**Lmantia Leadismo (Suing as an administrator of the Estate of Leadismo Nee Wildmonika Ilona) v Mbugua & 2 others (Environment & Land Case E063 of 2023) [2024] KEELC 1050 (KLR) (20 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1050 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ENVIRONMENT & LAND CASE E063 OF 2023**

**LL NAIKUNI, J**

**FEBRUARY 20, 2024**

**BETWEEN**

**LMANTIA LEADISMO (SUING AS AN ADMINISTRATOR OF THE ESTATE OF LEADISMO NEE WILDMONIKA ILONA) ..... PLAINTIFF**

**AND**

**JOHN MBUGUA ..... 1ST DEFENDANT**

**FRANCIS KOMBE ..... 2ND DEFENDANT**

**RAYMOND CHARO ..... 3RD DEFENDANT**

**RULING**

## I. Introduction

1. Before this Honorable Court for hearing and determination is the Notice of Motion application dated 26th June, 2023. It was instituted under a Certificate of urgency by Lmantia Leadismo (Suing as an Administrator of the Estate of Leadismo Nee Wild)Monika Ilona the Plaintiff/Applicant. It was under the provisions of Under Sections 1A, 1B, 3A and 63(e) of the *Civil Procedures Act*, Cap. 21 Laws of Kenya, Order 40, Rule 1, 2, 3 and 3(3) of the *Civil Procedures*, 2010 and Article 40 of *the Constitution* of Kenya, 2010.

2. Upon effecting service the Defendants/Respondents' filed a Replying Affidavit sworn and dated on 6th July, 2023. The Honourable Court shall deliberate on the responses in more depth later on in this Ruling.

## II. The Plaintiff/ Applicant case

3. The Plaintiff/Applicant sought for the following orders:-

a. Spent.

b. Spent.

c. That pending the hearing and determination of this suit tis Honourable Court be pleased to issue a Temporary Injunction restraining the Defendants/Respondents jointly and severally or their agents, successors, assigns or personal representatives or any acting in their behalf from dealing, alienating, disposing, damaging, trespassing, entering, remaining upon, sub-dividing, advertising for sale, constructing on or in any manner whatsoever interfering with the Plaintiff's quiet possession, use and enjoyment of the land known as CR.NO.33895- Plot Number MN/III/3995, CR. NO. 33896- Plot Number MN/III/3996, CR- NO. 33900- Subdivision No. 4000/SECIII/MN,CR. NO.4000, Plot Number /MN/III/4001, Title Number CR 4269;Plot Number Sub.1275 Mtwapa; CR. 4269-Plot Number MN/III/93; CR. 21646-Plot Number MN/III/1272;CR-21046; Plot Number 1532/III/MN; Plot Number MN/III/3998; Plot Number MN/III/3998; Plot Number MN/III/4003; Plot Number MN/III/4004; Plot Number MN/III/508/2; Plot Number MN/III/3993; Plot Number MN/III/3997; Plot Number MN/III/3996; Plot Number MN/III/3995; Plot Number MN/III/3994; Plot Number MN/III/4013;Plot Number MN/III/4012; Plot Number MN/III/4011; Plot Number MN/III/4010; Plot Number MN/III/4009; Plot Number MN/III/4008; Plot Number MN/III/4001;Plot Number MN/III/1532; Plot Number MN/III/6963;Plot Number MN/III/4007 and Plot Number MN/III/1208, herein referred to as the "the suit properties".

d. THAT the Honourable Court be pleased to issue an order of mandatory injunction directed at the Defendants, agents and/or servants to clear and/or remove all the constructions materials placed and/or deposited on the Plaintiff's property and/or remove and/or demolish any structures and/or any building or fixtures constructed on the Plaintiff's properties being CR. NO.33895-Plot Number MN/III/3995,CR.NO. 33896- Plot Number MN/III/3996, CR- NO. 33900- Subdivision No.4000/SECIII/MN, CR. NO.4000, Plot Number/MN/III/4001,Title Number CR 4269;Plot Number Sub. 1275 Mtwapa; CR. 4269-Plot Number MN/III/93; CR.21646-Plot Number MN/III/1272; CR-21046; Plot Number 1532/III/MN;Plot Number MN/III/3998; Plot Number MN/III/3998; Plot Number MN/III/4003;Plot Number MN/III/4004; Plot Number MN/III/508/2;Plot Number MN/III/3993;Plot Number MN/III/3997; Plot Number MN/III/3996;Plot Number MN/III/3995; Plot Number MN/III/3994; Plot Number MN/III/4013;Plot Number MN/III/4012; Plot Number MN/III/4011; Plot Number MN/III/4010;Plot Number MN/III/4009;Plot Number MN/III/4008;Plot Number MN/III/4001;Plot Number MN/III/1532; Plot Number MN/III/6963;Plot Number MN/III/4007 and Plot Number MN/III/1208 and further an orderdirected at the Defendants to restore the plaintiffs' property to its original status before trespass.

e. That an Order do issue to the Officer Commanding Station, Mtwapa Police Station or its officers to ensure compliance herein.

f. That the costs of this application be provided.

4. The application is premised on the grounds, testimonial facts and averments made out under the 25 paragraphed annexed affidavit of Lmantia Leadismo the Applicant herein. The Applicant averred that:-

a. The Plaintiff/Applicant herein is the legal and beneficial owner of all those properties situated in Mtwapa area within Kilifi County known as Monikas Private Bush Safaris

Limited, CR. NO.33895- Plot Number MN/III/3995, CR. NO. 33896- Plot Number MN/III/3996,CR-NO.33900- Subdivision No. 4000/SECIII/MN, CR. NO. 4000, Plot Number / MN/III/4001, Title Number CR 4269;Plot Number Sub.1275 Mtwapa; CR. 4269-Plot Number MN/III/93; CR. 21646-Plot Number MN/III/1272; CR-21046; Plot Number 1532/III/MN; Plot Number MN/III/3998; Plot Number MN/III/3998; Plot Number MN/III/4003; Plot Number MN/III/4004; Plot Number MN/III/508/2;Plot Number MN/III/3993; Plot Number MN/III/3997; Plot Number MN/III/3996;Plot Number MN/III/3995; Plot Number MN/III/3994; Plot Number MN/III/4013; Plot Number MN/III/4012; Plot Number MN/III/4011; Plot Number MN/III/4010; Plot Number MN/III/4009; Plot Number MN/III/4008; Plot Number MN/III/4001;Plot Number MN/III/1532; Plot Number MN/III/6963; Plot Number MN/III/4007 and Plot Number MN/III/1208, herein referred to as the "the suit properties".

b. The suit properties are registered in the name of as Monikas Private Bush Safaris Limited, which was a company and one of the properties of the Monika Ilona Leadismo Nee Wild (Hereinafter referred to as "The Deceased) who passed on 4th October, 2018 and which has been devolved to the Plaintiff/Applicant pursuant to the Certificate of Confirmation of Grant dated 14th December, 2022.

