



**Sahal Agro Holding Limited v Agricultural Development Corporation & 2 others (Environment & Land Case E036 of 2023) [2024] KEELC 1204 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1204 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE E036 OF 2023  
EK MAKORI, J  
FEBRUARY 22, 2024**

**BETWEEN**

**SAHAL AGRO HOLDING LIMITED ..... PLAINTIFF**

**AND**

**AGRICULTURAL DEVELOPMENT CORPORATION ..... 1<sup>ST</sup> DEFENDANT**

**MOHAMED BULLE ..... 2<sup>ND</sup> DEFENDANT**

**MOMBASA CEMENT LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. There are three applications for the consideration of this Court that were directed to be heard simultaneously. There is the Preliminary Objection dated 16<sup>th</sup> November 2023, the plaintiff's Notice of Motion dated 25<sup>th</sup> October 2023, and Contempt Proceedings dated 29<sup>th</sup> November 2023. Counsels filed written submissions and highlighted the same orally before this Court.
2. Regarding the 1<sup>st</sup> and 2<sup>nd</sup> defendants Preliminary Objection, the main point of contention is that the case is essentially the same as Malindi ELC No. 101 of 2023 Sahal Agro Holdings Ltd v. Agricultural Development Co-corporation, which violates the sub judice doctrine established by Section 6 of the *Civil Procedure Act*. This is because the interrogations in question here are directly and substantially in dispute before this Court as they were in the previous one.
3. The 1<sup>st</sup> and 2<sup>nd</sup> defendants aver that the 1<sup>st</sup> defendant is the legitimate owner of the suit land known as Galana Ranch/Block 1 measuring 1.7 million acres. In the year 2010, Agricultural Development Corporation and Sahal Agro-Holdings Limited executed a Lease Agreement over a portion of all that land known as Galana Ranch/Block 1/1. Despite being executed by the necessary parties, the Lease was never registered during its pendency by the laws relating to the registration of instruments. It was a term of the Lease that Agricultural Development Corporation (the Lessor) would lease 100,000 acres of the subject land to Sahal Agro-Holdings Limited (the Lessee) for 16 years and that the Lessee would



- pay consideration as tabulated in the lease agreement under clause 2 and 3. It was also a term of the Lease under clause 5.1.24 that in the event of breach and non-performance or non-observance by the Lessee of any covenants, agreements, conditions, restrictions, stipulations, or provisions of the lease, the Lessor should in the first instance provide notice identifying the breach complained of and give the Lessee 3 months to rectify the same failure to which the Lessor shall take any or further steps legally deemed necessary to secure its interests.
4. It is further argued by the 1<sup>st</sup> and 2<sup>nd</sup> defendants that when the Lessee violated the terms of the Lease by failing to execute any developments on the subject property and subsequently falling into arrears, the Lessor took necessary steps following the executed Lease Agreement and terminated the same. The plaintiff herein (Sahal Agro-Holdings Limited) filed Nairobi ELC Case No. 158 of 2013 against the 1<sup>st</sup> defendant herein (Agricultural Development Corporation) seeking to prevent it from enforcing its property rights.
  5. The 1<sup>st</sup> defendant herein, in its reply challenging the jurisdiction of the Court, pointed out the contents of Clause 8 of the Lease Agreement dated 28th September 2010, which provided for Arbitration and stipulated that any disputes would be determined through Arbitration. Concurrently, Advocates for the 1<sup>st</sup> defendant herein, wrote to the Chartered Institute of Arbitrators - Kenya, declaring the dispute and requesting an Arbitrator to be appointed in the matter. In effect, the Late Justice (Rtd) Benjamin P. Kubo accepted the nomination to serve as the sole Arbitrator.
  6. In Nairobi ELC Case No. 158 of 2013, the plaintiff therein (Sahal Agro-Holdings Limited), was granted ex-parte injunctive orders stopping the defendant therein (Agricultural Development Corporation), from evicting it from the subject property although the plaintiff had never taken possession. This prompted the defendant therein (Agricultural Development Corporation) to file a Notice of Motion application dated 25th February 2013 seeking to have the ex-parte interim orders lifted. Waweru J. (now retired) through a ruling delivered on the 6<sup>th</sup> of June 2013, transferred the matter to the High Court of Malindi. Upon transfer of the subject file to Malindi, the Court did not extend the injunctive orders. At this point, and even up to date, Sahal Agro-Holdings has not taken possession of the subject property.
  7. The matter was late to be mentioned before Angote J. on 27<sup>th</sup> August 2013, parties by consent transferred the matter to Arbitration, with the Court ordering that the status quo as of 27<sup>th</sup> August 2013 be maintained pending the Arbitration proceedings. It is submitted that the status quo at the time was that the Lease had been terminated and that Sahal Agro-Holdings had not taken possession. According to the 1<sup>st</sup> and 2<sup>nd</sup> defendants, this remains the position to date.
  8. In the meantime, parties attempted to settle the matter out of Court and it was agreed that the case would be withdrawn subject to payment of all the arrears by the plaintiff. Sahal Agro-Holding, being the aggrieved party, according to the Lease termination, did not take any steps to prosecute their claim until 2023 when they filed a new suit and application both dated 25<sup>th</sup> October 2023.
  9. The 1<sup>st</sup> defendant invites this Court to find that the suit and application filed by the plaintiff are improper as they are sub judice because the questions in issue here, are directly and substantially in issue in Malindi ELC Case No. 101 of 2013 between the plaintiff and 1<sup>st</sup> defendant herein. The 1<sup>st</sup> and 2<sup>nd</sup> defendants rely on Section 6 of the [Civil Procedure Act](#), Cap 21, Laws of Kenya.
  10. The 1<sup>st</sup> and 2<sup>nd</sup> defendants submit that the law on sub judice has been substantially addressed and settled in this country. The Supreme Court of Kenya in Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [202] eKLR) explained the term ‘sub-judice’ as defined in Black’s Law Dictionary 9th Edition as:



“Before the Court or Judge for determination.” Its purpose is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

