant/ Respondents restraining them from interfering with the Plaintiff/ Applicants' (and or their employees, servants, agents, guests and or any person authorized by them) access, quiet use, occupation and possession of Villa Numbers 5, 6, 11, 12, 13 and 14 (including the common areas, the Swimming Pool and Club House) all*

constructed on Land Reference Number: Chembe/Kibabamshe/ 2091 being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 1114, being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 387.

4. THAT pending the hearing and final determination of the application herein the honourable court be pleased to issue an order against the 4th Defendant/ Respondent restraining him/ her from making any entries and or registering any instruments as against Land Reference Number: Chembe/Kibabamshe/ 2091 being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 1114, being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 387 the Order so issued being a halt on any and all dealings with the land upon which the Plaintiff/ Applicants' Villas are constructed.
5. THAT pending the hearing and final determination of the application herein the honourable court be pleased to issue an order against the 1st and 2nd and 3rd Defendant/ Respondents restraining them from using, and or permitting the use of any, villa (including the common areas, the Swimming Pool and Club House) constructed on Land Reference Number: Chembe/Kibabamshe/ 2091 being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 1114, being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 387 for any commercial use other than for residential and agricultural purposes.
6. THAT pending the hearing and final determination of the application herein the honourable court be pleased to order the 1st and 2nd Defendant/ Respondents to deposit in Court the Title Document (s) over any and all properties that are subdivisions of Land Reference Number: Chembe/Kibabamshe/ 387 being the Title document to the land upon which the Plaintiff/ Applicants' properties being Villa Numbers 5, 6, 11, 12, 13 and 14 (including the common areas, the Swimming Pool and Club House) are constructed.
7. THAT pending the hearing and determination of the suit herein, the 1st and 2nd defendant/ respondents be ordered by the Court to deliver to Court the Electronic Tax Register (ETR) issued Receipts for all the money received from the Plaintiffs (directly by the 1st and 2nd Defendants or by their appointed agents) being payments towards condominium fees/ service charge over Villa Numbers 5, 6, 11, 12, 13 and 14 for

maintenance of the common areas, the Swimming Pool and Club House.

- 8.** *THAT pending the hearing and final determination of the suit herein, the honorable court be pleased to order a Forensic Audit of all money collected from the Plaintiffs herein as condominium fees and or service charge by the 1st and 2nd Defendant/ Respondents and or their appointed Agents, which forensic auditor shall be agreed upon by the Plaintiffs and the 2nd Defendant, in the event that parties fail to agree, the Plaintiffs and 2nd Defendant shall propose auditors for the Court to appoint and the costs of the audit shall be borne proportionately by parties in the suit hereto in accordance to the number of Villas they own;*
- 9.** *THAT pending the hearing and determination of the suit herein, the honorable court be pleased to issue an order suspending the current property management company operating on Land Reference Number: Chembe/Kibabamshe/ 2091 being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 1114, being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 387 (Jacaranda Villas) and direct the Plaintiff/ Applicants and the 2nd Defendant/ Respondent to mutually agree (within 14 days of the Order being made) on a reputable property management company to maintain the common areas, the Swimming Pool and Club House and collect the service charge from all villa owners which service charge and or maintenance costs shall be apportioned equally to and paid by each villa owner of the villas erected on Land Reference Number: Chembe/Kibabamshe/ 2091 being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 1114, being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 387 (Jacaranda Villas);*
- 10.** *THAT in the event that the Plaintiff/ Applicants and the 2nd Defendant/ Respondent cannot agree on a reputable property management company for purposes of compliance with Order No. 8 hereabove, the Honorable Court be pleased to appoint a reputable property management company (from the names proposed by parties) to maintain the common areas, the Swimming Pool and Club House and collect the condominium fees and or service charge from all villa owners which service charge and or maintenance costs shall be apportioned equally to and paid by each villa owner of the villas*

erected on Land Reference Number: Chembe/Kibabamshe/ 2091 being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 1114, being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 387 (Jacaranda Villas);

- 11.** *THAT pending the hearing and final determination of the suit herein the honourable court be pleased to issue an order against the 1st and 2nd defendant/ respondents to deposit Kenya Shillings One Hundred and Twenty-Three Million (Kes. 123,000,000/-) in a joint interest earning account in the joint names of the Plaintiffs' Advocates and the 1st and 2nd Defendant/ Respondents (or their Advocates) within 3 days of the order having been issued by this honorable Court.*
- 12.** *THAT pending the hearing and final determination of the suit herein the honourable court be pleased to issue an order against the 1st and 2nd and 3rd Defendant/ Respondents restraining them from selling, marketing for sale and or lease (short term or otherwise), leasing and or letting the Plaintiff/ Applicants' properties being Villa Numbers 5, 6, 11, 12, 13 and 14 (including the common areas, the Swimming Pool and Club House) and any other Villa constructed on Land Reference Number: Chembe/Kibabamshe/ 2091 being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 1114, being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 387.*
- 13.** *THAT pending the hearing and final determination of the suit herein the honourable court be pleased to issue an order against the 1st and 2nd and 3rd Defendant/ Respondents restraining them from interfering with the Plaintiff/ Applicants' (and or their employees, servants, agents, guests and or any person authorized by them) access, quiet use, occupation and possession of Villa Numbers 5, 6, 11, 12, 13 and 14 (including the common areas, the Swimming Pool and Club House) all constructed on Land Reference Number: Chembe/Kibabamshe/ 2091 being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 1114, being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 387.*
- 14.** *THAT pending the hearing and final determination of the suit herein the Honourable Court be pleased to issue an order against the 4th Defendant/ Respondent restraining him/ her from making any entries and or registering any instruments as against Land Reference Number:*

Chembe/Kibabamshe/ 2091 being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 1114, being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 387 the Order so issued being a halt on any and all dealings with the land upon which the Plaintiff/ Applicants' Villas are constructed.