c. The Plaintiff/Applicant was the husband to the Deceased. The deceased and the Plaintiff/Applicant conducted a civil marriage before Mombasa Registrar of marriages on 2nd June, 1987 and the said union remained in force until the death of Monika Ilona Leadismo Nee Wild which occurred on 4th October, 2018.

d. The suit properties were acquired by the Deceased and the Plaintiffs/Applicants during the period of their marriage which lasted for more three decades.

e. On 12th October, 1987 the Deceased and the Plaintiff/Applicant incorporated a company known as which they used to run our family businesses for years. At the time, his wife (the deceased) was the sole director. The Plaintiff/Applicant averred that they did a lot of private safaris and display of Samburu cultural activities in various part of the world including the deceased's home country being Germany.

f. They acquired most of their matrimonial properties and other assets through Monikas Private Bush Safaris Limited, the Respondents herein.

g. The suit properties were therefore acquired jointly through the efforts of both the Plaintiff and the deceased and registered in their company- Monikas Private Bush Safaris Limited, which the deceased was the sole director for many years.

h. The deceased passed on 4th October, 2018 and in 15th March, 2022 the Court granted the Plaintiff/Applicant Grant Letters of Administration Intestate and thus granting him opportunity to step into the shoes of the deceased.

i. On 14th December, 2023 the Honourable Court in Mombasa Principal Magistrate's Court Succession Cause No.3 73 of 2018 issued a Certificate of Confirmation of Grant and Scheduled of Distribution of the Estate properties including the suite properties have since been vested in the Plaintiff/Applicant in whole and absolutely being the only dependant of the estate of the state of the Deceased.

j. The Defendants/Respondents herein have made several attempts and concerted efforts to illegally occupy the suit properties, these included illegal cutting down of the trees in the suit

properties; digging trenches and erecting illegal temporary makeshift structures and temporary fence on the part of the suit properties.

k. The Plaintiff/Applicant had on various occasions made reports to Mtwapa Police Station, nonetheless no action had been taken against the Defendants/Respondents.

l. On the 11th and 12th June, 2023, the Defendants/Respondents invaded the suit properties accompanied by a number of rowdy youth and goons who upon confronted by the Plaintiff/ Applicant threatened to harm him and informed him in the Kiswahili language that:- "mtu wa Bara hawezi miliki Shamba Kilifi ama Mombasa" which was loosely translated to mean that "non - local should not own land in Kilifi or Mombasa".

m. The Defendants/Respondents proceeded to cut down more trees, illegally, unlawfully and forcefully purported to allocated themselves portions of the Plaintiff/Applicant's properties - the suit properties without any legal or justifiable claim.

n. The Defendants/Respondents informed him that they had already secured buyers (private developers) for the suit properties and he ought to relocate to Samburu County which his original home.

o. The said properties were devolved upon him following the deceased who passed on 4th October, 2018 and a Certificate of Confirmation of Grant dated 14th December, 2022 was issued vesting the suit properties in his name in whole and absolutely and thus he was the legal and beneficial owner of the said properties.

p. The Defendants/Respondents had no any genuine claim in respect of the suit properties and their attempts to dispose the Plaintiff/Applicant of the suit properties was unlawful and illegal.

q. The aforesaid actions by the Defendants/Respondents were threats and/or contravention of his right to acquire and own property of any description enshrined under Article 40 of *the Constitution* of Kenya, 2010.

r. Due to the illegal and unlawful actions by the Defendants/Respondents, the Plaintiff has been prevented from developing and enjoying the suit properties contrary to the provision of Section 25 of the *Land Registration Act*, 2012 and thereby incurring huge losses on its investments and entitled to award of damages to an award of damages for trespass.

s. The Plaintiff/Applicant was apprehensive that the Defendants/Respondents were to sell or transfer to unsuspecting 3rd parties unless an order of this court pending the hearing and determination of the Motion and main suit.

t. From the foregoing, it was necessary for the court to intervene at this stage and make immediate orders to stop the Defendants/Respondents from ever transferring, trespassing, constructing on; damaging and/or possession of the suit properties pending the hearing and determination of the Motion and main suit.

u. There was danger of the Defendants/Respondents fraudulently transferring the suit properties to unsuspecting third parties on the basis forged documents and the Plaintiff/Applicant stood to suffer substantial and irreparable loss which could not be compensated by award of damages should prayers sought herein not be granted. The particulars of irreparable harm were as particularized herein:

    i. The suit properties would dissipate and thus rendering the present suit nugatory and a mere academic exercise;

ii. The Defendants/Respondents had indicated that they would force the Plaintiff/ Applicant out of the suit properties as they had already secured the buy for the said suit properties and consequently the Plaintiff/Applicant, if the Defendants/Respondents were not restrained would be deprived of the suit properties contrary to the Article 40 of *the Constitution* of Kenya, 2010.

v. The Honourable Court is seized with judicial authority to issue the orders sought in the Notice of Motion application.

**III. Submissions**

5. On 17th July, 2023 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 26th June, 2023 be disposed of by way of written submissions. Unfortunately, it was only the Plaintiff/Applicant who complied. Pursuant to that, the Honourable Court reserved a date for delivering of the Ruling on notice accordingly.

**A. The Written Submission by the Plaintiff/Applicant**

6. The Plaintiff/ Applicant through the Law firm of Messrs. Hashim & Lesaigor Associates Advocates filed their written submissions dated 9th October, 2023. Mr. Lesaigor Advocate commenced his submission by stating that the only issue for determination was whether the Plaintiff/Applicant had made out a case for grant of injunctive relief:

7. The Learned Counsel submitted that by an application dated 26th June, 2023, the Plaintiff/ Applicant approached the Honourable Court seeking the afore stated orders. He provided the factual background of the case. According to the Learned Counsel, the said application was premised on the grounds set out on the face of it and supporting affidavit deposed by Lmantia Leadismo on his own behalf and that of the Estate of the Deceased who died on 4th October, 2018 at Mtwapa Kilifi County and the then owner of Monikas Private Bush Safaris Limited which was the family business vehicle. The Plaintiff/Applicant is the legal and beneficial owner of all those properties in Mtwapa area within Kilifi County known as Monikas Private Bush Safaris Limited and the suit properties.