11. The 1<sup>st</sup> and 2<sup>nd</sup> defendants are of the view that as demonstrated, there exists an active case between the parties, dealing with the same subject matter, seeking the same reliefs and that matter is yet to be concluded. The matters are completely related, and the Lease in dispute is the same in black and white and is the subject of the case filed in 2013.
12. The 1<sup>st</sup> and 2<sup>nd</sup> defendants believe that the conditions herein demonstrate what a Preliminary Objection entails as laid out in the case of Mukisa Biscuits Manufacturing Ltd v West End Distributors [1969] EA 696.
13. The 1<sup>st</sup> and 2<sup>nd</sup> defendants aver that the letters dated 4<sup>th</sup> June 2021 and 19<sup>th</sup> November 2020 and marked AMH3 & AMH4 in the plaintiff's replying affidavit, did not abate the proceeding in Malindi ELC Case No.101 of 2013 yet there is no evidence of withdrawal of the matter. The plaintiff, in this case, has approached this Court with ill motives and is bent on abusing the Court process. The Letters which were the subject of an attempt to settle the case in Malindi ELC Case No.101 Of 2013 were conditional that the plaintiff was to settle all outstanding arrears of Kshs. 24,200,000/=; the case was to be withdrawn once the payments had been made. Once the conditions had been met then the parties would agree on the issue of the Lease which had been terminated.
14. The 1<sup>st</sup> and 2<sup>nd</sup> defendants maintain that to date no conditions have been met and hence the plaintiff cannot circumvent the law by trying to use tactics and unfounded claims. What the plaintiff has deliberately refused to point out is that the orders granted by this Court were based on non-disclosure and misinterpretation of material facts with an intent to mislead this Court into believing that the plaintiff has the subject suit land and yet there is an active dispute on a Lease that had long ago been terminated. It is also erroneous for the plaintiff to suggest that this Court should prohibit the 1<sup>st</sup> defendants from pursuing any claim under ELC Case No. 101 of 2013.
15. The 1<sup>st</sup> and 2<sup>nd</sup> defendants further state that this Court should find that it does not have jurisdiction given the pending suit and calls for the downing of tools for want of jurisdiction by this Court as held in the Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR
16. The 3<sup>rd</sup> defendant supports the Preliminary Objection and in addition avers that the plaintiff came to Court with unclean hands and failed to disclose that there existed another suit similar to this one which amounts to abuse of the Court process. Material non-disclosure is fatal to a case significantly when one is seeking an equitable remedy as in this case. An injunction ought to be denied under the maxim: ‘he who comes to equity must come with clean hands.’
17. The 3<sup>rd</sup> defendant cited the following judicial decisions in support of its assertion - Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties [2020] eKLR and Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others [2009] eKLR 229.



18. The plaintiff on the other hand opposed the Preliminary objection and contended that the two fronts raised by the 1<sup>st</sup> and 2<sup>nd</sup> defendants that the current suit is similar to ELC case No. 101 of 2013 and is still pending arbitration is under a false narrative. From the prayers in the former suit, the plaintiff was trying to protect a lease agreement that they had entered which was being illegally terminated. The said lease has now been registered after arbitration and by the conduct of the parties, the former suit was abandoned. The current suit is dealing with a lease that is properly registered and the 1<sup>st</sup> defendant wants to deprive the plaintiff of ownership and proprietary rights to use the suit land which is contrary to Article 40 of *the Constitution* and Section 24(b) of the *Land Registration Act*.
19. The plaintiff states that the foregoing analysis is a clear unequivocal demonstration that the issues in the two cases are not the same. The 3<sup>rd</sup> defendant has no locus in matters arising from the earlier case, it is not a party thereto and there is no privity of contract between the 3<sup>rd</sup> defendant and the plaintiff. At best its submissions on issues or matters of this previous suit are at best, hearsay.
20. The plaintiff asserts that the defendants have distorted and misconstrued the circumstances pleaded by the plaintiff in this new suit to the extent that they have refused to admit there is trespass or even distinguish the cause of action in the two suits. The plaintiff's claim is founded on trespass for which the plaintiff has sought injunctive relief. The law of trespass is based on violating the plaintiff's right to property. The ownership issue is not in dispute, the subject matter of the illegal termination and deprivation of property as pleaded in Malindi ELC. Case No. 101 of 2013 was overtaken by events instigated jointly by the parties themselves in a settlement out of court.
21. The plaintiff proceeds to state that it does not make sense one day for the 1<sup>st</sup> defendant to issue a termination notice and to follow it up on another day by giving out the lease for registration unless the parties had a meeting of minds, at which the 3<sup>rd</sup> defendant was not present. Failure to bring the old suit to an end is not fatal and it is up to the Courts to deal with a dormant suit in the normal manner, 2013 to 2023 are ten good years. The 1<sup>st</sup> and 2<sup>nd</sup> defendants for the obvious reason that they had decided not to pursue the matter, and justifiably so failed to prosecute the same.
22. On the authorities relied by the 1<sup>st</sup> and 2<sup>nd</sup> defendants the plaintiff submits that the decision by the Supreme Court of Kenya in the Kenya National Commission on Human Rights v Attorney General; IEBC and 16 Others [2020] eKLR is inapplicable as the plaintiff's case before this Court is distinct and separate from the cause of action or rights that were in issue in Malindi ELC. Case No. 101 of 2013. In the same breath, the distinction and difference herein also disqualify the applicability of the case of Shree Builders Limited v Barasa Alex Tabulo & Another [2016] eKLR. The plaintiff in the instant case is not seeking to prevent the invalidation of the lease illegally (as in the former suit), but the plaintiff is seeking to enforce its right to quiet possession free from interference by trespassers such as the 3<sup>rd</sup> defendant abetted by the 1<sup>st</sup> and 2<sup>nd</sup> defendant. The other cases submitted and relied on by the 3<sup>rd</sup> defendant are inapplicable for the mere reason that the subject matter, issues, or cause of action are not the same. Similar prayers, as alleged by the defendants do not make the subject matter, issues, or cause of action the same. Injunctive reliefs are applied daily in Court to all kinds of situations.
23. The plaintiff takes issue that there are several allegations posited by the 1<sup>st</sup> defendant that do not posit 'pure points of law' but will require a trial. The 1<sup>st</sup> defendant has at paragraph (h) of their submissions on page 7 set a scenario that is totally untrue and factually not supported by any evidence. It is submitted that the said letters copies of which are annexed in the plaintiff's affidavit dated 16<sup>th</sup> December, 2023, unequivocally communicated the 1<sup>st</sup> defendant's stance and decision on the said suit Malindi ELC Cause No. 101 of 2013. In compliance with the terms plaintiff was issued the Lease and supporting plans for registration and registration was effected on 19<sup>th</sup> May 2021 as seen in the copy of the 1<sup>st</sup>