15. *THAT* pending the hearing and final determination of the suit herein the honourable court be pleased to issue an order against the 1st and 2nd and 3rd Defendant/ Respondents restraining them from using, and or permitting the use of any, villa (including the common areas, the Swimming Pool and Club House) constructed on Land Reference Number: Chembe/Kibabamshe/ 2091 being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 1114, being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 387 for any commercial use other than for residential and agricultural purposes.
16. *THAT* pending the hearing and final determination of the suit herein the honourable court be pleased to order the 1st and 2nd Defendant/ Respondents to deposit in Court the Title Document (s) over any and all properties that are subdivisions of Land Reference Number: Chembe/Kibabamshe/ 387 being the Title document to the land upon which the Plaintiff/ Applicants' properties being Villa Numbers 5, 6, 11, 12, 13 and 14 (including the common areas, the Swimming Pool and Club House) are constructed.
17. *THAT* pending the hearing and final determination of the suit herein the Honourable court be pleased to order the 4th Defendant/ Respondent to deliver to Court for scrutiny, the Land Record (Green Card, Deed and Parcel Files) over Land Reference Number: Chembe/Kibabamshe/ 2091 being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 1114, being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 387 being the land record over the land upon which the Plaintiff/ Applicants' properties being Villa Numbers 5, 6, 11, 12, 13 and 14 (including the common areas, the Swimming Pool and Club House) are constructed.
18. *THAT* the OCS Watamu Police Station and the OCS Kizingo Police Station ensure compliance with any Order issued by the Honorable Court.

1st Respondent's Reply To Motion Dated 8/5/2024

31. The application dated 8th May 2024 is opposed through the affidavit of **Pasquale Tiritto**, the 1st defendant, dated 10th April 2025, on the basis that the application does not meet the requirements of the law in that it neither establishes that the plaintiffs have any *prima facie* case nor that they may suffer irreparable damage; that the plaintiff's leases are intact and in the event they are any anomalies, the 4th defendant and by extension the 2nd defendant are ready and willing to make rectification; that no third party is laying any claim to the plaintiffs titles; that the plaintiffs are in occupation of the suit properties; that ownership of a freehold title by a foreign company cannot render the 2nd defendant's title illegal as the same would translate automatically into a 99 year lease, that the resultant 99 year lease cannot be invalidated; that no irreparable damage would be occasioned to the plaintiffs as the claim for damages if any can be paid by the 2nd defendant whose has an immense investments portfolio in Kenya; that under Article 65 (2) of the Constitution of Kenya any irregularity in the leases is not fatal to the acquisition of the suit premises. The provisions of **Article 65** are as follows; that pursuant to complaints by the plaintiffs, the 4th defendant agreed to rectify any anomalies that were existing in the plaintiff's titles and the rectification process was undertaken to near completion, only for the plaintiffs to file the present suit. It is deponed that the 2nd defendant is not intent on dispossessing the plaintiffs of their Villas, neither is there an adverse claim by any

third party over those same villas; that in the event that there was any defect on the titles, then the plaintiffs are also to blame because they were parties to the conveyance and had an advocate acting on their behalf, and the issues they are raising now ought to have been brought up at the preliminary stage of the agreement for sale under the principle of due diligence. Plot No Chembe/Kibabamshe/387 was in any case acquired by the 2nd defendant in 2007 before the promulgation of the Kenyan Constitution 2010 which brought about Article 65. For that reason, the title was automatically converted into a 99 years lease once the 2010 Kenya Constitution was promulgated; that Villas nos 2,3,4, 7, 8, 9, 10, 15 and 16 are owned by the 2nd defendant, who by virtue of ownership of title thereto has an unfettered right over them as per the terms set out in the subleases; that no villa owner has any supervisory right over the other as the plaintiffs executed their subleases within LR Chembe/Kibabamshe/1114 on the understanding the such other leases/houses are in existence, and would be sold and/or occupied by other third parties and/or the 2nd defendant.

The deponent avers on the basis of information provided by his advocate that prayers number **12 14 15 16 and 17** are illegal and cannot be granted in the face of Article 40 of the Constitution of Kenya; that it is illegal to deny the 2nd defendant the use of its property independent of the plaintiff's applicants titles; that the existence of the current interim orders impedes the 2nd

defendants from dealing or peacefully utilizing Villas number **2, 3, 4, 7, 8, 9, 10, 15 and 16** within LR Chembe/Kibabamshe/1114, and has occasioned the 2nd defendant immense loss as the construction of the villas were not for keeping by the 2nd defendant, but for sale and/or other related commercial ventures/opportunities; that the interim injunction orders have been in place; that the **prayers number 7,8, 9 and 10** of the application are in respect to service charge fees and dispute between the plaintiffs and the 2nd defendant which is subject to **Malindi ELC E053 of 2022**, now pending for arbitration, and cannot be subject to determination before this court; that the prayer **number 11** seeking deposit by the 1st and 2nd defendants of **Kenya Shillings 123,000,000/-**, the purported value of the plaintiffs' suit premises in court is without any justification at all; that it is a final prayer which should be granted only after the hearing of the main suit; also, the 2nd defendant would suffer double jeopardy if it deposited the said amount in a joint account yet the plaintiffs are still in occupation of the suit premises and are enjoying use and utilization of the same; the application does not therefore meet to the requirements of Order 40 of the Civil Procedure Rules and the principles set out in the case of **Giella Versus Cassman Brown 1973 EA 358** since especially the plaintiff has admitted, by seeking an award of damages, that there is no irreparable loss that would be occasioned to them; that an injunction order sought under the provisions of **Order 40**