8. The Learned Counsel averred that the suit properties were registered in the name of Monikas Private Bush Safari Limited, which company was one of the properties of the Monikas Ilona Leadismon Nee Wild (Deceased) who passed on 4th October, 2018 and which was devolved to the Plaintiff/Applicant pursuant to the Certificate of Confirmation of Grant dated 14th December, 2022. The Plaintiff/ Aplicant was the husband to the late Monikas Ilona Leadismon Nee Wild. The deceased and the Plaintiff/Applicant conducted a civil marriage before Registrar of Marriages at Mombasa on 2nd June, 1987 and the union remained in force until the death of Monikas Ilona Leadismon Nee Wild which occurred on 4th October, 2018.The suit properties were acquired by the late Monikas Ilona Leadismon Nee Wild and the Plaintiff/Applicant during the period of their marriage which lasted for more than three decades. The Plaintiff/Applicant and the deceased incorporated a company known as Monikas Private Bush Safari Limited which they used to run the family business for years and indeed most of the family properties were registered in the name of the said entity.

9. He stated that thesuit properties were acquired through the efforts of both the Plaintiff/Applicant and the deceased and registered in their company-Monikas Private Bush Safaris Limited, which the deceased was the sole director for many years. The deceased passed on 4th October, 2018 and in 15th March, 2022 the Court granted the Plaintiff/Applicant Grant Letters of the Administration Intestate and thus granting him opportunity to step into the shoes of the deceased. On 14th December, 2022

the Honourable Court in Mombasa Principal Magistrate's Court Succession Cause No. 373 of 2018 issued a Certificate of Confirmation of Grant and Schedule of Distribution of the Estate properties including the suite properties and the same have since been vested in the Plaintiff/Applicant in whole and absolutely being the only dependant of the Estate of Monikas Ilona Leadismon Nee Wild.

10. The Plaintiff through his Supporting Affidavit sworn on 26th June, 2023 and annexures thereto demonstrated that the Defendants had made several attempts and concerted efforts to including illegal cutting down of the trees in the suit properties; digging trenches and erecting illegal temporary makeshift structures and temporary fence on the part of the suit properties. These actions were not only illegal, but unconstitutional and particularly contrary to the provision of Article 40 of *the Constitution* of Kenya, 2010.The Plaintiff has on various occasions made report to Mtwapa Police Station, nonetheless no action has been taken against the Defendants/Respondents. The Defendants on 11th and 12th June, 2023 invaded the suit properties accompanied by a number of rowdy youth and goons who upon confronted by the Plaintiff/Applicant threatened to harm him and informed him in Kiswahili language:- "mtu wa Bara hawezi miliki shamba Kilifi ama Mombasa" which was loosely translated in English language to mean that:- "non - local should not own land in Kilifi or Mombasa."

11. The Learned Counsel submitted that the Defendants/Respondents had no genuine claim in respect to the suit properties and their attempts to dispose the Plaintiff/Applicant of the suit properties was unlawful and unconstitutional.The suit and the application was opposed through the Replying Affidavit of the of 1st Defendant/Respondent JOHN MBUGUA sworn on 6th July, 2023. The 1st Defendant/Respondent claimed ownership of the suit properties though no documentation had been shared in support.

12. The Learned Counsel further submitted that they would rely on the following laws:-

    a. *The Constitution* of Kenya, 2010;

    b. The *Evidence Act*, Cap 80 Laws of Kenya

    c. The *Environment and Land Court Act*, 2011

    d. The *Law of Succession Act* Cap 160 Laws of Kenya

13. The Learned Counsel further reiterated that it is trite law that prior to issuance of interlocutory injunctions, the court must satisfy itself as to whether the Applicant had discharged its tripartite obligations to warrant judicial protection to wit;

    i. Establish a prima facie case;

    ii. Demonstrate irreparable injury in the absence of temporary injunctions; and

    iii. Allays any doubts as to (b) by showing that the balance of convenience is on their side. "*East African Industries – Versus - Trufoods* [1972] EA 420" and "*Giella – Versus - Cassman Brown & Co. Ltd* [1973]EA 358". In "*Nguruman Limited – Versus - Jan Bonde Nielsen & 2 Others* [2014] eKLR".

14. The leading authority on interlocutory injunction is the well-known case of "*Giella – Versus - Cassman Brown & Co. Ltd*(1973)(CAK)". Spry VP in his judgment put forth three conditions to be satisfied before an interlocutory injunction can be granted:

> "The conditions for the grant of interlocutory injunctions are now. I think, well settled in East. First, an applicant must show a prima facie case with probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant

might otherwise suffer irreparable injury, which would not be adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (*E. A. Industries -vs- Trufoods*, (1979)E.A. 420)."

15. In he further cited the case of:- "Nguruman Limited( Supra)", the Court of Appeal considered the three obligations. The Learned Counsel therefore, reiterated that having laid the foundation for grant of interlocutory orders, it became necessary to discuss the facts of the instant application to establish whether they meet the threshold for grant of interim orders. On the issue of a prima facie case, the Learned Counsel contended that the general rule in an application for interlocutory orders was that the court should not look at the merits or demerits of the case, that is, the court shall not delve with the substantive issues in controversy which issues should be reserved for trial. See "N*airobi High Court Civil Case No. 517 of 2014-Lucy Nungari Ngigi & 4 Others – Versus - National Bank of Kenya Limited & Anor* (eKLR)".

16. The Learned Counsel submitted that whereas the court was restrained from dealing with finality on substantive issues under controversy in an application for interlocutory orders, it was however, obliged to give its "prima facie' view of the matter establishing whether averments in the supporting affidavit are not true. In "*Dr. Simon Waiharo Chege – Versus - Paramount Bank of Kenya Ltd*. Nairobi (Milimani) HCCC No.360 of 2001", Ringer J (as he then was) opined thus:

> " The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation which have been, or are being or are likely to be violated by the adversary. To benefit from theremedy, at an interlocutory stage, the applicant must, in the first instance show he has a prima facie case with a probability of success at the trial. If the Court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the Courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as appertains to the subject matter of the suit does not meet the approval of the eye of equity."

17. The Learned Counsel asserted that while considering an application for injunction and it being an equitable remedy, the court is supposed to consider such issues as the conduct of both the Applicant and Respondents; the circumstances surrounding the case to establish whether grant of orders has an impact on third parties as well as consider whether an undertaking for damages has been issued. Pursuant to section 1A (2), of the *Civil Procedure Act*, the court is mandated to give effect to overriding objectives set out in section 1A (1) in exercise of its powers under the Act. What then was a prima facie case? To answer that query, he sought assistance from the case of:- "*MRAO Ltd – Versus - First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125", the Court of Appeal stated thus:-

> " 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."