- defendant's title Galana Ranch Block 1/1 and the accompanying Official Search Certificate which are annexed to the plaintiff's affidavit dated 25<sup>th</sup> October 2023.
24. Plaintiff states that the 1<sup>st</sup> defendant has submitted in paragraph (l) that there is malice, misconception, and abuse of the Court process giving rise to innuendos and rumors. These are issues that are strange allegations, without proof, are contentious in the least and cannot be points of law or support a claim to the 1<sup>st</sup> defendant's objection being based on pure points of law. Their inclusion is only intended to vex and annoy the plaintiff.
  25. That the Filing of the Bundle of documents by 1<sup>st</sup> and 2<sup>nd</sup> defendants demonstrates there is "no point of law" and within the said bundle there is material non-disclosure of the fact that the Lease is registered, a clear reading of the Lease at paragraph 8 and 9 provided for Arbitration of disputes and also specifically stated that jurisdiction of the Courts was not ousted. The Arbitration as noted from the proceedings did not move far and eventually, the appointed Arbitrator, the late Justice (Retired) B. Kubo is reported as deceased. No record of Arbitration proceedings has been exhibited in any Court to prove the same is ongoing. According to the plaintiff, the foregoing are highly contentious issues requiring the Court to delve into the same by way of trial. Taken together this collapsed the substratum, or better still, the subject matter of the Malindi ELC Case No. 101 of 2013 and that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are merely belabouring to flog a dead horse.
  26. On allegations of fraudulent registration of the Lease, the plaintiff avow that the 1<sup>st</sup> defendant in an affidavit sworn on 16<sup>th</sup> January 2024 in response to contempt proceedings has cunningly, and as an afterthought deponed that the Lease of 2021 was registered illegally and fraudulently and without their consent and yet there is no provision for them to consent to registration of their own lease. There are no particulars of illegality or fraud given and lastly, the documents were officially given to the plaintiff to register after the plaintiff met the requisite conditions. It is submitted that the 1<sup>st</sup> defendant has not filed any other pleadings alleging illegalities and fraud upon which such claim is founded and has further not pleaded any particulars of such illegality or fraud nor brought any evidence of how such illegality and fraud were allegedly perpetrated. The case of *Westmont (Kenya) Limited v Westmont (Kenya) Limited* [2003] is cited to support the position that there must be particularity in the defendant's allegations. A general allegation of fraud or illegality is not sufficient to infer liability on the part of those who are said to have committed it.
  27. The plaintiff asserts that the 1<sup>st</sup> and 2<sup>nd</sup> defendants released the lease for registration and directed the suit be withdrawn that they are estopped from denying or claiming that the plaintiff has no proprietary rights over the suit premises and which rights are now being violated by way of trespass, see *Serah Njeri Mwobi v John Kimani Njoroge* [2013]eKLR where the Court held that the doctrine of estoppel operates as a principle of law which precludes a person from proclaiming something contrary to what is implied by a previous action or statement by that person.
  28. The plaintiff concludes that the Preliminary Objection raised does not meet the test laid in the *Mukisa Biscuit Case* (supra). The Court is further referred to the decision in *Cyrus Mucebu Irungu v Martha Wanjiru Irungu & Another* [2022] where the issue of sub-judice was raised by way of a Preliminary Objection made by the defendant. In that case, Cheron J. held that he considered the import of Section 6 of the *Civil Procedure Act*, several other precedents from the courts together with the case of *Margaret Wachu Karuri v John Waweru Ribeiro* [2021] eKLR which dealt with a similar question as to whether sub-judice can be raised as a preliminary point and found that where the issues are conflicting and require interrogation, sub-judice cannot succeed through a Preliminary Objection.
  29. The issues that fall for the determination of this Court in the instant motion are whether a Preliminary Objection as known in law has been attained. Whether sub-judice doctrine has been achieved to



warrant the striking out of the pending application for an injunction and the entire suit. Finally, who should bear the costs of the application?

30. Parties cited relevant judicial precedents on what a Preliminary Objection entails. A preliminary Objection rests on the proposition that when raised, its fundamental achievement will have a bearing on disposing of a matter because it raises pure points of law. It also underscores the need for prudent management of time as a Court resource by summarily flagging out a frail and hopeless suit that if admitted to full trial, will be a waste of judicial time and will not serve the interest of justice. One will not be required to look elsewhere to find an answer as to whether a Preliminary Objection is sustainable or not, but look at the pleadings and discover that the suit is a none starter - see Ogola J. in *DJC v BKL (Civil Suit E021 of 2021) [2022] KEHC 10189 (KLR) (27 June 2022) (Ruling)*:

“The Supreme Court in *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others* cited the leading decision on Preliminary Objections, *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd. (1969) EA 696*, where the Court held as follows:

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

8. The Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR* made the following observation as relates to Preliminary Objections:

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection— against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

31. The 1<sup>st</sup> and 2<sup>nd</sup> defendants significantly raised the issue of sub-judice as the substratum of the Preliminary Objection – the pendency of Malindi Malindi ELC Case No. 101 of 2013. The doctrine of sub judice has been discussed severally by this Court and our Superior Courts of record as ably demonstrated by the parties in their respective submissions. For example, in *Daniel Kipkemoi Bett & Another v Joseph Rono [2022] eKLR*, Dr, Iur Nyagaka J. captured the principle in this manner:

“The concept of sub judice is one that bars a Court from trying a matter that is in one way or other before another Court of competent jurisdiction by way of a previously instituted suit as long as it is between the same parties canvassing it under the same title. In essence, if both Courts were to proceed with the matters on merit and determine them, without deference



to the former, they would arrive at similar or different results on the same rights claimed by the same parties and there would be a duplication of the reliefs or a conflict of them, which would be a recipe for confusion and chaos in the legal system. In the alternative of the scenario immediately above, where one of the Courts determined the matter before the one still pending would be *res judicata*. Section 6 of the [Civil Procedure Act](#) bars any court from engaging in matters *sub judice* before them. It provides as follows:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

20. In a recent decision, my brother Justice Mativo discussed the concept *sub judice*. This was in *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR where he stated as follows: -

“...there exists the concept of *sub judice* which in Latin means “under Judgement.” It denotes that a matter is being considered by a court or judge. The concept of *sub judice* that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent court to stay the proceeding and such order can be made at any stage.”