of the Civil Procedure Rules cannot be granted in cases where the claim is liquidated the damages are quantified; that the claim that the 2nd plaintiff has never been registered as proprietor of villa number 5 does not concern the 2nd defendant since the 2nd plaintiff has an advocate who ought to have rectified such a mistake; that neither has the 2nd defendant been requested to execute any documents nor has it refused to do so in the interest of validating such a rectification; that title number LR Chembe/Kibabamshe/1114 is in existence and the plaintiffs' leases registered against it are subsisting; that **Malindi ELC Case Number E053 of 2022** is in respect of disputes of a service charge only regarding the suit premises and has nothing to do with proprietorship or ownership of leaseholds registered against the parcel number LR Chembe/Kibabamshe/1114; that the villas which were hired out by the 3rd defendant at the instance of the 1st and 2nd defendants belonged to the 2nd defendant; that it is within the 2nd defendant's constitutional rights and Article 40 of the Kenya constitution to have unimpeded right of ownership and use of the said villas; that however the arrangement between the 2nd defendant and the third parties for utilization of the villas was purely on a "bed only/single occupancy" which is not in contravention of the leases executed between the plaintiffs and the 2nd defendant; that these villas were acknowledged by the plaintiffs which villas the 2nd defendant has the right to sell occupy or use for its own purposes. The 2nd defendant denied any

immoral or illegal activities occurred on the land hosting the villas as alleged by the plaintiffs in **paragraph 17** of their supporting affidavit; that no fraud has been occasioned to the plaintiffs and no third party is claiming ownership of their properties. It is denied that the plaintiffs do not risk losing their properties; that no parcel of land known as Chembe/Kibabamshe/2091 in exists as alluded to by the supporting affidavit. He concludes that the application dated 8/5/2024 ought to be dismissed.

32. In summary therefore, the 1st and 2nd defendants' response is that

- (a) the plaintiffs have not established a prima facie case;*
- (b) In any event the plaintiffs are able to claim damages and would suffer no irreparable loss;*
- (c) Also, in any event the lease in favour of the 2nd defendant for the land on which the villas are erected would in law revert back to 99 years and there would be no loss;*
- (d) The 1st and 2nd and 4th defendants are able to resolve the problems that beleaguer the title to the land on which the villas are erected;*
- (e) That there is no third party claiming the plaintiff's villas;*
- (f) That in any event the plaintiffs advocate must be blamed for contribution for not having advised them against purchase of the villas, that he could not have done sufficient due diligence;*
- (g) That the plaintiffs impliedly agreed to the principle of co-existence with other villa owners when they purchased their villas;*
- (h) The 2nd defendant would be denied his right to utilize the properties in some of the villas not yet sold and lose business;*

The plaintiffs' further affidavit dated 22/10/25

33. The further affidavit of the 5th plaintiff (wrongly titled replying affidavit) dated 22nd October 2025 was filed in response to the affidavit of the 1st defendant analyzed here in above. The deponent pointed out the technical defects in the affidavit of the

1st defendant, but as I have already addressed the defects and made a determination on the same as herein above, I will not address the issue again.

34. Regarding the substance of the application, it is stated that the entire suit is based on the 1st and 2nd defendants' acts of *fraud in obtaining money from the plaintiffs under the misrepresentation that they were in a position to grant long term leases to the plaintiffs based on their freehold ownership of land in the Republic of Kenya*; that the leases to the plaintiffs are illegal and void *ab initio*, having been granted by an entity that could not own any absolute title to land in the Republic of Kenya, and who was *devoid of capacity to contract*, and whose ownership of freehold property contravenes the provisions of Article 65; that in a letter dated 6th December 2023, the *advocate formerly in conduct of the suit herein for the 1st and 2nd defendants admitted* that plot no **Chembe/Kibabamshe/1114** was subdivided and the portion which was leased to the plaintiffs is not identifiable, *no longer exists and cannot be identified on any cadastral map*; the green card of the said property having been closed, *the leases entered into by the parties registered against the said green card are now mere papers*; that the subdivision of plot number **Chembe/Kibabamshe/387** which gave rise to **Chembe/Kibabamshe/1114** was a mistake of law and fact and this court cannot rubber stamp an illegality; that consequently, the long-term leases on plot no **Chembe/Kibabamshe/1114** are

therefore null and void as the 2nd defendant lacked capacity to own and hold an interest in and or grant any long-term lease on freehold property, being land reference numbers **Chembe/Kibabamshe/387, Chembe/Kibabamshe/1113 Chembe/Kibabamshe/1114** and/or **Chembe/Kibabamshe/2091**. That the Land Registrar's powers of rectification are limited to rectifying errors mistakes or omissions that do not materially affect the interests of any proprietor and that cancellation of title material affect the interest of the register proprietor, and it is only the court under **Section 80(1)** of the Land Registration Act that has power to direct the cancellation of a registration; that there is no legal enforceable agreement between the plaintiffs and any of the defendants, the leases sought to be relied on having been executed by the plaintiffs and the 2nd defendant, which leases are admittedly null and void *as the subject matter no longer exists and is unidentifiable physically or in the records now held by the 4th defendant*; that it is only the 4th defendant who can present the land records or present before this court any document opposing and/or challenging the averments made as against the 4th defendant, and there being no opposition to the plaintiffs supporting affidavit dated 8th May 2024, the Plaintiffs' claim therefore satisfies all the principles in the established in **Giella Vs Cassman Brown Case**. It is stated, for example, *that if the deponent attempts to make a search for his villa and the land on*