18. He held that, in the instant case, it was uncontested that the Plaintiff/Applicant was the owner of the suit properties which devolved to him pursuant to the issuance of Certificate of Confirmation of Grant dated 14th December, 2022 arising from the Mombasa Principal Magistrate's Court Succession Cause No. 373 of 2018. It had also been established through averments contained in the supporting affidavit of the Plaintiff/Applicant and the documents annexed that the Plaintiff/Applicant and his deceased wife had been in possession and ownership of the suit properties from the years of 1990s. This evidence remained undisputed and unrebutted by the Defendants. [See Paragraphs 2, 3, 4, 5, 7, 8, 9and 10 of the Supporting Affidavit of Lmantia Leadismo sworn on 26th June, 2023]. The Plaintiff/Applicant's contestation was on there being an attempt to illegally and unlawfully disentitle him and forcefully acquire the suit properties by the Defendants/Respondents notwithstanding that there was no genuine claim for the suit properties by the Defendants/Respondents. This had been established by evidence showing that the Defendants/Respondents invaded the suit properties cut down trees, demolish the fence, unlawfully sub - divided the suit properties and erected illegal structures. The Defendants/Respondents actions were illegal, unlawful and unconstitutional. Under the contents made out of Paragraphs 11, 12, 13, 14, 15 and 17 of the Supporting Affidavits of the Lmantia Leadismo sworn on 26th June, 2023, the Plaintiff/Applicant had demonstrated that the illegal and unlawful acts effected by the Defendants/Respondents with the intention of taking occupation of the suit properties without any colour of right.

19. The contention by the Learned Counsel was that indeed the Plaintiff/Applicant averred Paragraph 13 of his supporting affidavit that when the goon invaded his properties on 11th and 12th June, 2023 they categorically informed him in clear and unequivocal terms that he was a foreigner in Coastal region. Thesaid affidavit read as follows: "mtu wa Bara hawezi miliki Shamba Kilifi ama Mombasa" this is loosely translated to mean that "non - local should not own land in Kilifi or Mombasa". According to him, this was a direct and deliberate assault on the dictates of provision of Article 40 of *the Constitution* of Kenya, 2010 which provides that every person has a right to own a property of any size anywhere in the Republic of Kenya. It was important to point out that the suit properties were in eminent danger of being illegally and unlawfully alienated by the Defendants/Respondent The trees in the suit properties had been cut down. Illegal structures were continuously being put up notwithstanding that the court did issue a temporary injunctive relief on 29th June, 2023. He posited that there was no doubt that the Plaintiff/Applicant had made out a cogent case for grant of the relief sought.

20. His argument was that the Plaintiff/Applicant's case was further buttressed and strengthened by the facts that the weighty issues raised by the matter have not been disputed and/or rebutted by the Defendants/Respondents. They remained uncontroverted. In "*Mustano Rocco - Versus - Aniello Sterelli* (2019) eKLR", Chepkwony J cited in affirmative "*Mohammed & Another – Versus - Haidara* [1972] E.A 166" at page 167 Paragraph F-H, Spry V.P, where it was held:

> " The Respondent made no attempt to reply to these allegations and they therefore remain unrebutted.....Here, the Respondent's affidavit gives no material facts and the only real evidence of facts is that contained in the appellant's affidavit. In these circumstances, it seems to me that a replying affidavit was essential. There was no need for it to be prolix but it should have made clear which of the facts alleged by the appellants were denied..."

21. According to the Learned Counsel, the Plaintiff/Applicant had demonstrated in his application and Supporting Affidavit both dated 26th June, 2023 the following key issues:

    a. The Plaintiff/Applicant in his application and supporting affidavit that the Court issued Certificate of Confirmation of Grant dated 14th December, 2022 arising from the Mombasa Principal Magistrate's Court Succession Cause No. 373 of 2018 which vested the suit properties in the Plaintiff/Applicant;

    b. The Plaintiff/Applicant had equally demonstrated that he had been in possession of the suit properties since 1990s;

    c. The Plaintiff/Applicant had also demonstrated that he was married to the Deceased. The civil marriage was conducted before Mombasa Registrar of marriages on 2nd June,1987 and the said union remained in force until the death of Monika Ilona Leadismo Nee Wild which occurred on 4th October, 2018. See Annexed in the affidavit and marked as "LL – 2" was a copy of the Certificate of Marriage].

    d. The Plaintiff/Applicant had further shown through credible evidence that the Defendants/ Respondents had made several attempts to forceful occupy the suit properties and that the numerous reports had been made to the Mtwapa Police Station without any success. [See paragraphs 12 and annexures Annexed in the affidavit and marked as "LL – 5" were copies of Police Abstracts.].

22. The Learned Counsel submitted that further to the foregoing a reading of the Defendants/ Respondents' Replying Affidavit sworn on 6th July, 2023 does not expressly rebut any of the averments made in the supporting affidavit to the Application of the Plaintiff as such, in view of the "Mohammed & Another – Versus - Haidara [supra]" the only evidence of malpractice available to the Honourable Court was that contained in the supporting affidavit of the 1st Defendant/Respondent. The Respondent's dispositions only provided a narrative of what the Plaintiff/Applicant, supported by the available evidence from the relevant government agencies, issues of illegal, unlawful, irregular and unconstitutional attempt to dispossesses the Plaintiff/Applicant of the suit properties without any lawful justification.

23. The Learned Counsel posited that the said Replying Affidavit never even purported to deny the averments in the supporting affidavit depose to by the Plaintiff/Applicant. There was no iota of evidence adduced by the Defendants/Respondent to rebut the averments contained in the supporting affidavit of the Plaintiff/Applicant. The Defendants/Respondents' response was built on quick sand and must collapse under its weight. Indeed, this Court should at the Ex - Parte stage find that the

Plaintiff/Applicant's application was meritorious. It should grant the injunctive relief pending the hearing and determination of the said application on 29th June, 2023.

24. In the circumstances, it was the Learned Counsel's submission that the Plaintiff/Applicant had established "a prima facie case' to warrant grant of injunctive reliefs pending the hearing and determination of the suit.

25. On the issue of irreparable loss. The Learned Counsel stated that in the absence of interim injunctive orders pending the hearing and determination of the suit, the Honourable Court having considered in detail the issue of prima facie case, the tripartite obligations on the part of the Applicant demanded a separate, distinct and logical disquisitionof the other two obligations in order to get judicial protection by way of interim injunctive orders. See "*Kenya Commercial Finance Co. Ltd – Versus - Afraha Education Society* [2001] Vol. 1 EA". In "Nguruman Limited case (supra)" the Court of Appeal held in this regard;

> "On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.

26. He submitted with regards to Irreparable injury. It was defined by *Halbury's Laws of England, 3rd Edition Vol. 21*, paragraph 739page 352 as:

> "Injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by grant of injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages, an injunction may be granted, if the injury in respect of which relief is sought is likely to destroy the subjected matter in question."

27. Further, on this point he cited the case of:- "*Joseph Siro Mosioma – Versus - Housing Finance Company of Kenya Limited & 3 Others* [2008] eKLR", Warsame J (as he then was) held that damages could not replace loses arising from clear breaches of the law and while considering an application for injunctions, a party's financial strength should not always be a factor for denying an injunction. In this matter, the Plaintiff/Applicant had demonstrated that he was the beneficial owner of the suit properties and that the same had been subject to illegal and unlawful invasion by the Defendants/Respondents. It had been established on balance of probability and preponderance of evidence that the suit properties are threatened with unlawful and illegal alienation by the Defendants/Respondents. This was a clear demonstration that an irreparable harm shall and had indeed been occasioned to the suit properties.