21. The import of the concept is that as soon as the Court finds a matter *sub judice* it stays immediately the proceedings until the prior one is heard and determined. On this point, the Supreme Court of Kenya in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)*, stated therein as follows: -

“[67] The term ‘*sub-judice*’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the *sub-judice* rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party



that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

32. Is the present legal action sub-judice? For sub-judice to attach, as stipulated by the cited judicial decisions and Section 6 of the [Civil Procedure Act](#):
- a. The present suit in issue has to be directly and substantially in issue in the previous suit between the parties under whom they or any of them claim; litigating with the same title;
  - b. Such suit or proceedings pending in the same or any other Court having jurisdiction in Kenya.
  - c. The two suits have to be congruent in all aspects, with a likelihood that if all are to proceed there are likely to be outcomes that may lead to conflicting decisions over the same subject matter.
  - d. That it will be both a waste of judicial time and resources to undertake two similar causes over the same issue.
  - e. The issues here cannot possibly be migrated to the former suit for trial and final determination.
  - f. Looking at the pleading per se will ipso facto lead a reasonable man to conclude the suits are the same.
32. The fact that Nairobi ELC Case No. 158 of 2013 (presently Malindi ELC Case No. 101 of 2013) was filed is undeniable. According to the court documents, the parties are the plaintiff and the 1<sup>st</sup> defendant. In the previous lawsuit, the plaintiff filed the claim to prevent the 1<sup>st</sup> defendant from terminating a lease they had signed for a piece of property known as Galana Ranch Block 1/1. Although there has been a plea of fraud regarding its registration, the lease has been registered. In the current complaint, the parties don't appear to agree that the aforementioned lease was registered following arbitration and that the earlier lawsuit was dropped as a result of the parties' actions. In the current lawsuit, the plaintiff has approached the Court to protect its rights as enshrined under Article 40 of [the Constitution](#) and Section 24(b) of the [Land Registration Act](#) on the right to own property.
33. Looking at the materials and the submissions by the parties the cause of action in this suit and the former suit are not congruent. In the former suit, the Court was asked to debar the 1<sup>st</sup> defendant from terminating a lease that had not been registered while in the current suit, the plaintiff seeks to protect rights that have accrued with the registration. In the current suit, we have the introduction of two new parties the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The plaintiff now vouches that the 1<sup>st</sup> defendant is colluding with the 3<sup>rd</sup> defendant to infringe its rights on the quiet enjoyment of the suit property – hence the institution of the current suit. Significantly the 3<sup>rd</sup> defendant has no locus in matters arising from the earlier case, it is not a party thereto and there is no privity of contract between the 3<sup>rd</sup> defendant and the plaintiff.
34. Looking at the conduct of the parties in the former suit, from the materials placed before me, the ownership issue is now in dispute in this suit, the subject matter of the illegal termination and deprivation of property as pleaded in Malindi ELC. Case No. 101 of 2013 was overtaken by events instigated jointly by the parties themselves in a settlement plan out of court. The former suit dealt with the termination notice. Parties then seem to have agreed - from the correspondences attached to the affidavits by the plaintiff to have the suit withdrawn and have the lease registered, which is



why none of the parties annexed or disclosed the award issued by the single Arbitrator Retired Justice B.Kubo (now deceased), which emanated from a consent the parties had recorded before this Court. At best the former suit was abandoned by the parties. The suit property has long mutated from an unregistered lease agreement to a registered one. The entry of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to the fore leading to ostensibly renegotiation of the lease with 3<sup>rd</sup> parties over the same subject matter will be at the core and in controversy in this suit. It is a feature that was not in the former suit. There is controversy as to whether after acquiescing to the abandonment of the former suit, the conditions attached to it had been fulfilled. It will be a matter requiring evidence and cannot be dealt with by a Preliminary Objection as proposed here.

35. As correctly pointed out by the plaintiff issues like fraud, the registration of the lease itself, the entry of 3<sup>rd</sup> parties, and trespass after registration will be new features in this trial, those issues cannot be transferred or migrated for trial in the former suit. They are contested issues for trial. At best the former suit cannot be possibly resuscitated. See *Cherono J. in Cyrus Mucebu Irungu v Martha Wanjiru Irungu & Another* [2022]:

“In the case of *Margaret Wachu Karuri Vs John Waweru Ribiro* (2021) e K.L.R, the Court was faced with a similar question whether sub-judice can be raised as a preliminary point and held as follows;

“For the Court to determine whether the issues herein were directly and substantially in issue with the other suit, it is this court’s considered view that it will have to ascertain facts and probe evidence by ascertaining whether the issues raised in the instant suit are the same as the ones in the Appeal aforesaid and further interrogate the prayers sought whether they are the same and relate to the same issues. On whether or not the same is sub-judice, facts have to be ascertained and a preliminary objection cannot be raised on disputed facts. Therefore, this court holds and finds what has been raised by defendant/objector does not amount to a preliminary objection, and thus the preliminary objection is not merited.

Consequently, the court finds and holds that the notice of preliminary objection dated 30<sup>th</sup> August, 2019, by the defendant/objector is not merited and the same is dismissed entirely with costs to the plaintiff/Respondent”.

I agree entirely with the reasoning in the above decision which is in all fours with the instant case.”

36. The upshot from the foregoing is that this suit is incongruent with the former suit. The preliminary Objection dated 16<sup>th</sup> November 2023 is hereby dismissed with costs.
37. Before I proceed to the application dealing with the issuance of an injunction let me deal with the Contempt Proceedings commenced on 29<sup>th</sup> November 2023 first.
38. The Plaintiff vide an Application dated 29<sup>th</sup> November 2023 applied to the Court for orders that:
- i. This Court be pleased to grant the plaintiff leave to commence contempt of Court proceedings against Mr. Mohammed Bulle in his capacity as the 2<sup>nd</sup> defendant and the Managing Director of the 1<sup>st</sup> defendant, the 3<sup>rd</sup> defendant’s Chief Executive officer, Mr. Bhadra Shah, and the 3<sup>rd</sup> defendant’s Legal Officer Ms. Esther Kiriro in their capacity as Chief Officers of the 3<sup>rd</sup> defendant for failure to comply with this Court’s Order given on 26<sup>th</sup> October, 2023.



