REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELCLA/E043/2025

TAMU RAFIKI REAL ESTATE LIMITED……

APPELANT

VERSUS

BELEC VERONIQUE T/A CARIBOU KIJANI REAL ESTATE LIMITED……..RESPONDENT

(An appeal against the ruling issued and the orders made on 13 August.2025 by Hon. E. K. Usui, Chief Magistrate in Malindi Chief Magistrate's ELC Case No. E001 of 2025).

JUDGMENT

1. The Memorandum of Appeal dated August 14, 2025, outlines the grounds for appeal stemming from the ruling and orders of the Trial Court in **Malindi Chief**

Magistrate's ELC Case No. E001 of 2025 (Hon. E.K. Usui CM) as follows:

a) ***The learned magistrate misinterpreted the facts before her and decided the respondent's application dated July 7, 2025, because she believed the cause of action was a draft agreement for sale, when in fact the agreement before her had been executed by the parties on July 3, 2024.***
b) ***The learned Chief Magistrate delivered the ruling on the respondent's motion dated January 7, 2025, without thoroughly considering the facts, resulting in an erroneous and unreasonable(sic) decision.***
c) ***The Learned Chief Magistrate erred in law and fact by granting injunctions that effectively evicted the appellant from its own property.***
d) ***The learned Chief Magistrate made an error in law and fact by failing to conclude that the respondent refused to pay more than 50% of the purchase price for Villa Number 11A at Jua Resort, and thus was not entitled to the injunction orders.***
e) ***The learned Chief Magistrate erred both in law and fact by failing to find that the Respondent had not established a prima facie case.***
f) ***The learned Chief Magistrate erred in law and in fact by granting injunction orders against the second***

test in Giella v Cassman Brown and by failing to recognize that injunctions were not available because the respondent has an alternative claim to recover the deposit paid for Villa No. 11A at Jua Resort.

g) The learned Chief Magistrate erred in both law and fact by issuing injunction orders against the entire Jua Resort, which includes 12 villas, when the respondent's suit and application only related to Villa No. 11A.

h) The learned Chief Magistrate erred in law and fact by granting orders that the respondent did not request.

i) The learned Chief Magistrate erred in law and fact by granting injunction orders against the entire Jua Resort without hearing the owners of the other 11 villas or giving the Appellant and those villa owners prior notice that orders restraining use, entry, and occupation of the whole Jua Resort might be issued.

j) The learned Chief Magistrate made a legal and factual error by issuing a biased and unconstitutional ruling.

k) The learned Chief Magistrate made an error in law and fact by dismissing the appellant's application dated 22 January 2025 based on the grounds that

there was no certificate of the appellant's costs in Mombasa CM ELC No. 314 of 2024.

l) The learned Chief Magistrate made a legal and factual error by violating Article 40 of the Constitution of Kenya regarding the appellant's right to property and by issuing orders aimed at forcing the appellant to transfer its property to the respondent without receiving the purchase price.

m) The learned Chief Magistrate made an error in law and fact by failing to address the appellant's argument that the respondent's application lacked a supporting affidavit.

n) The learned Chief Magistrate made an error in law and fact by ordering the return of the respondent's movable or personal belongings, which the respondent had already collected.

o) The learned Chief Magistrate erred in law and fact by failing to determine that the respondent's plaint was verified with a false affidavit and that the affidavit was, in fact, not prepared by an advocate.

p) The learned Chief Magistrate made a legal and factual error by ignoring relevant factors and considering irrelevant ones.

2. The application is intended to request this honorable court for orders that:

a) The ruling issued on August 13, 2025, shall be completely overturned.

b) The appellant's Notice of Motion dated January 27, 2025, is granted as requested, and all proceedings in the Court below are stayed until the appellant's Costs in Mombasa CM's ELC Case No. E314 of 2024 is paid.

c) The respondent's Notice of Motion filed on January 7, 2025, should be dismissed with costs.

d) Costs of this appeal.