28. According to the Learned Counsel in the instant case, it was the Plaintiff/Applicant's unrebutted evidence that the Defendants/Respondents had made concerted effort to unlawful force the Plaintiff/Applicant out of the suit properties without any lawful justification. It was equally evidenced that in the event that the suit properties which the Plaintiff/Applicant had known as home since 1990s was

lost; award of damages would not be adequate. In considering an application for interlocutory orders, the court was called upon to take into consideration such issues as inter alia whether an undertaking for damages had been issued. It was the Learned Counsel's contention that none had been issued, as such, in the absence of interlocutory orders, the Plaintiff/Applicant stood to suffer irreparable injury not capable of redemption by way of an award of damages.

29. On the issue of the balance of convenience, the Learned Counsel submitted that it was held in "*Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai* [2018] eKLR" as follows:-

> " The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor 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 would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer" In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it."

30. Additionally, he cited the case of:- *"Chebii Kipkoech – Versus - Barnabas Tuitoek Bargoria & Another* [2019] eKLR", the court considered the issue of balance of convenience in the following manner;

> " The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to them would be greater than that caused to the defendants if an injunction is granted and suit is ultimately dismissed."

31. A further elucidation of what it was meant by the balance of convenience was made in the case of:- "*Paul Gitonga Wanjau – Versus - Gathuthis Tea Factor Company Limited & 2 Others* [2016] eKLR", where the court expressed itself thus;

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

32. In the instantapplication the Applicant's claim thatthe Respondents have trespassed the suit property and was at theverge of losing his proprietary rights thereto had been demonstratedbeyond peradventure. It was clear that unless the orders sought were issued the Plaintiff/Applicant would suffer greater inconvenience bearing in mind that it is legal owner of the suit properties and ought to findprotection conferred to him under the provision of Article 40 of the Constitutionof Kenya 2010 as read together with the provision of Sections 24 (a), 25 and 26(1) of the *Land Registration Act* No.

3 of 2012. If theinjunctive relief was denied and the suit properties were alienated by the Defendants/Respondents and the Plaintiff/Applicant succeeded; the suit properties shall neverbe recovered and the loss suffered by the Plaintiff/Applicant shall not beadequately atone by award of damages.

33. There was a high likelihood that in the absence of the injunctive orders, the Defendants/Respondents may proceed to further alienate the suit properties thereby making the Applicant's claim over the suit properties a mere academic exercise.

34. On the whether the mandatory injunction should issue or not. The Learned Counsel asserted that the Plaintiff/Applicant sought for an order of mandatory injunction directed at the Defendants/Respondents and/or their agents to clear and/or remove all construction materials placed and/or deposited on the suit properties and/or demolish any illegal structures and/or building constructed on the suit properties by the Defendants. He emphasized that through its supporting affidavit, the Plaintiff/Applicant had established the Defendants/Respondents first trespassed into the suit properties erected some ramshackle structures and rush to the court through Originating Summons ELC No. E007 of 2023 seeking a declaration that the suit properties had been vested in them through adverse possession. It would be unfair to allow the Defendants/Respondents obtain advantage anchored on illegal, unlawful and unconstitutional conducts which were in total disregard of the legal framework governing property rights in Kenya.

35. He opined that the Plaintiff/Applicant had produced annexures marked as "LL – 4" which demonstrated continuous acts of illegalities to wit cutting down trees on the suit properties, constructions of temporary structures and defacing of the suit properties which actions were met to pre-decide the matter in court.

36. The Learned Counsel stated that on the principles governing grant of mandatory injunctions that this Honourable Court was properly clothed with requisite jurisdiction to grant an order of mandatory injunction. It was imperative to point out that an order of mandatory injunction may be granted at interlocutory stage where the justice of the case dictate so. It was ordinarily issued in the clearest of the cases and not as a matter of course. It was the Learned Counsel's submission, that the Plaintiff/Applicant had clearly demonstrated through his supporting affidavit and the annexures thereto that this a case where mandatory injunction was necessary to restore the status of the suit property and disentitle the Defendants/Respondents unfair advantage obtained pursuant to illegal and unlawful acts committed prior and during the pendency of the suit.

37. To buttress on this point, he referred Court to a decision by this Court in the matter of: "*Bandari Investments & Co. Ltd – Versus - Martin Chiponda & 139 others* [2022] eKLR", whereby I remarked as follows:

> "Before proceeding further, its significant to appreciate the great distinction between the prohibitory injunction as envisaged in the "Locus Classicus" case of "*Giella - Versus - Cassman Brown*,1973 E.A. Page 358" and a Mandatory Injunction. The first authority on making this distinction was "*Shepard Homes - Versus - Sandham* (1970) 3 WLR Pg. 356 Case" in which Megarry. J as he then was stated follows:-
>
> "Whereas a Prohibitory Injunction merely requires abstention from acting, a Mandatory Injunction requires the taking of positive steps, and may require the dismantling or destruction of something already erected, or constructed. This will result in a consequent waste of time, money and materials. If it is ultimately established that the Defendant was entitled to retain the erection".

38. Mandatory injunction requires that certain positive steps may need to be taken and indeed in the case before the court the Plaintiff/Applicant was seeking orders of demolition of the structures illegal constructed during the pendency of the suit which granted the Defendants/Respondents undue advantage. Therefore, it was trite law that an order of mandatory injunction could only be granted in a clear case. The Honourable Court to find that the case before it deserves grant of mandatory injunction. The Plaintiff/Applicant in this matter had been in possession of the suit properties since the years of 1990s and it had been their matrimonial home since then. The pleadings filed in court demonstrated that bold attempts to illegal and forceful occupy the suit properties began following the death of the Plaintiff/Applicant's wife in the year 2018. The Defendants/Respondents had been advancing forceful and illegally occupation of the suit properties and had indeed trespassed on the suit properties and continued to construct on the suit properties even during the pendency of this matter.

39. He further cited the case of:- "*Josphat Obarasa Ekisa (suing as the Legal administrator of the Estate of Santrino Madola (the administrator of Estate of Sabastiano Ekisa Ngege – Versus - Barasa Ekapolon Auko & 3 others; Benjamin Pamba Ekisa (Intended 3rd Parties)* [2019] eKLR" Justice A. Omollo stated as follows:

> "Since there is no rejoinder that the Respondents invaded the land on 8/10/2019 and constructed semi-permanent structures thereon and in light of the pendency of this case where the Applicants title is yet to be cancelled, the actions by the Respondents promote anarchy and are intended to defeat the cause of justice. The Plaintiff's submission that eviction orders as sought cannot be granted at an interlocutory stage seems to encourage the proposition that parties who take law into their own hands should be protected by the same law they are intent on breaking."