*which it is located, he cannot get any results because it has ceased to exist; that the leases are in any event illegal in that the 2nd defendant purported to grant a lease over freehold property which property it cannot legally own for being a company owned by foreign individuals, a fact which has not been disputed. It is stated that a contract entered into by a party devoid of capacity to enter the said contract renders the same contract as unenforceable; that the 4th defendant, at the instruction of the 2nd defendant represented by the 1st defendant, interfered with the land records affecting the ownership of the plaintiffs' property and the 4th defendant has not denied **paragraph 15** of the plaintiff's supporting affidavit. (That paragraph states that the plaintiff's properties are now located on a new property registered as land reference number **Chembe/Kibabamshe/2091** title to which was issued to the 2nd defendant on 7th December 2022 after the green card of a land reference numbers **Chembe/Kibabamshe/1114** was closed.)* He has also not controverted the exhibits to the said paragraph; that though the 1st and 2nd defendants now at **paragraph 24** in their replying affidavit allege that **Chembe/Kibabamshe/2091** does not exist, they had earlier admitted the same in their advocate's letter dated **6th December 2023**. (A copy of that letter, written by Kimakia Magara, formerly advocates for the 1st and 2nd defendants, is exhibited as exhibit "ELD16" at page 182 of the application bundle.) The deponent states that the present

*application simply seeks to preserve the subject properties in their current state, protect the right to property as enshrined in the constitution until the plaintiffs are reimbursed the total value of the villas, so that new homes can be found and purchased, and to ensure that the 1st and the 2nd defendants stop harassing the plaintiffs and or interfering with their quiet use and possession of the villas; that the prayers in the application seek no more than that the 1st the 2nd defendants utilize the villas that are registered to them in the right manner which is as per **Clause 2.8** in the numerous leases issued to the plaintiffs; that other prayers in the said application seek information crucial to the hearing, and an order compelling the 1st and 2nd defendants to honour the covenants indicated at **Clauses 3** and **4** of the leases; that in any event, the 1st and 2nd defendants cannot suffer any prejudice from any orders being granted, which is why a consent order was entered into by all parties on **19th June 2024**, which orders are in force to date; that no prejudice has been established by the 1st and 2nd defendants; that the orders sought against the defendants are critical to preserve the rule of law and protect the plaintiffs from the defendant.*

Motions Dated 8/5/2024 And 10/4/2025 - Further Analysis and Determination

35. The plaintiff's case is that they purchased villas from the 2nd defendant on long term leasehold basis. The plaintiffs' case is that majority of the shares in the 2nd defendant company are

foreign owned. On **13th October 2016** the shareholding of the 2nd defendant changed; the Kenyan shareholding was abandoned and a company registered in Delaware in the United States replaced the only Kenyan shareholder, a Mr. Mwakilulu. The 1st defendant remained a director of the 2nd defendant alongside the US Company and has been running the affairs of the 2nd defendant.

36. The villas the plaintiffs purchased were then situate on plot no Chembe/Kibabamshe/1114. Plot no Chembe/Kibabamshe/1114 is a subdivision of plot Chembe/Kibabamshe/387. The leases, except the 2nd plaintiff's, were registered in the plaintiff's names at the land registry on various dates between 7th December 2016 and 14th December 2018. The lease on the 2nd plaintiff stated that his villa was on plot Chembe/Kibabamshe/1113 and not Chembe/Kibabamshe/1114. Unbeknownst to the plaintiffs, the 1st and 2nd defendants subdivided the land upon which their villas were located and extinguished the title to plot no Chembe/Kibabamshe/1114. The green card for plot no Chembe/Kibabamshe/1114 was closed. That rendered all leases registered over that title to be invalid; that the plaintiff's leases consequently became domiciled on plot no Chembe/Kibabamshe/2091, title of which was issued to the 2nd defendant on 7/12/2022. Further anomalies were discovered by the plaintiffs as follows: plot Chembe/Kibabamshe/387 was divided in breach of the law to yield inter alia, plot Chembe/Kibabamshe/1114. The Land Registrar not only effected

subdivision over an encumbered property but also effected registrations on a title without any supporting documents and failed to secure consents for subdivisions from the plaintiffs. Correspondence was exchanged between the advocates from both sides and the advocate for the defendants admitted to the irregularities in a letter dated 6/12/23 which termed the leases as null and void. The plaintiffs aver that owing to the activities of the defendants, they stand to lose their properties, currently valued at K.sh 123,000,000/= . It is stated that plot no Chembe/Kibabamshe/2091 upon which the plaintiffs' villas happen to be located has no encumbrance and may be disposed of by the defendants. The defendants being foreign, may leave the plaintiffs obstructed from obtaining justice if they move out of Kenya. It is also averred that the irregularities in the titles were discovered only after a case regarding service charge was filed, being case no **Malindi ELC No E053 of 2022**. The plaintiffs sought the following orders in the plaint:

- 1. THAT the Honourable court be pleased to issue an order declaring the long-term leases (as well as the contents and agreements contained therein) entered into between the Plaintiffs and the 2nd Defendant, dated 7th December 2016, 11th January 2017, 24th August 2017, 5th September 2017, 14th December 2018 and 14th December 2018 as frustrated, invalid, unenforceable, illegal, null and void.*
- 2. THAT the Honorable Court be pleased to Order the 1st and 2nd Defendants to deliver to Court the Electronic Tax Register (ETR) issued Receipts for all the money received from the Plaintiffs (directly by the 1st and 2nd Defendants or by their appointed agents) being payments towards condominium fees/ service charge over Villa Numbers 5, 6,*

11, 12, 13 and 14 for maintenance of the common areas, the Swimming Pool and Club House.