3. This matter coming up on September 25, 2025. The court issued the following orders and directions:

a) That, pending the hearing and determination of the current application, the defendant (now appellant) is hereby restrained from entering into, transferring, alienating, leasing, disposing of, charging, or handling in any manner all that property known as Villa No. 11, part of the residential complex called Jua Resort inside Rafiki Tamu Residence located in Watamu, Kenya, Jacaranda Road, Plot 2019 (Ex 1870) (one villa).

b) That the issues raised in the appeal are consistent with those raised in the pending application.

c) That, subject to the confirmation of the orders I issued in my earlier directions (which I hereby

confirm) and in the spirit of active case management (ACM), the appeal is hereby admitted.

d) That the record of appeal be filed and served within 14 days by the appellant, simultaneously with their written submissions.

e) That, after service, the respondents have 14 days to file their written submissions. That further mention is scheduled for November 5, 2025, to take directions on the taking of a judgment date.

4. It is noted from the record that on November 5th, 2025, the Court was not in session; a mention was scheduled for December 4th, 2025, when the matter was set for judgment. The parties' counsel, Ms. Muyaa and Mr. Olaha, representing the appellant and respondent, respectively, requested an additional 14 days to submit written arguments, and the judgment was scheduled for delivery on February 11th, 2026.

5. According to the record, due to work pressure, the judgment was not ready on the scheduled date. On March 19, 2026, while the court was still to deliver its decision, the judge was actively participating on a three-judge bench in Malindi. The judgment was then further scheduled for delivery today.

6. From the CTS, neither the appellant nor the respondents submitted any written arguments for consideration when preparing this judgment. The court will then rely on the record to prevent further delay, since the appeal stems from interlocutory proceedings and the main issues are still awaiting trial in the Lower Court.

7. After reviewing the appeal record and the Memorandum of Appeal dated August 14, 2025, the issues for this court's determination are whether the learned trial magistrate erred in disallowing the application dated January 27, 2025, which requested that all proceedings in the lower court be stayed until the appellant's costs in Mombasa CM's ELC Case No. E314 of 2024 is paid, and whether the learned magistrate erred in issuing the injunctive orders concerning the application dated January 7, 2025.

8. This being an interlocutory appeal, in Kenya, the principles guiding the 1st appellate court's intervention in a Lower Court's exercise of discretion are well established and mainly stem from the foundational case of **Mbogo & Another v Shah [1968] EA 93**. An appellate court will not overturn a lower court's discretionary decision merely

because it would have reached a different result; instead, it must be demonstrated that the discretion was exercised unfairly or incorrectly.

9. Madan, JA (as he then was), succinctly captured the principle in **United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] EA 898** as follows:

> "***The court of appeal will not interfere with the discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to various factors in the case. The court of appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account or fifthly, that his decision, albeit a discretionary one, is plainly wrong.***"

10. Regarding the request to stay proceedings until the payment of costs involving the same parties and subject

matter in Mombasa **CM's ELC Case No. E314 of 2024**, after reviewing the parties' submissions, the learned Magistrate concluded as follows:

> ***"It is not in dispute that initially the Plaintiff herein filed Mombasa CM ELC Case no E314 of 2024 but the same was later withdrawn and the instant suit preferred before this court. From the sentiments shared by the parties herein, the suit was withdrawn as a matter of territorial jurisdiction based on the location of the suit property subject of the proceedings herein. Upon withdrawal of the suit, the Defendants seek for costs of Kshs 407,153/-, which they state ought to be paid before the suit herein proceeds and thus the application for stay of proceedings. The power to grant stay of proceedings is an exercise of the discretion of the Court on sufficient cause being shown by an Applicant. Therefore, the test in deciding whether or not to grant a stay of proceedings as sought in this application is whether the Applicant has established sufficient cause to the satisfaction of the court, that it is in the interest of justice to grant the orders sought. In determining the foregoing, the court will first interrogate the process of recovering costs from a party after the suit is disposed. Parties are***

referred to the provisions of Order 25 Rule 3 of the Civil Procedure Rules. The court notes that the defendant has not demonstrated the process undertaken towards the recovery of the alleged costs other than the alleged bill of costs which in my humble view is yet to be taxed, the court is yet to come across the certificate of costs if any was ever issued. In any event there is no written rule that a party is barred from proceeding with a separate suit before settling costs in a previous suit. Litigation over the ownership of the suit property is entirely different from costs sought in the withdrawn suit. I find the applicant has not demonstrated sufficient and satisfactory reasons why the instant proceedings should be stayed."