40. It was the contention of the Learned Counsel that the Defendants/Respondents had not denied illegal, unlawful and unconstitutional occupation of the suit properties. Indeed, the Defendants/Respondents were telling the Court that though the Plaintiff/Applicant was illegally and unlawful occupied the suit properties an order of mandatory injunction could not issue at interlocutory stage. The Learned Counsel urged the Honourable court not to be persuaded by the said arguments because to do so "shall encourage the proposition that parties who take the law into their own hands should be protected by the same law they are intent on breaking". The Defendants/Respondents approached the court with unclean hands and thus they should not find favour in the court of equity. Their Honourable Court have been clear that any advantage obtained by a party through planned and blatant and unlawful acts ought not be retained. This court in "*Bandari Investments & Co. Ltd – Versus - Martin Chiponda & 139 others* (Supra)" had this to say:

> "In the given circumstances, this Court holds that a party as in the case of the Plaintiff herein, as far as possible ought not be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act in any way attempting to pre -decide the intended suit or influence a decision thereon."

41. The Learned Counsel urged the court to find that the Defendants/Respondents' planned and blatant acts being forceful entry and occupation of the suit properties and continuous constructions during the pendency of the suit and despite injunctive orders issued on 29th June, 2023 should be discourage by issuance of mandatory injunction.

42. On costs, the Learned Counsel averred that they follow the cause. He urged the Court to grant the Plaintiff costs of the application. In conclusion, the Learned Counsel submitted that going by the

evidence on record, their submissions herein and the long-established position of law on grant of prohibitory and mandatory injunctions; the Plaintiff/Applicant had established the threshold for grant of both prohibitory and mandatory injunctive relief and the same ought to be granted. The instant application was merited and that in order to protect the substratum of the case, it would be in the interest of justice that the application be allowed with costs.

**IV. Analysis and Determination**

43. I have carefully read and considered the pleadings herein, being the Notice of Motion application dated 26th June, 2023 by the Plaintiff/Applicant, the replies by the Defendants/Respondents, the written submissions and the plethora of authorities cited herein by the parties and the relevant provisions of *the Constitution* of Kenya, 2010 and the statures.

44. In order to arrive at an informed, reasonable, fair and Equitable decision, the Honorable Court has three (3) framed issues for determination as follows:-

    a. Whether the Notice of Motion dated 26th June, 2023 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.

    b. Whether the Plaintiff/Applicant has made out a case for the grant of Mandatory injunction at the interlocutory stage.

    c. Who will bear the Costs of Notice of Motion application dated 26th June, 2023.

**Issue No. a). Whether the Notice of Motion dated 26th June, 2023 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.**

45. The main substratum in this application by the Plaintiff/Applicant is whether or not to grant both interim and mandatory injunctive orders against the Defendants/Respondents herein. The said application herein is premised under the provision of Order 40 Rule 1 of the C*ivil Procedure Rules* 2010 amongst the provisions of the law. Which provides as follows: -

    Order 40, Rule 1

    Where in any suit it is proved by affidavit or otherwise—

    a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

    b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

46. The principles applicable in an application for an injunction were laid out in the celebrated case of "*Giella – Versus - Cassman Brown & Co Ltd* (Supra)", where it was stated:-

    " First an applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of

damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

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

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

48. In dealing with the first condition of prima facie case, the Honorable Court guided by the definition melted down in "*MRAO Limited – Versus - First American Bank of Kenya Ltd* (Supra). The Plaintiff/Applicant averred that he is the legal and beneficial owner of all those properties situated in Mtwapa area within Kilifi County known as Monikas Private Bush Safaris Limited and the suit properties. According to the Plaintiff in his submissions, it is uncontested that the Plaintiff/Applicant is the owner of the suit properties which devolved to him pursuant to the issuance of Certificate of Confirmation of Grant dated 14th December, 2022 arising from the Mombasa Principal Magistrate's Court Succession Cause No. 373 of 2018. It has also been established through averments contained in the supporting affidavit of the Plaintiff/Applicant and the documents annexed that the Plaintiff/Applicant and his deceased wife have been in possession and ownership of the suit properties from the years 1990s. This evidence remains undisputed and unrebutted by the Defendants/Respondents. [See Paragraphs 2, 3, 4,5,7,8,9,and 10 of the Supporting Affidavit of Lmantia Leadismo sworn on 26th June, 2023]. According to the Plaintiff/Applicant his contention was that there was an attempt to illegally and unlawfully disentitle him and forcefully acquire the suit properties by the Defendants/Respondents notwithstanding that there is no genuine claim for the suit properties by the Defendants/Respondents. This has been established by evidence showing that the Defendants/Respondents invaded the suit properties cut down trees, demolish the fence, unlawfully sub-divided the suit properties and erected illegal structures. The blatant acts of omission and commission by the Defendants/Respondents were illegal, unlawful and unconstitutional. In paragraphs 11, 12, 13, 14, 15 and 17 of the Supporting Affidavits of the Lmantia Leadismo sworn on 26th June, 2023, the Plaintiff/Applicant has demonstrated that the illegal and unlawful acts effected by the Defendants/Respondents with the intention of taking occupation of the suit properties without any colour of right.

49. It evident that goons invaded his properties on 11th and 12th June, 2023. They categorically informed him in clear and unequivocal terms that he was a foreigner in Coastal region. The said affidavit reads as follows: "mtu wa Bara hawezi miliki Shamba Kilifi ama Mombasa" this is loosely translated to mean that "non-local should not own land in Kilifi or Mombasa". This was according to the Plaintiff/

Applicant a direct and deliberate assault on the dictates of the provision of Article 40 of *the Constitution* of Kenya, 2010 which provides that every person has a right to own a property of any size anywhere in the Republic of Kenya.

50. In the case of "*Mbuthia – Versus - Jimba credit Corporation Limited* 988 KLR 1", the Court held that:-

> "In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties cases."

51. Similarly, in the case of "*Edwin Kamau Muniu – Versus- Barclays Bank* of Kenya Ltd" the court held that;

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

52. In the present case, there are two conflicting interests by the Plaintiffs/Applicant and the Defendants/ Respondents. I have gone through the annexures by the Plaintiff/Applicant and I am of the opinion that regarding this first condition, the Plaintiff/Applicant has established that he is the lawful registered Proprietor of the Suit Property which in my opinion established that the Plaintiff has a right that may be infringed if the orders sought are not granted. In these circumstances, I strongly find and hold that the Plaintiff/Applicant has established that he has "a prima facie" case with a probability of success.