- ii. A declaration that Mr. Mohamed Bulle in his capacity as the 2<sup>nd</sup> defendant and the Managing Director of the 1<sup>st</sup> defendant, the 3<sup>rd</sup> defendant Chief Executive Mr. Bhadra Shah, and the 3<sup>rd</sup> defendant Legal Officer Ms. Esther Kiriro in their capacity as the Chief Legal Officers of the 3<sup>rd</sup> defendant are guilty of contempt of the Court Order issued on 7<sup>th</sup> November, 2023.
  - iii. Mr. Mohamed Bulle in his capacity as the 2<sup>nd</sup> defendant and the Managing Director of the 1<sup>st</sup> defendant, the 3<sup>rd</sup> defendant's Chief Executive Officer, Mr. Bhadra Shah, and the 3<sup>rd</sup> defendant's Legal Officer Ms. Esther Kiriro in their capacity as Chief Officer of the defendant be detained in prison for a term not exceeding 6 months or for such period as the court shall deem fit.
  - iv. An order of Sequestration, attachment, and sale of personal properties be issued against Mr. Mohamed Bulle, in his capacity as the 2<sup>nd</sup> defendant and the Managing Director of the 1<sup>st</sup> defendant, the 3<sup>rd</sup> defendant's Chief Executive Officer Mr. Bhadra Shah, and the 3<sup>rd</sup> defendant's Legal Officer Ms. Esther Kiriro in their capacity as Chief Officers of the 3<sup>rd</sup> defendant.
  - v. The properties of Mr. Mohamed Bulle in his capacity as the 2<sup>nd</sup> defendant and the Managing Director of the 1<sup>st</sup> defendant, the 3<sup>rd</sup> defendant's Chief Executive Officer, Mr. Bhadra Shah, and the 3<sup>rd</sup> defendant's Legal Officer Ms. Esther Kiriro in their capacity as Chief Officers of the 3<sup>rd</sup> defendant be attached for a period not exceeding one year or for such period as this Court shall deem necessary for being in disobedience of the orders of this Court.
  - vi. The 2<sup>nd</sup> defendant Mr. Mohamed Bulle and the Chief Executive Officer of the 3<sup>rd</sup> defendant Mr. Bhadra Shah be summoned to Court to personally explain why they should not be punished for contempt
  - vii. Any other or further relief as this Court may deem fit and appropriate to grant.
  - viii. Costs be provided for.
39. According to the plaintiff, this Court initially issued orders on 26<sup>th</sup> of October 2023 restraining the 1<sup>st</sup> defendant from negotiating, and advertising for a lease in respect to the suit property - Galana Ranch Block 1/1. The plaintiff/applicant did obtain ex-parte orders from this Court which were served on the defendants on the 27<sup>th</sup> of October, 2023 and a return of service was duly filed by one Stephen Shikanda, an Advocate of the High Court of Kenya. The matter came up for an inter-partes hearing and the 3 defendants were represented in Court by their counsels when the Court made orders extending the interim injunction issued on 26<sup>th</sup> October. The order was nonetheless served on them. That at all material times, the orders were served subject to a penal notice being endorsed thereon.
40. The contemptuous acts complained of are deponed to in the supporting affidavit dated 29<sup>th</sup> November 2023. The 2<sup>nd</sup> defendant Mr. Mohamed Bulle, Chief Executive of the 3<sup>rd</sup> Defendant Mr, Bhadra Shah, and Legal Officer Ms. Esther Kiriro as Chief Officers of the 3<sup>rd</sup> defendant have refused, neglected, and / or ignored to comply with the said orders injuncting the defendant from continuing negotiations over the leasing of the suit property, allowed, permitted and acquiesced to the 3<sup>rd</sup> defendant trespassing on the suit property and carrying out construction despite the 3<sup>rd</sup> defendant having absolutely no proprietary interest in the same. The 2<sup>nd</sup> defendant Mr. Mohamed Bulle, Chief Executive of the 3<sup>rd</sup> defendant Mr, Bhadra Shah, and Legal Officer Ms. Esther Kiriro as Chief Officers of the 3<sup>rd</sup> defendant have caused construction to continue illegally on the suit premises despite clear orders of this court restraining them. The 2<sup>nd</sup> defendant Mr. Mohamed Bulle, Chief Executive of the 3<sup>rd</sup> Defendant Mr, Bhadra Shah, and Legal Officer Ms. Esther Kiriro as Chief Officers of the 3<sup>rd</sup> defendant have on the 9<sup>th</sup>



- November, 2023, 16<sup>th</sup> November, 2023, and 22<sup>nd</sup> November caused, instructed and/or permitted their employees, servants and/or agents, members, officers, proxies, associates goons and/or third parties acting at their behest to violently chase away one Julius Arimi and other agents of the plaintiff from the suit premises whenever they report to carry out their duties.
41. The plaintiff proceeds to state that despite knowledge of the said orders the defendants have persisted in their defiance and 3<sup>rd</sup> defendant by a replying affidavit dated 1<sup>st</sup> December, 2023 denied the claim and disowned Esther Kiriro.
  42. The Plaintiff filed a further or supplementary affidavit dated 16<sup>th</sup> December 2023 and demonstrated through evidence obtained electronically that the 3<sup>rd</sup> defendants are the employers of Esther Kiriro and Bhadra Shah is the Chief executive and both appear in an electronic notice marked Exhibit “AMH2” and the 3<sup>rd</sup> defendant has failed to explain why they both appear in the exhibit but only deny she is not their employee.
  43. It is submitted further that the said affidavit dated 16<sup>th</sup> December 2023 contains more graphic evidence by way of actual photographs of the construction being undertaken on the suit property and further electronic evidence and pictures of the directors of the 3<sup>rd</sup> defendant in meetings with the 1<sup>st</sup> defendant. All this mass of evidence is available on the internet and to date has not been pulled down.
  44. The plaintiff cited several cases to guide the Court on the ingredients of contempt, significantly Teachers Service Commission v Kenya National Union of Teachers & 2 Others [2013] eKLR.
  45. The plaintiff has also cited the case of Nonny Gathoni Njenga & Another v Catherine Mastsa & Another [2014] eKLR which held that certificates in terms of section 106B of the *Evidence Act* can be filed later and pursuant thereto the plaintiff did file such certificates that were inadvertently overlooked therefore, inviting the Court to read and consider the contents of the affidavit dated 16<sup>th</sup> December 2023 as additional proof of the contemptuous acts of the contemnors.
  46. The plaintiff cited the case of Valentine Opiyo & Another Vs. Maseline Odhiambo T/A Ellyams Enterprises [2014] eKLR, as enunciating the position that when a company is cast in a bad light, say on issues like fraud or improper conduct ordinarily the corporate veil is pierced and the Directors are the ones to answer for it.
  47. The 1<sup>st</sup> and 2<sup>nd</sup> respondents state that on the issue of contempt, parties have a right to discuss amongst themselves unless it is shown that the talk or discussion will be around the breach of National Security.
  48. In this case there was nothing to show that such negotiations were ever undertaken. It has not been shown that if there were any talks, it was concerning the suit land because Galana Ranch has over 1.7 Million acres and the suit property herein is just 100,000 acres. The photographs displayed could have been on any place or site within the expansive Galana Ranch.
  49. The 1<sup>st</sup> and 2<sup>nd</sup> respondent states that pursuant to Section. Section 107 of the *Evidence Act*, he who asserts must prove there is no tangible evidence to show that indeed the 1<sup>st</sup> and the 2<sup>nd</sup> defendants are in contempt of the Court orders issued on the 26<sup>th</sup> October 2023. Be it as it may, the plaintiff has never owned the subject suit land and if there’s anything to go by, then they are the ones liable for trespass.
  50. 1<sup>st</sup> and 2<sup>nd</sup> defendants further said that the reliance of the pictures taken in June by the 1<sup>st</sup> defendant in the plaintiff’s further affidavit is characterized by ill motive and malice by the plaintiff as it lays no legal basis for any contempt of court orders. The pictures as marked by the plaintiff were taken way back in June 2023 before the plaintiff rushed to Court and misled the Court for orders. The pictures taken should be compliant with Section 106(b)(4) of the *Evidence Act* which requires a party to prepare a certificate before a party can rely on them in evidence, which certificate should inter alia-



SUBPARA a.