11. As can be seen, the former suit was withdrawn due to territorial jurisdiction challenges, leading to the filing of this one. I see no grounds for staying proceedings pending the payment of the taxed bill, if any. As correctly noted by the learned Magistrate, it would be impeding justice to ask parties to settle bills of costs before pursuing their matters when the Advocates Remuneration Order (which provides the manner on how to tax bills), the Civil Procedure Act (Part III Section 28 to 51), and the Civil Procedure Rules

(Order 21) expressly provide on how to recover and execute decrees, including the recovery of taxed costs. I do not fault the findings and conclusions made by the learned Magistrate and hold that she properly guided herself in dismissing the application dated January 27, 2025.

12. On the issuance of injunctive orders, after considering the parties' affidavits, the learned Magistrate arrived at the following conclusions:

> ***“I am guided further by the holding in the case of Amir Suleiman Vs 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." Consequently, “I am convinced that there is a lower risk in granting restraining orders than not granting them pending the hearing and determination of the suit on merit. The upshot is that the application dated 7/1/2025 is hereby allowed as follows; -***
>
> ***1. That the honourable court be and is hereby pleased to grant an order restraining the defendant by***

themselves, their servants and/or agents or whomsoever from entering into, transferring, auctioning, leasing, selling, disposing, charging or handling in any other manner all that property known as Jua Resort inside Rafiki Tamu residential located in Watamu Kenya Jacaranda Road, Plot 2019[ex 1870] [pending hearing and determination of this suit.

2. The honourable court be and is hereby pleased to grant an order against the defendant, that the defendant do forthwith return ALL the plaintiffs personal belongings which were removed from the suit property villa marked no 11A part of the residential complex called Jua Resort inside Rafiki Tamu residential located in Watamu Kenya Jacaranda Road, Plot 2019[ex 1870] in the Plaintiff's absence in their original condition [without damage] pending hearing and determination of this suit."

13. The principles for the issuance of interlocutory injunctions were articulated in the well-known case of **Giella v Cassman Brown & Company Limited [1973] EA 358**, reiterated in **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR**, where the Court of Appeal held that:

"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) establishes his case only at a prima facie level,

(b) demonstrates irreparable injury if a temporary injunction is not granted, and

(c) allay any doubts as to b, by showing that the balance of convenience is in his favour.

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 steps are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially."

14. A *prima facie* case is defined in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**, where the Court of Appeal held as follows:

"The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show 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 adequately be

compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience...A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true that the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms "prima facie" case, and "genuine and arguable" case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words "prima facie" are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant's interest to adopt a

genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two...In civil cases a prima facie case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

15. In arriving at the orders, which can be termed as preservation orders, the learned Magistrate evaluated the evidence and averments by the parties as follows:

"The Plaintiffs have produced before court a copy of the payment receipts for part of the purchase price to the suit property in evidence of her intended purchase and subsequent ownership. As alleged, the property is indeed registered in the names of the Defendant who communicated their intention to sale the same. The Plaintiff has also produced copies of her registration

for a pin certificate for tax purposes and the registration of her company which she purchased the property though, all these steps point towards her intentions to secure the property in her names. It is also noted that the Plaintiff had already been allowed occupation of the property before the fallout and eviction. No evidence was tendered by the defendants to refute all the above processes by the Plaintiff and her intent. The court is convinced that a prima facie case has been established. As to whether the Applicant is bound to suffer irreparable damage and loss in the event that the orders sought are not granted, I first wish quote another decided case; Robert Mugo Wa Karanja Vs Ecobank (Kenya) Limited & Another [2019] eKLR, where the court stated;

"*circumstances consideration before granting a temporary injunction under order40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts...*"