53. With regard to the second limb of the Court of Appeal in "*Nguruman Limited* (supra)", held that:-

> "On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

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

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

55. Quite clearly, in the instant case, it is the Plaintiff/Applicant's unrebutted evidence that the Defendants/Respondents who have made concerted effort to unlawful force the Plaintiff/Applicant out of the suit properties without any lawful justification. It is equally evidenced that in the event that the suit properties which the Plaintiff/Applicant has known as home since 1990s is lost; award of damages will not be adequate. In considering an application for interlocutory orders, the court is called upon to take into consideration such issues as inter alia whether an undertaking for damages has been issued. It is the Plaintiff/Applicant's submission that none had been issued, as such, in the absence of interlocutory orders, the Applicant, stands to suffer irreparable injury not capable of redemption by way of an award of damages. Therefore, the Plaintiff/Applicant has not satisfied the second condition as laid down in "Giella's case".

56. Thirdly, the Plaintiff/Applicant has to demonstrate that the balance of convenience tilts in his favour. In the case of "*Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai* (Supra)" 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".

57. In the case of "*Paul Gitonga Wanjau – Versus - Gathuthis Tea Factor Company Ltd & 2 others* (Supra)", the court dealing with the issue of balance of convenience expressed itself thus:-

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

58. In this instant case, the Plaintiff/Applicant's claim that the Defendant/Respondents have trespassed the suit property and are at the verge of losing his proprietary rights thereto has been demonstratedbeyond peradventure. It is clear that unless the orders sought areissued the Plaintiff/Applicant will suffer greater inconvenience bearing in mindthat it is legal owner of the suit properties and ought to findprotection conferred to him under Article 40 of the Constitutionof Kenya 2010 as read together with sections 24(a), 25 and 26(1) of the *Land Registration Act* No. 3 of 2012. If theinjunctive relief is denied and the suit properties are alienated by theDefendants/Respondents and the Plaintiff/Applicant succeed; the suit properties shall neverbe recovered and the loss suffered by

the Plaintiff/Applicant shall not be adequately atone by award of damages. The decision of "Amir Suleiman – Versus - Amboseli Resort Limited [2004] eKLR" where the Learned Judge offered further elaboration on what is meant by "balance of convenience" and stated:-

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

59. According to the Plaintiff/Applicant there isa high likelihood that in the absence of the injunctive orders, the Defendants/Respondents may proceed to further alienate the suit properties thereby making the Plaintiff/Applicant's claim over the suit properties a mere academic exercise. Thus, I am convinced that the balance of convenience lies with the Plaintiff/Applicant in this case as he is the legal and beneficial proprietor of the suit property.

60. Be that as it may, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the ownership of the suit property by the Plaintiff/Applicant.

61. In saying so, I wish to refer to the case of:- "*Robert Mugo Wa Karanja – Versus - Ecobank (Kenya ) Limited & Another* [2019) eKLR" where the court in deciding on an injunction application stated;

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

62. I am convinced that if orders of temporary injunction are not granted in this suit, the properties in dispute might be in danger of being dealt in the manner set out in the application and apprehended by the Plaintiff/Applicant. From the facts herein, the Plaintiff/Applicant has been in occupation of the suit land from time memorial until they were forcefully evicted by the Defendants/Respondents. It follows that the Plaintiff has a prima facie evidence and legal inclination to the suit property. In view of the foregoing, I find that the suit property is at risk of being wasted. Therefore this Honourable court orders that the status quo of the suit property in the course of the hearing and determination of this suit.

**Issue No. b). Whether the Plaintiff/Applicant has made out a case for the grant of Mandatory injunction at the interlocutory stage.**

63. Before proceeding further, its significant to appreciate the great distinction between the prohibitory injunction as envisaged in the "Locus Classicus" case of "*Giella – Versus - Cassman Brown*, 1973 E.A. Page 358" and a Mandatory Injunction. The first authority on making this distinction was "Shepard Homes – Versus – Sandham (1970) 3 WLR Pg. 356 Case" in which Megarry .J as he then was stated follows:-

> " Whereas a Prohibitory Injunction merely requires abstention from acting, a Mandatory Injunction requires the taking of positive steps, and may require the dismantling or destruction of something already erected, or constructed. This will result in a consequent

waste of time, money and materials. If it is ultimately established that the Defendant was entitled to retain the erection".

64. The question is then whether the Plaintiff/Applicant is entitled to be granted the Permanent Injunction restraining the Defendants on the suit property. Unlike Temporary Injunction which are granted only to be in force for a specified time or until the issuance of further orders from Court, Permanent Injunction are rather different, in that they are perpetual and issued after a Suit has been heard and finally determined.

65. This Honourable Court opined itself as follows in the case of "*Bandari Investments & Co. Limited – Versus - Martin Chiponda & 139 others* [Supra]":-

> " Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Plaintiff in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the *Civil Procedure Code*, 2010 if it feels the right of a Party has been fringed, violated and/or threatened as the Honourable Court cannot just seat, wait and watch under these given circumstances.
>
> It's the effect of the order that matter as opposed to it mere positive working which makes it mandatory. The Honorable Court must be very cautious and vary that the matter before court is not only an application for mandatory injunction, but is one which, if granted would amount to the grant of a major part of the relief claimed in the action. Such applications should be approached with great circumspect and caution and the relief granted only in a clear case lest the suit is finalized at the interlocutory stage and there is nothing left to be heard and determined at the chagrin of the opposing party. Certainly, that would not be equity, fair and just at all to the other party."

66. The circumstances under which the Court would grant a Mandatory Injunction was well stated out by the Court of Appeal in the Case of "*Malier Unissa Karim – Versus - Edward Oluoch Odumbe* (2015) eKLR" as follows:-

> " The test for granting a Mandatory Injunction is different from that enunciated in the "*Giella –Versus - Cassman Brown* case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of "*Kenya Breweries Ltd-Vs- Washington Okeyo* (2002) EA 109" had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 24 Halsbury Laws of England 4th Edition Paragraph 948 which states as follows:-
>
> "A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, it the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a match on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application".

67. Further the same Court of appeal in the case of "*Jay Super Power Cash and Carry Ltd –Versus - Nairobi City Council and 20 others* CA 111/2002" held that:-

> " This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken balance he can pay for it".

68. Additionally, based on a passage from 24 *Halsbury Laws of England,* Page 248, the case of "*Locabail International Finance Limited - Versus - Agro Export and others* (1986) All ER 906", the court held thus:-

> 'A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can easily be remedies, or if the Defendant attempted to steal a march on the Plaintiff... .....a Mandatory injunction will be granted on an interlocutory application.'