3. *THAT* the Honorable Court be pleased to Order a Forensic Audit of all money collected from the Plaintiffs herein as condominium fees and or service charge by the 1st and 2nd Defendant/ Respondents and or their appointed Agents, which forensic auditor shall be agreed upon by the Plaintiffs and the 2nd Defendant, in the event that parties fail to agree, the Plaintiffs and 2nd Defendant shall propose auditors for the Court to appoint and the costs of the audit shall be borne proportionately by parties in the suit hereto in accordance to the number of Villas they own;
4. *THAT* the Honorable Court be pleased to issue an order suspending the current property management company operating on Land Reference Number: Chembe/Kibabamshe/ 2091 being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 1114, being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 387 (Jacaranda Villas) and direct the Plaintiffs and the 2nd Defendant to mutually agree (within 14 days of the Order being made) on a reputable property management company to maintain the common areas, the Swimming Pool and Club House and collect the service charge from all villa owners which service charge and or maintenance costs shall be apportioned equally to and paid by each villa owner of the villas erected on Land Reference Number: Chembe/Kibabamshe/ 2091 being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 1114, being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 387 (Jacaranda Villas);
5. *THAT* in the event that the Plaintiffs and the 2nd Defendant cannot agree on a reputable property management company for purposes of compliance with Order No. 4 hereabove, the Honorable Court be pleased to appoint a reputable property management company (from the names proposed by parties) to maintain the common areas, the Swimming Pool and Club House and collect the condominium fees and or service charge from all villa owners which service charge and or maintenance costs shall be apportioned equally to and paid by each villa owner of the villas erected on Land Reference Number: Chembe/Kibabamshe/ 2091 being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 1114, being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 387 (Jacaranda Villas)

6. *THAT the Honorable Court be pleased to Order that any money collected by the 1st and 2nd Defendant as condominium fees/ service charge that was not applied to the maintenance of the common areas, the Swimming Pool and Club House and or is not evidenced by an Electronic Tax Register (ETR) Receipt from the service provider be reimbursed in full to the respective Plaintiffs through their Advocates;*
7. *THAT the Honourable Court be pleased to issue an order against the 1st and 2nd and 3rd Defendants restraining them from interfering with the Plaintiffs' (and or their employees, servants, agents, guests and or any person authorized by them) access, quiet use, occupation and possession of Villa Numbers 5, 6, 11, 12, 13 and 14 (including the common areas, the Swimming Pool and Club House) all constructed on Land Reference Number: Chembe/Kibabamshe/ 2091 being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 1114, being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 387.*
8. *THAT the Honourable Court be pleased to issue an order against the 4th Defendant restraining him/ her from making any entries and or registering any instruments as against Land Reference Number: Chembe/Kibabamshe/ 2091 being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 1114, being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 387 the Order so issued being a halt on any and all dealings with the land upon which the Plaintiffs' Villas are constructed.*
9. *THAT the Honourable court be pleased to issue an order against the 1st and 2nd and 3rd Defendants restraining them from using, and or permitting the use of any, villa (including the common areas, the Swimming Pool and Club House) constructed on Land Reference Number: Chembe/Kibabamshe/ 2091 being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 1114, being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 387 for any commercial use other than for residential and agricultural purposes.*
10. *THAT the Honourable court be pleased to order the 1st and 2nd Defendant to deposit in Court the Title Document over Land Reference Number: Chembe/Kibabamshe/ 2091 being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 1114, being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 387 being the Title document to the land upon which the Plaintiffs' properties being Villa Numbers 5, 6, 11, 12, 13 and 14*

(including the common areas, the Swimming Pool and Club House) are constructed.

- 11.** *THAT* the Honourable court be pleased to order the 4th Defendant to deliver to Court for scrutiny, the Land Record (Green Card, Deed and Parcel Files) over Land Reference Number: Chembe/Kibabamshe/ 2091 being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 1114, being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 387 being the land record over the land upon which the Plaintiffs' properties being Villa Numbers 5, 6, 11, 12, 13 and 14 (including the common areas, the Swimming Pool and Club House) are constructed.
- 12.** *THAT* the Honourable Court be pleased to issue an order against the 1st and 2nd Defendant to deposit Kenya Shillings One Hundred and Twenty-Three Million (Kes. 123, 000, 000/-) in a joint interest earning account in the joint names of the Plaintiffs' Advocates and the 1st and 2nd Defendants (or their Advocates) within 3 days of the order having been issued by this Honorable Court.
- 13.** *THAT* the Honourable Court be pleased to order and direct the 1st and 2nd Defendant to issue the 4th Plaintiff with a Certificate of Lease and or valid ownership documents for Villa No. 14 located on Land Reference Number: Chembe/Kibabamshe/ 2091 being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 1114, being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 387 within 7 days of the Order having been made and should the 1st and 2nd Defendants fail to do so then any Deputy Registrar in the Environment and Land Court, Malindi shall execute any document necessary to ensure that the 4th Plaintiff is issued with a valid Certificate of Lease over Villa No. 14 located on Land Reference Number: Chembe/Kibabamshe/ 2091 being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 1114, being a subdivision of Land Reference Number: Chembe/Kibabamshe/ 387.
- 14.** *THAT* the Honourable Court be pleased to order the 1st and 2nd Defendant jointly and or severally to pay the 1st, 2nd, 3rd, 5th, 6th and 7th Plaintiffs through their Advocates, Kenya Shillings Kenya Shillings One Hundred and one Million (Kes. 101, 000, 000/-) being the full current value of their Villas as valued and presented in the report by FAPCL Valuers Limited and particularized at paragraph 27. hereof, and if any money is held in a joint account in the names of parties' Counsel pursuant to an order of this Court, then