Describe how the photograph was produced or taken; and

b. Give particulars of the device involved in the production of the photograph or electronic evidence.

51. The 1<sup>st</sup> and 2<sup>nd</sup> defendants opine that the photographs that the plaintiff exhibited lack any significance in the suit herein given that the plaintiff did not attach a certificate as required. No effort was made to describe how they were taken by whom and using what device. The fatal omission cannot form the basis for the grant of the orders sought and has not met the threshold of contempt proceedings.
52. 1<sup>st</sup> and 2<sup>nd</sup> defendants reiterate that a mere allegation that parties are negotiating and press reports that are not verified are not sufficient enough to demonstrate that a Court order was violated and, in any case, these are events that took place a long time before the Court issued the interim orders.
53. 1<sup>st</sup> and 2<sup>nd</sup> defendants are of the view that Contempt proceedings are a serious undertaking because a court exercising this jurisdiction is minded to ensure the orderly functioning of society and the rule of law. On conviction, the alleged contemnor stands to lose his or her liberty. It should not, therefore, be taken lightly. That the plaintiff having not provided any tangible evidence to demonstrate contempt, is taking the Court on a wild goose chase and the Court should be mindful of the judicial time wasted by dismissing the application with costs.
54. The 3<sup>rd</sup> defendant adopted the stance taken by the 1<sup>st</sup> and 2<sup>nd</sup> defendants and added that the 3<sup>rd</sup> defendant is separate from an entity called 'Nyumba Foundation' - there is no nexus established by the plaintiff between the evidence and the documentation shared with the 3<sup>rd</sup> defendant's conduct hence the plaintiff has no cause of action against the 3<sup>rd</sup> defendant.
55. The 3<sup>rd</sup> defendant laments the introduction of new evidence after all parties had made their replies, particularly on linking its Directors to 'Nyumba Foundation.' The case of *Geotop Surveys Limited v Oldonyonyoike Group Ranch & another; Geoflex Consultants Limited (Intended Interested Party)* (Civil Suit E004 of 2021) [2022] KEHC 11394 (KLR) (16 March 2022) (Ruling), is cited on striking out new evidence introduced without leave of the Court to the detriment of the adverse party. The alleged photographs were never accompanied by a certificate and did not show who processed them. It offends the provisions of Section 106(b) of the *Evidence Act* and as held in the case of *Samwel Kazungu Kambi v Nelly Ilongo & 2 Others* [2017] eKLR.
56. The 3<sup>rd</sup> defendant further stated that the burden of proof in contempt proceedings is higher than that in a normal civil matter because when such proceedings are taken out, the same has the potential of impacting the rights of a party who may end up being committed to civil jail. The case of *MNN v JMM* [2022] eKLR is cited in support of that contention.
57. The issues that fall for the determination of this Court are whether the plaintiff has proved that the respondents and the parties cited are in Contempt of the orders issued by this Court. And who should bear costs?
58. Several judicial authorities were cited by the parties to guide the Court on the threshold to be achieved for this Court to cite one for contempt. In *Samuel M. N. Mweru & Others v National Land Commission & 2 others* [2020] eKLR, Mativo J. had this to say on proof and the rationale for contempt:

“It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove



- (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book Contempt in Modern New Zealand who succinctly stated:-

"There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that: -

- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- (b) the defendant had knowledge of or proper notice of the terms of the order;
- (c) the defendant has acted in breach of the terms of the order; and
- (d) the defendant's conduct was deliberate.

41. It is the last test in paragraph (d) above that warrants detailed consideration. Unfortunately, the applicant's counsel never addressed it at all. On the face of our transformative constitution with an expanded Bill of Rights, a pertinent question warrants consideration. Do constitutional values permit a person to be put in prison to enforce compliance with a civil order when the requisites are established only preponderantly, and not conclusively? In my view, a high standard of proof applies whenever committal to prison for contempt is sought because contempt of Court is quasi-criminal in nature.

42. Two principals emerge. The first is liberty: - it is basic to our Constitution that a person should not be deprived of liberty, albeit only to constrain compliance with a court order if reasonable doubt exists about the essentials. In this regard, I am not



satisfied that wilful disregard of the court order has been established.

43. The second reason is coherence. It is practically difficult, and may be impossible, to disentangle the reasons why orders for committal for contempt are sought and why they are granted. In the end, whatever the applicant's motive, the court commits a contempt respondent to jail for Rule of Law reasons; and this high public purpose should be pursued only in the absence of reasonable doubt. Accordingly, it is impermissible to find an alleged contemnor guilty of contempt in the absence of conclusive proof of the essential elements. The requisite elements must be established beyond reasonable doubt. In such a prosecution the alleged contemnor is plainly an 'accused person.
44. Third, accidental or unintentional disobedience is not sufficient to justify one for holding guilty of contempt. It is further relevant to bear in mind the settled law on the law of contempt that casual or accidental or unintentional acts of disobedience under the circumstances which negate any suggestion of contumacy, would amount to a contempt in theory only and does not render the contemnor liable to punishment.
45. It should be noted that developing the common law thus does not require the prosecution to lead evidence as to the accused's state of mind or motive: once the three requisites mentioned earlier have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted willfully and mala fide, all the requisites of the offence will have been established. And as O'Regan J pointed out, the power to



imprison for coercive and non-punitive purposes is ‘an extraordinary one’: -

‘The power to order summary imprisonment of a person in order to coerce that person to comply with a legal obligation is far-reaching. There can be no doubt that indefinite detention for coercive purposes may involve a significant inroad upon personal liberty. Clearly it will constitute a breach of s 12 of *the Constitution* unless both the coercive purposes are valid and the procedures followed are fair. In this case there seems no doubt that the purpose is a legitimate one. It also seems necessary and proper, however, for the exercise of the power to be accompanied by a high standard of procedural fairness.’

46. Contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest.”
59. Applying those principles to the current case, the orders issued by this Court were served on parties, they were clear and unambiguous.
60. What remains to check in this matter is whether there was willful and deliberate disobedience. Much of the evidence relied upon by the plaintiff to show the disobedience was obtained through photographic evidence and from newspaper reporting. This evidence has been attacked because initially there was no certificate attached to the photographs. It was argued by the defendants that this offended Section 106B of the *Evidence Act*. It was introduced much later without the leave of the Court. This is admitted



in the final submissions by the plaintiff as captured elsewhere in this ruling. The plaintiff cited the case of Nonny Gathoni Njenga & Another v Catherine Mastsa & Another [2014]eKLR, that such a certificate could be introduced later this is what Ogola J stated:

“The admissibility of electronic records is provided for under Section 106 B of the Evidence Act (Cap 80) Laws of Kenya in the following terms:

“106B

- (1) Notwithstanding, anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electromagnetic media produced by a computer (herein referred to as a computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.”

Under sub-section (4), where a party seeks to give evidence by virtue of section 106B he has, among other things, to tender a certificate dealing with any matters to which the conditions above relate. The certificate should further:

- a) identify the electronic record containing the statement and describing the manner in which it was produced; and
- b) give such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer.”

The certificate has to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate).

In the case of REPUBLIC.V. BARISA WAYU MATUGUDA [2011] eKLR the court observed that:

“. . . any information stored in a computer. . . which is then printed or copied. . . shall be treated just like documentary evidence and will be admissible as evidence without the production of the original. However, section 106B also provides that such electronic evidence will only be



admissible if the conditions laid out in that provision are satisfied.”

The court went on that:

“ This provision makes it abundantly clear that for electronic evidence to be deemed admissible, it must be accompanied by a certificate in terms of section 106B (4). Such certificate must in terms of S.106B (4) (d) be signed by a person holding a responsible position with respect to the management of the device... Without the required certificate this CD is inadmissible as evidence.”

In light of the above analysis and having already stated above that the DVDs attached by the Plaintiffs are not accompanied by a Certificate as required under the *Evidence Act*, it therefore follows that the said DVDs are inadmissible as evidence.

However, in the interest of justice, it is my view that the Plaintiffs are at liberty to produce such certificate for the admissibility of the said evidence. When that is done, the Court will be able to examine the evidence and evaluate the probative value of the said DVDs as well as the authenticity. The Respondent has alleged that the DVDs were obtained illegally, however that cannot be ascertained at this stage until the Certificate is filed and the Court is able to determine the source of the DVDs.

61. The defendant on the other hand cited the case of Samwel Kazungu Kambi v Nelly Ilongo & 2 Others [2017] eKLR, where Korir J. stated this way on the same issue:

“Sub-section (4) of Section 106B requires a certificate confirming the authenticity of the electronic record. Such a certificate should describe the manner of the production of the record or the particulars of the device. The certificate could also have the signature of the person in charge of the relevant device or the management of the relevant activities.

22. The source of the photocopies of the photographs annexed to the affidavit sworn by the Petitioner in support of the Petition was not disclosed. The device used to capture the images was unknown. The person who took the photographs was not named. The person who processed the images was not named. The Petitioner was not an eyewitness to the incident and he could not therefore tell the court that the photographs were a true reflection of the incident he witnessed.



23. The conditions set down in Section 106B were not met by the Petitioner. He could not therefore be allowed to produce the photographs. His claim that the respondents were estopped by virtue of Section 120 of the Evidence Act from challenging the evidence having not raised the issue at the pre-trial conference is not valid. The production of evidence did not feature in the pre-trial conference. Knowing the kind of the evidence he intended to rely on, it was upon the Petitioner at that early stage to bring up the discussion. He did not do so. The respondents never gave him any hint that they would not be opposing the production of the photographs. The estoppel envisaged by Section 120 of the Evidence Act is therefore not applicable in the circumstances of this matter.”
62. The Judicial authorities cited by both parties on the certificate are quite germane. The authorities talk about the fatal effect of failure to produce the same which leads to the inadmissibility of the evidence intended to be produced. Judge Ogola was of the view that whereas late production of the certificate could be allowed, in the interest of justice, the overall probative value and the authenticity had to be reckoned in the final verdict considering other evidence tendered altogether on the issue under discussion. I will take that reasoning as well, but consider that the current certificate was produced much later when all the parties in this matter had already done their replies. I will then check its overall effect when considering the other issues raised in opposition.
63. The defendants contend that the evidence produced by way of photographs and electronically does not support where and when the meetings took place. Galana Ranch is quite expansive with over 1.7 acres. We are dealing with 100,000 acres in this case. The pictures could have been taken elsewhere. It is alleged the pictures were taken much earlier before this case was commenced and could have been the reasons for the current suit. The 3<sup>rd</sup> defendant further digs in and says that it is not associated with the ‘Nyumba Foundation’.
64. Looking at the whole totality of the evidence produced before me and this being a quasi-criminal trial, I cannot tell on a beyond reasonable doubt basis that – the parties were further negotiating on the lease subject and under litigation in this matter, the place where the negotiations were being t and whether it was after or before the orders of this Court were issued.- I can also not tell whether the Nyumba Foundation has a link to the 3<sup>rd</sup> defendant.
65. The effect of the foregoing is that the Contempt Proceedings dated 29<sup>th</sup> November 2023 are hereby dismissed with costs.
66. On the injunction application dated 25<sup>th</sup> October 2023 the plaintiff as already stated earlier from the extensive discussion in the other two applications contends that it is the lawful lessee of all that land containing approximately 100,000 acres of land comprised in LR. No. Galana Ranch/Block1/1 as identified in red on a sketch map attached to the Lease as entry number 4 on the Certificate of Lease registered and issued under title No. Galana Ranch/Block 1/1.
67. Vide a Lease Agreement dated 17<sup>th</sup> February 2021 the 1<sup>st</sup> defendant granted the plaintiff the right to possession, occupation, and use of the suit property.
68. The plaintiff took possession of the suit property on 1<sup>st</sup> November 2011 and has been quietly carrying on her business activities. On diverse dates in October 2023, the defendants have without any colour of right authorized, permitted, and allowed their servants, agents, employees, goons, and third parties acting at their behest to enter without authority onto the suit property herein, without instruction and permission from the plaintiff and have committed acts of waste thereupon.