69. The reason for this rule on granting of Mandatory Injunction is plain. Megarry .J put is succinctly in a subsequent passage in the case of "Shepard Homes Case (Supra)" as follows:-

> " .....if mandatory injunction is granted on motion, there will be normally be no question of granting a further mandatory injunction at the trial; what is done and the Plaintiff has, on motion, obtained once and for all the demolition or destruction that he seeks. Where an injunction is prohibitory, however, there will often still be a question at the trail whether the injunction should be dissolved or contained"

70. In this case, the Plaintiff/Applicant sought for an order of mandatory injunction directed at the Defendants/Respondents and/or their agents to clear and/or remove all construction materials placed and/or deposited on the suit properties and/or demolish any illegal structures and/or building constructed on the suit properties by the Defendants. The Plaintiff/Applicant through its supporting affidavit has established the Defendants/Respondents first trespassed into the suit properties erected some ramshackle structures and rush to the court through Originating Summons ELC No. E007 of 2023 seeking a declaration that the suit properties have been vested in them through adverse possession. It would be unfair to allow the Defendants/Respondents obtain advantage anchored on illegal, unlawful and unconstitutional conducts which are in total disregard of the legal framework governing property rights in Kenya.

71. Paradoxically this Honourable Court takes note that the suit is at its ripe stage being that as much as the Honourable Court has determined above that the Plaintiff/ Applicant has made out a case for grant of temporary injunctive orders, it will be premature to grant a mandatory injunction at this stage. Therefore the prayer for the grant of mandatory injunction is declined.

**Issue No. c). Whether the Plaintiff/ Applicant is entitled to the orders sought.**

72. While making this ruling, this court has derived its inherent powers vested on it in what is now termed as the overriding objectives (or loosely known as "the Oxygen rule"). The said powers are founded under the provisions of Sections 1, 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Cap. 21, Sections 3 and 19(1) of the Environment Land Court Act, No 19 of 2011 and Article 159 (1) and (2) of *the*

*Constitution* of Kenya and in particular the principles which guide proceedings before this court being "the Practice directions on proceedings in the ELC" developed pursuant to the Provisions of Sections 18, 19, 20, 24 and 30 of the ELC Act specifically being just, expeditious disposal of cases, proportionate and accessible to resolution of disputes pertaining to land.

73. The Plaintiff/ Applicant has presented to this Honourable Court material in form of annextures and in his averments has satisfied to this Honourable Court deserving of the temporary injunction he seeks against the Defendants. As for the mandatory injunction, the suit is still ripe and therefore it will be premature to grant such orders at this interim stage.

**Issue No. d). Who will bear the Costs of Notice of Motion application 26th June, 2023.**

74. It is now well established that the issue of Costs is at the discretion of the Court. Costs mean the award that a party is granted at the conclusion of a legal action or proceeding in any litigation thereof. The *Black Law Dictionary* defines cost to means:-

> " the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other"

75. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. provides as follows:-

> "(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."

76. A careful reading of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book The Code of Civil Procedure, 18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise. By events, it means the outcome or result of the legal action.

77. In this case, as Court finds that the Plaintiff/Applicant has fulfilled the conditions set out under Order 40 Rule 1 of the Civil Procedure Rules, 2010. In tandem with the provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21, the events and/or results in this case are the Plaintiff/ Applicant has succeeded in his case. Therefore, for this very fundamental reason, the costs of the Notice of Application dated 26th June, 2023 will be made to the Plaintiff/Applicant by the Defendants/ Respondents herein.

**V. Conclusion & Disposition**

78. In long analysis, upon the Honorable Court has carefully considering and weighing the conflicting parties' interest as regards to balance of convenience, it is clear that the Plaintiff/ Applicant has a case against the Defendants/ Respondents.

79. However, it is only during the full trial and upon the adducing of the evidence that a final and reasonable determination of the matter will have been logically attained. But by all means there are

all imperative reasons to preserve the suit property in the meantime. For avoidance of doubt I do specifically proceed to order:-

a. That the Notice of Motion application dated 26th June, 2023 be and is hereby found to have merit and hence it is allowed partially.

b. That for the benefit of any doubt whatsoever, prayers No. 4 and 5 on the Notice of Motion dated 26th June, 2023 be and are hereby declined.

c. That an order made that pending the hearing and determination of this suit do hereby issue a temporary injunction restraining the Defendants/Respondents jointly and severally or their agents, successors, assigns or personal representatives or any acting in their behalf from dealing, alienating, disposing, damaging, trespassing, entering, remaining upon, sub-dividing, advertising for sale, constructing on or in any manner whatsoever interfering with the Plaintiff's quiet possession, use and enjoyment of the land known as CR.NO.33895-Plot Number MN/III/3995, CR. NO. 33896- Plot Number MN/III/3996,CR-NO.33900-Subdivision No. 4000/SECIII/MN, CR. NO.4000, Plot Number /MN/III/4001, Title Number CR 4269;Plot Number Sub.1275 Mtwapa;CR. 4269-Plot Number MN/III/93; CR. 21646-Plot Number MN/III/1272; CR-21046; Plot Number 1532/III/MN; Plot Number MN/III/3998;Plot Number MN/III/3998; Plot Number MN/III/4003; Plot Number MN/III/4004; Plot Number MN/III/508/2; Plot Number MN/III/3993; Plot Number MN/III/3997;Plot Number MN/III/3996; Plot Number MN/III/3995;Plot Number MN/III/3994; Plot Number MN/III/4013; Plot Number MN/III/4012; Plot Number MN/III/4011; Plot Number MN/III/4010;Plot Number MN/III/4009;Plot Number MN/III/4008; Plot Number MN/III/4001;Plot Number MN/III/1532; Plot Number MN/III/6963; Plot Number MN/III/4007 and Plot Number MN/III/1208, herein referred to as the "the suit properties".

d. That for expeditious sake this matter to be heard on 16th May, 2024. There shall be a mention on 8rd April, 2024 for conducting Pre – Trail Conference pursuant to the provision of Order 11 of the Civil procedure Rules, 2010 and also to consider with concurrence of the parties herein the consolidation of the two suits being "ELC No. 007 of 2023 – "John Mbugua & Others – Versus – Monikas Private Bush Safaris Limited" and "ELC No. E063 of 2023 of 2023 – Lmantia Leadismo – Versus – John Mbugua & 3 Others" pursuant to the provision of Section 81 (h) of the *Civil Procedure Act*, Cap. 21.

e. THAT the cost of the Notice of Motion application dated 26th June, 2023 is awarded to the Plaintiff/Applicant to be borne by the Defendants/Respondents herein.

80 It Is So Ordered Acordingly.

**RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS SIGNED AND DATE AT MOMBASA THIS 20TH DAY OF FEBRUARY 2024.**

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**HON. JUSTICE MR. L. L. NAIKUNI**

**ENVIRONMENT AND LAND COURT AT**

**MOMBASA**

Ruling delivered in the presence of:

a. M/s. Firdaus Mbula, the Court Assistant;

b. Mr. Lesaigor Advocate for the Plaintiff/Applicant.

c. Non appearance by the Defendants/Respondents.