the said amount be released immediately to the Plaintiffs' Advocates with the instructions to transfer the funds held in the Joint Account being executed by all signatories within 3 days of the Judgement being delivered failure to which any Deputy Registrar of the Environment and Land Court Malindi can execute the instructions to transfer the money held in the Joint Account.

- 15.** *THAT upon grant of prayer number 14 hereabove, the Honorable Court be pleased to Order that the 1st, 2nd, 3rd, 5th, 6th and 7th Plaintiffs are granted sixty (60) days to hand over physical possession of Villa Numbers 5, 6, 11, 12, and 13 to the 2nd Defendant and time shall only start running upon the 1st and 2nd Defendant's full compliance with the Judgement of this Honorable Court as relayed in Orders 1 to 14 of the Plaint.*
- 16.** *THAT the Court be pleased to award the Plaintiffs interest on the amount stated in prayer number 14. hereabove at Court rates, to accrue from the date of Judgement until payment in full.*
- 17.** *THAT the OCS Watamu Police Station and the OCS Kizingo Police Station ensure compliance with any Order issued by the Honorable Court.*
- 18.** *THAT costs of the suit be awarded to the Plaintiffs with interest at Court Rates accruing to the same until payment in full.*

37. It is clear now that there are some prayers sought both in the application as well as in the Plaint. Prayers **number 7,8,9** and **10** have been sought in the final Plaint in the present suit and cannot therefore be granted in their application. Besides that, this court has perused the plaint in **Malindi ELC 53 OF 2022** where at **paragraph 6** it reads as follows:

"The first defendant has been charging and collecting from the plaintiffs the sum of euro 100 per month as service charge for the last five years. That despite collecting service charge the first defendant has never provided the plaintiffs with receipts, invoices and or statements (service charge records) related to the service charge. The first defined as similarly

never contacted an audit of the service charge account to ascertain if the plaintiffs and other villa owners have been over or under paying service charge. Since no records have been shared with the plaintiffs regarding service charge it is unclear whether all villa owners actually pay service charge. That the first defendant has never shared service charge records despite various requests by the plaintiffs."

38. Prayer **number c** in that suit reads as follows:

"A declaration that increasing service charge without conducting an audit of the service charge account with respect to the estate and without involving the plaintiffs is void."

39. Prayer **number d** in that suit reads as follows:

"An order compelling the first defendant to produce statements receipts and invoices with respect to expenses paid by the service charge collected from the plaintiffs and other villa owners of the estate."

40. It is clear that the matters contained in prayers **number 7,8,9, and 10** not only fall into the genre of prayers revolving around the category of service charge, but can be sought in the suit number **ELC Number 53 Of 2022**. In this court's considered view, whilst that older suit is pending, they may not be sought in the present suit whose dominant cause of action is title to property. It is for the plaintiffs to ensure that those prayers are moved to the proper forum being that suit. There being a suit preceding this one, and it being in relation to Service Charge relating to the same properties, prayers **7,8,9** and **10** cannot therefore be granted in the present application.

41. **Prayer No 12** relates to the maintenance of the *status quo* at the suit premises and is one of the prayers conceded to on 19/6/2024

by consent of the parties on an interim basis and extended by this court to the determination of the application dated 8/5/2024.

42. Prayers **Number 13** and **15** in the application are in respect of the use and enjoyment of the suit property by the plaintiffs are premised on the allegations that the terms of the contractual relationship between the plaintiffs and the first and second defendants do not allow the third defendant to hire out to villas not occupied by the plaintiffs as well as the amenities that is, the shared spaces, the swimming pool and the clubhouse on the development to tourists as an extension of Jumbo Resort Watamu; the plaintiffs disapprove of staff from the Resort as well as other third party strangers unknown to the plaintiffs having access to the entire development (*see paragraph 16 of their supporting affidavit of Elena Dardanelli dated 8th May 2024*). It has been stated that the grant of access to third party strangers and foreign tourists has caused insecurity, and there have been several incidents of theft that have left the plaintiffs worried for their safety and that of their families, and their belongings. Issues of morality have cropped up in the allegations by the deponent that the third defendant is accommodating same-sex couples on the development which is detrimental to the family settings and the residential purpose intended at the point of purchase contracted from the second defendant. It is claimed that the purpose for which Villas were contracted for has now been completely frustrated; that the area in which the villas are located

is zoned purely for agricultural and residential purposes and not for hotel purposes, which was clearly indicated on the plaintiff's leases and the zoning regulations in force. (*Paragraphs 16, 17, and 18 of the supporting affidavit.*) At **paragraph 21** of the supporting affidavit, it has been claimed that the plaintiffs have served a letter dated 6th December 2023 seeking and arrest of the allegedly illegal and immoral activities on the land upon which the applicants' villas are constructed which have been perpetuated by the commercial letting of the other villas by the third defendant with the permission of the second defendant. (*See Paragraph 21 of the affidavit in support*). These allegations were denied by the first and second defendants.