69. The 1<sup>st</sup> defendant at all material times is under constitutional, statutory, and contractual obligation to grant and guarantee to the plaintiff peaceful and quiet possession, occupation, and use of the leased property without any interference or interruption whatsoever.
70. That there is real and imminent danger that unless a restraining order is granted the defendants will continue with their ultra vires, illegal, mala fides, and unconstitutional acts rendering the plaintiff's right to the suit property otiose.
71. The plaintiff submits that the threshold for issuance of an injunction has been achieved as set in the notorious *Giella v Cassman Brown & Co. Ltd* [1973] EA.358 and a prima facie case is as described in *Mrao Limited v First American Bank of Kenya Limited* [2003] eKLR.
72. The plaintiff implores that it will suffer irreparable loss if an injunction is not issued since the terms of the lease were to accrue a benefit on it as this was an economic venture. The entry of 3<sup>rd</sup> parties and the disruption from goons are obstructing the development plan on the land by the plaintiffs hence the need for an injunction to be issued to protect that right. The balance of convenience according to the plaintiff tilts in its favour since if the orders are not issued the property will be alienated in the disfavour of the plaintiff. The plaintiff cited the following cases to support its contention on this issue - *Pius Kipchirchir Kog v Frank Kimeli Tenai* [2018] eKLR and *Amir Suleiman v Amboseli Resort Limited* [2004] eKLR.
73. The 1<sup>st</sup> and 2<sup>nd</sup> defendants in opposition reiterated that the lease between the plaintiff was long terminated. There is a pending suit as discussed elsewhere touching on the said issue and that the termination of the lease was because the plaintiff failed to take possession of the suit property, develop it, and pay the necessary rent as agreed. The 3<sup>rd</sup> defendant avers that it has no nexus between it and the plaintiff as the material presented before the Court will show. No prima facie case has been shown by the plaintiff with a probability of success as held in the *Giella Case* (supra). Nothing was provided to show there were negotiations between the 1<sup>st</sup> defendant and the 3<sup>rd</sup> defendant concerning the same subject matter.
74. On irreparable damages the plaintiff does not possess the property in issue and hence stands to suffer no loss. Besides, as can be seen from the pleadings by the plaintiff, there are alternative prayers for the award of damages for which the plaintiff can be compensated.
75. And, the 3<sup>rd</sup> respondent proceeds to state that the balance of convenience does not tilt in favour of the plaintiff. The 3<sup>rd</sup> defendant cited the following authorities for the consideration of this Court - *Mrao Ltd. v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR, *Giella v Cassman Brown & Co. Ltd* [1973] EA.358, *Yellow Horse Inns Ltd v Nduachi Company Ltd. & 2 Others* [2017] eKLR, *Kenya Commercial Bank Limited v Afraha Education Society* [2001] 1 EA 86 and *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR.
76. Significantly at this point the Court is being asked to determine whether to issue a temporary injunction or not and who should bear the costs of this application.
77. For an injunction to be attained as held in the celebrated case of *Giella v Cassman Brown & Company Limited* [1973] E.A. 360(supra), the following threshold has to be surmounted:

“The applicant should satisfy the Court that he has a prima facie case with a probability of success. Secondly, he stands to suffer irreparable loss or injury which cannot be compensated by damages and thirdly, if the Court is in doubt, it should decide on a balance of convenience.”



78. Firstly, this Court has to ascertain whether the applicant has established a prima facie case with the probability of success as held in *Mrao v First American Bank of Kenya & 2 others* [2003] KLR 125:

“A prima facie case in a civil application includes but is not confined to a ‘genuine and arguable case’. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation in rebuttal from the latter.”

79. And, that the principles stated in the *Giella* case (supra) are to be addressed sequentially as held in *Kenya Commercial Finance Company Ltd Afraha Education Society* [2001] 1 EA 86 as cited in *Karen Bypass Estate Ltd v Print Avenue and Company Ltd* [2014] eKLR:

“so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed”.

80. Having extensively discussed the relationship of the parties in this matter, the plaintiff and the defendant seem to have a long-standing feud and history over the lease of the suit property herein - LR. No. Galana Ranch/Block1/1 since 2010 which culminated in the former moribund suit that is Nairobi ELC Case No. 158 of 2013 (presently Malindi ELC Case No. 101 of 2013) being commenced.

81. As held elsewhere in this judgment there is now a transformation from a lease agreement to a registered lease which the plaintiff wishes to protect at this point. There seems to be a scheme to renegotiate the lease with other 3<sup>rd</sup> parties, hence the entry of the 3<sup>rd</sup> defendant in this suit. It seems that there are attempts to have the 3<sup>rd</sup> defendant take possession of the suit property hence the contempt proceedings which this Court has discussed.

82. At this point in my view, the 3<sup>rd</sup> defendant has no interest at all in the suit property if its averment in the contempt proceedings is anything to go by. We then remain with the plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> defendants to deal with in this application.

83. The plaintiff has shown prima facie that the lease having been registered it has now acquired proprietary rights which ought to be protected under Article 40 of *the Constitution* and Section 26 of the *Land Registration Act*. In my considered view, the deprivation of the right to use the said property will negatively impact the plaintiff's desire since it was a commercial venture using the said land, which cannot be compensated by way of damages.

84. The balance of convenience in my view at this point tilts towards the issuance of an injunction to protect the substratum of the suit property pending trial.

85. The orders then which commend issuance concerning the application dated 25<sup>th</sup> October 2023 at this point are as follows:

- i. The defendants whether by themselves, their employees, servants, agents, members, officers, proxies, associates, goons, third parties acting at their behest, or otherwise howsoever be restrained from advertising, offering to lease, negotiating a lease, leasing, entering upon, trespassing, occupying, constructing, offering for sale and/or security, putting up public notices, or otherwise dealing with all that piece of land comprised of Galana Ranch/Block 1/1 as identified in red in the sketch map attached to the lease and which is 5 kilometers from the banks of Galana River pending the hearing and determination of this suit.
- ii. That the physical status and registration of the said suit property remain as it is currently until the hearing of this suit or further orders from this court.



- iii. To actively manage this matter, directions to issue forthwith as to the immediate disposal of this suit.

Consequently:

- a. The Preliminary Objection dated 16<sup>th</sup> March. 2023 dismissed with costs.
- b. The Contempt Proceedings dated 29<sup>th</sup> November 2023 dismissed with costs.
- c. Plaintiff's Notice of Motion dated 25<sup>th</sup> October 2023 allowed with costs in the manner I have provided in (i) to (iii) above.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 22<sup>ND</sup> DAY OF FEBRUARY 2024.**

**E. K. MAKORI**

**JUDGE**

**In the Presence of:**

Ms. Sheunda for the Plaintiff.

Ms. Kolum for the 1<sup>st</sup> & 2<sup>nd</sup> Defendants.

Mr. Mwiti for the 3<sup>rd</sup> Defendant.

Court Assistant: Happy.