The Applicant is apprehensive that, in the event that the Defendant's actions are not stopped, they are probably going to lose the property. I have seen the draft sale agreement that has been relied upon by both parties. The property was indeed being sold to the applicant despite the fact that the sale was yet to be finalised. The defendants have not refuted receiving the money for the sale or being part of the agreement. The aspect of evicting the Plaintiff and withholding her property has further not been disputed. I believe that the second threshold for grant of the orders sought has been made. It is imperative of the court to protect the applicant from loss and to further preserve the suit property pending the hearing and determination of the suit. From the foregoing, the balance of convenience automatically tilts towards the applicant. The case of Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) EKLR defined the concept of balance of convenience as: 'The meaning of balance of convenience will favour of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of

convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer. In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting."

16. Applying the principles for granting an injunction, the learned Magistrate, noticing that there was a sales agreement between the parties and that the applicant (respondent here) had substantially paid the purchase price, and that the respondent (appellant here) placed the applicant (respondent here) in possession pending its completion, believed it was appropriate to preserve the suit property as she did, pending the hearing and resolution of the case. I do not think, based on the materials presented to her and after evaluating what was before her, that she erred in ordering the preservation and safeguarding of the substratum of the suit property pending the final disposal of the suit.

17. The only issue raised in this appeal worth considering is that the learned Magistrate issued injunctive orders covering the entire Jua Resort without hearing the owners of the other 11 villas or giving the appellant and those villa owners prior notice that orders restraining use, entry, and occupation of the whole Jua Resort might be issued.

18. For this, the learned Magistrate made an error, and the record should be corrected to protect the interests of both the appellant and the respondent regarding what needs to be preserved pending appeal.

19. Regarding the return of the goods and personal effects confiscated from the respondent, the learned Magistrate made a finding that:

> ***"It is also noted that immediately the Applicant was informed of the eviction and the state of her belongings, efforts were made to report the matter to the police, and in the company of one of the officers, she set out to recover her belongings. The applicant stated that she was however denied access to the property and recovery of her property. It is unjust in the courts view, for the defendants to now lay claim for storage fees of the applicant's belongings given that a claim for the same was made way before they were***

stored in whichever place they are in. The same amounts to unjust enrichment. The court in the interest of justice will order for release of the same forthwith. The court will however not grant orders for refund of the Kshs 10,000/- as sought, the same ought to be determined after substantive hearing of both parties and evidence of the said loss alluded to which was not placed before this court."

20. I do not think that the learned Magistrate misdirected herself on this point, considering that the eviction of the respondent was carried out without notice; any penalty charges will remain unlawful and, as she found, constitute unjust enrichment.

21. The appeal will then partially succeed, and the ruling and final orders issued by the learned Magistrate will be modified to this extent, and these will then be the final orders regarding the two applications:

a) The dismissal of the application dated January 27, 2025, on the stay of proceedings pending the settlement of costs is hereby upheld.

b) That the final orders issued on August 13, 2025, concerning the application dated January 7, 2025, by the learned Magistrate, are hereby varied to the

extent that, pending the hearing and determination of the main suit, the defendant (now appellant) is hereby restrained from entering into, transferring, alienating, leasing, disposing of, charging, or handling in any manner all that property known as Villa No. 11, part of the residential complex called Jua Resort inside Rafiki Tamu Residence located in Watamu, Kenya, Jacaranda Road, Plot 2019 (Ex 1870) (one villa).

c) The court orders the defendant (appellant) to promptly return all of the plaintiff's (respondent's) personal belongings taken from Villa No. 11A at Jua Resort, Rafiki Tamu, Watamu, Kenya, Jacaranda Road, Plot 2019 [ex 1870], in original condition without damage, pending the suit's hearing and determination. These orders are thus confirmed.

d) Since the appeal partially succeeded, there will be no order as to costs concerning the current appeal.

e) The matter before the Lower Court be fast-tracked for hearing and final disposal.

Dated, signed, and electronically delivered in Nyeri on this 9th day of April, 2026.

E. K. MAKORI

JUDGE

In the presence of:

Ms. Muyaa for the Appellant

Mr. Olaha for the Respondent

Kendi: Court Assistant