43. To investigate this matter, I have looked at the lease between the 2nd defendant and the 1st plaintiff, *Elena Dardanelli*, dated 1st July 2018. **Paragraph c** has the description of the premises on which the villas are built, as follows:

"...a piece of land residential premises known as Jacaranda Village containing 16 villas 1 swimming pool parking and gardens serving the same and other usual amenities hereinafter referred to as "the estate."

44. **Clauses 1.1 -1.3** of that lease provides for the usual common rights for the lessee, the lessees' servants, visitors and licensees: rights of ingress and egress and parking of motorized vehicles at designated areas, easements and quasi easements, lights off maintenance of is meant or services upon over or under the villas for the benefit of any other part of the estate, and rights to

execute repairs or other works that the lessor may consider necessary.

45. **Clause number 2.8** provides follows:

"Not to use or permit to be used the said villa for any purpose other than as a single private residence and not for any purpose or in any manner which may at any time be or become a nuisance or annoyance to the lessor or occupiers or any other villas in the estate."

46. **Clause number 2.10** states follows:

"Not to do or permit to be done in the said villa anything which may be a nuisance or may or can tend to the annoyance of the lessee or occupiers of any of the other villas in the estate."

47. **Clause number 2.11** states:

"Not to use the said villa or permitted to be used for any illegal immoral or improper purposes or which may be injurious to the reputation of the estate."

48. In his further affidavit dated 22nd October 2025 the fifth plaintiff, Roberto Merlo, stated follows

"That I am further informed by my advocate on record which information I'm verily believe to be true that the prayers in the application here to are only long owing to the change in lands records but simply seek that until the suit herein is determined, the first and second defendants utilize the villas that are registered to them in the right manner which is as per clause 2.8 of the numerous leases issued to the plaintiffs (see page 97 of an annexure "ELD6" on page 61)" it is true that this conditions are attached to all the leases and that the plaintiffs are entitled to quiet possession of their villas in observance of them. There is no doubt that the activities described by the plaintiffs in the paragraph of the supporting affidavit outlined hearing above are contrary these covenants in the leases."

49. These are clauses that purposely restrict the user of the villas on the suit land to a defined purpose, "residential" and "single private residence" which the plaintiffs are insisting should be

observed by the 1st and 2nd defendants. In other words what the plaintiffs are protesting is the hiring out of villas not occupied by the plaintiffs as well as the shared spaces, including the swimming pool and clubhouse on the development to tourists as an extension of Jumbo Resort Watamu.

50. It is inconceivable that any incompatible or inconsistent user was intended for the villas, which neighbour one another and are put together as an estate on a single parcel of land, and given a cherished name, "*Jacaranda Village*." The lease terms frown even on conduct that would adversely impact on the reputation of the estate! It is also inconceivable that some villa owners would be entitled to do things that amount to a nuisance to their neighbours, or to harass their neighbours and prevent their ingress and/or egress with regard to the suit villas.
51. It is axiomatic that the 1st and 2nd defendants, not having sold the remaining villas built within what is referred to as Jacaranda Village, they are bound to their own rules just as are the plaintiffs.
52. Consequently, to protect the purpose for which the villas were meant, the plaintiffs have sought prayers **number 13** and **15**. In this court's view those prayers do not seek to bar the defendants from anything other than that which is not encompassed in the leases that they themselves have prescribed for the plaintiffs. Figuratively speaking, the plaintiffs are of the view that if they are to drink water rather than wine, then so should the defendants who prescribed the water for them.

53. In this court's view, it is an issue for determination at the main suit as to whether inviting guests from Jumbo Resort to partake of the luxury of the villas and the subservient amenities, and the amount of liberty they are allowed while on the premises, amounts to "*residential*" and "*single private residence*" in "*the estate*." The inconveniences described by the plaintiffs seem to suggest that the two users may be incompatible. It is therefore proper that **prayers nos 13 and 15** in the application dated 8/5/2024 be granted to maintain the proper user pending the hearing and determination of the suit.
54. **Prayer number 14 16 and 17** relate to restraining order barring all dealings with the land on which the villas are constructed by the fourth defendant, (**prayer 14**) deposit of the title document of or properties resulting from the subdivision of plot number Chembe/Kibabamshe/387 by the first and second defendants (**prayer 16**) and delivery to court for scrutiny of the green card deed and parcel files by the fourth defendant (**prayer 17**) in respect of Chembe/Kibabamshe/2091, being one of those parcels.
55. These prayers arise from the claim that after the villas were sold to the plaintiffs the land on which they were situated (plot number Chembe/Kibabamshe/1114) was subdivided without their consent being sought, the original title was closed, to a new plot number Chembe/Kibabamshe/2091, which is to date subject to a great mystery as to whether or not it exists. Though the plaintiffs are not certain that plot number Chembe/Kibabamshe/ 2091 does or

does not exist, the first and second defendants appear to blow both hot and cold with the same mouth over the issue of its existence. The letter exhibited by the plaintiffs which emanates from the defendant's own former counsel on record in this matter appears to acknowledge that plot **number Chembe/Kibabamshe/2091** exists. The affidavit of the first and second defendants sworn by Pasquale Tiritto and dated 10/4/2025 is categorical that plot 2091 *does not exist* (see para 24 thereof), and it is the existence of that controversy that informs the seeking of a **prayer number 17** in the application. Roberto Merlo the deponent in the further affidavit of the Plaintiffs avers that even if he was to conduct a search today, it would not be possible to get a certificate official search showing that plot number **2091** exists. Though the defendants have not effectively rebutted that assertion and that leads this court to observe that it is not possible to resolve that issue without examining the court record of yet another piece of litigation, **Malindi ELC Number E079 Of 2014** in which the first and second defendants herein have sued the Land Registrar and 4 other persons over the mess surrounding plot number Chembe/Kibabamshe/2091. In that case it is pleaded by the plaintiffs therein that plot number 387 was subdivided into plot number Chembe/Kibabamshe/1113 and Chembe/Kibabamshe/1114 in November 2016. In March 2022, plot number Chembe/Kibabamshe/1114 was subdivided into **8** separate plots including plot Chembe/Kibabamshe/2091. That

plaint in that case is verified by the verifying affidavit of the first defendant as director of the second defendant. It is pleaded in that plaintiff that all the subdivisions of plot number Chembe/Kibabamshe/387 were cancelled due to irregularities, an acknowledgment which seems to support the Plaintiffs' claim that a certificate of official search cannot be obtained in respect of plot Chembe/Kibabamshe/2091 in the event one makes an application for the same. As the plaintiff's leases were registered against title to plot number Chembe/Kibabamshe/1114, it is not for this court, or even any person to presume that they are registered against the title plot number Chembe/Kibabamshe/387 which used to be the mother parcel for number 1114. It would appear to me that as prudent holders of leases whose host land's titles have been cancelled for irregularities, the plaintiffs are entitled to seek **Prayer number 17**, if only to clarify the position regarding the validity of their lease, whether they have been exterminated alongside the host title. **Prayer number 17** is there for deserved.

56. It has been established that the villas the plaintiffs bought having been rendered to be apparently not registered as against any title for now, seem like they hang in the air. I am persuaded that the plaintiffs herein risk irreparable loss. This is the kind of case that should go to full hearing so that the plaintiffs may know the ultimate fate of their leases sold to them by the 1st and 2nd defendants. This court, having considered all the affidavit evidence presented by the parties, is of the view that a *prima*

facie case has been presented by the plaintiffs in accordance with the principle in *Giella Vs Cassman Brown 1973 EA 358*.

57. Regarding deposit of titles, this court is not assured of the merits of **prayer number 16** seeking that the first and second respondents deposit all the title documents over any and all properties that are subdivisions of land reference **Number 387**, primarily because this court has not been shown that the deposit will serve any useful purpose. Besides, as stated by the defendants, the plaintiffs are still in occupation of the villas that were purportedly sold to them by the defendants, and a refund of the purchase price is sought in the final orders of the plaint, which will be granted in the event the plaintiffs prove their claim.
58. The 1st and 2nd defendants have also objected, and I agree with them, that the deposit of the funds sought in **prayer no 11** by the plaintiffs may subject them to double jeopardy as long as the plaintiffs are in occupation of the suit premises.
59. The prayers that were granted as an interim measure with regard to the application dated **8/5/24** were simply meant to preserve a **certain status quo** pending the final determination of that application. The final determination is in the present ruling. Arising from the foregoing discussion, the conclusion is that **prayer number 1** in the first and second defendants' application dated **10th April 2025** seeking to vacate those interim prayers application dated **8/5/24** cannot be granted as prayed. Instead, it is the grant or denial of some of the prayers in the application

dated **8/5/2024** that will determine the rights of a parties at this interlocutory stage and therefore the ultimate fate of all the applications dated, 8/5/2024, 7/11/25 and 10/4/25. The interim nature of the prayers that have been in existence will thus be rendered otiose and be substituted with final prayers as hereinunder that will carry to the end of the suit.

60. The upshot of the foregoing is that the application dated **8th May, 2024** has partial merit and I therefore make the following orders:

- a. The prayers in the application dated 7/11/2025 are granted only to the extent that the Forensic Document Examiner's Report dated 31st October 2025 by Mr. Emmanuel Kenga, is deemed properly filed and admitted as evidence in support of the application dated 7/11/2025 only;**
- b. The affidavit of Pasquale Tiritto dated 14th November 2025 is hereby struck out due to its defects;**
- c. The prayers nos 1, 2 and 3 in the application dated 10/4/2025 are declined;**
- d. Prayers number 12, 13, 14, 15 and 17 in the application dated 8/5/2024 are hereby granted as prayed save that shall in complying with the order no 17 herein above the 4th defendant shall be deemed to have complied with this order if he files in this court record and serves on all parties clear certified copies of the green card, deeds and instruments registered over title to parcel number 2091, if any;**
- e. The costs of the applications dated 7/11/2025, 10/4/2025 and 8/5/2024 shall be in the cause.**

- f. This suit shall be readied for hearing and shall be accorded a hearing date on a priority basis;**
- g. This matter shall be mentioned on 23/3/2026 alongside Malindi ELCLC E079 of 2024 and Malindi ELCLC E053 OF 2022 involving the same parties.**

Dated, signed and delivered at Malindi this 26th day of February, 2025.



**MWANGI NJOROGE
JUDGE, ELC, MALINDI**