



**Mbugua & 2 others v Monikas Private Bush Safaris Limited (Enviromental and Land Originating Summons E007 of 2023) [2024] KEELC 1000 (KLR) (20 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1000 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E007 OF 2023**

**LL NAIKUNI, J**

**FEBRUARY 20, 2024**

**IN THE MATTER OF: PLOT NUMBER CR 3995/111/MN, CR 33895/111/MN, CR 3996/111/MN, CR NO 4000/111/MN, CR 33900/111/MN, CR 4001/111/MN, CR 33901/111/MN AND IN THE MATTER OF AN APPLICATION FOR DECLARATION THAT THE PLAINTIFFS HAVE OBTAINED OWNERSHIP OF THE ABOVE SAID PARCEL OF LAND BY WAY OF ADVERSE POSSESSION AND IN THE MATTER OF: LIMITATION OF ACTIONS ACT CAP 22 OF LAWS OF KENYA**

**BETWEEN**

**JOHN MBUGUA ..... 1<sup>ST</sup> PLAINTIFF  
FRANCIS KOMBE ..... 2<sup>ND</sup> PLAINTIFF  
RAYMOND CHARO AND 15 OTHERS ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**MONIKAS PRIVATE BUSH SAFARIS LIMITED ..... DEFENDANT**

**RULING**

**I. Introduction**

1. The application before this Honorable Court for hearing and determination is the Notice of Motion application dated 15<sup>th</sup> May, 2023 filed under a Certificate of urgency. It was brought by the Plaintiffs/Applicants under the provisions of Order 40 Rule 1 of the Civil Procedure Rules 2010, Sections 3A and 63 of the *Civil Procedure Act* Cap 21 Laws of Kenya.
2. Upon service, the Defendant/Respondent herein did respond by filing replies. The Honourable Court will be dealing with the said replies at a later stage of this Ruling.



## II. The Plaintiffs/ Applicants case

3. The Plaintiffs/Applicants sought for the following orders:-
  - a. Spent.
  - b. Spent.
  - c. That the Defendants/Respondents by themselves, its servants and or its agents be restrained by a temporary injunction from evicting, demolishing, harassing and or interfering in any manner with the Plaintiffs/Applicants occupation of plot number CR 3995/111/MN, CR 33895/111/MN, CR 3996/111/MN, CR NO 4000/111/MN, CR 33900/111/MN, CR 4001/111/MN, CR 33901/111/MN Mtwapa Kilifi County and the OCPD, DCIO Mtwapa Police Division and OCS Mtwapa Police Station to enforce these orders pending the hearing of the main suit.
  - d. That an order be issued directing the Land Registrar to prohibit or restrict dealings to all that parcel of land known as plot number CR 3995/111/MN, CR 33895/111/MN, CR 3996/111/MN, CR NO 4000/111/MN, CR 33900/111/MN, CR 4001/111/MN, CR 33901/111/MN Mtwapa Kilifi County pending the hearing and determination of this application and the main suit thereafter.
  - e. That this Honourable Court be pleased to invoke its inherent powers and issue any further Orders that will be just and fair to safeguard the interests of the Plaintiffs herein.
  - f. That costs be in cause.
4. The application was premised on the grounds, facts and testimony on the face of the application and further supported by the 18 Paragraphed annexed affidavit of John Mbugua the 1<sup>st</sup> Plaintiff/Applicant herein. The Plaintiff/Applicant averred that:
  - a. The Defendant/Respondent had been sending unknown people to the Plaintiffs/Applicants who had threatened to evict and demolish the houses belonging to the Plaintiffs/Applicants which houses were situated on the suit property.
  - b. Each Plaintiff had been living on the parcel of land known as of plot number CR 3995/111/MN, CR 33895/111/MN, CR 3996/111/MN, CR NO 4000/111/MN, CR 33900/111/MN, CR 4001/111/MN, CR 33901/111/MN Mtwapa Kilifi County and had constructed a house on a portion of the suit properties herein and each stood to suffer irreparable loss and damage, mental and psychological anguish should they be evicted and their houses demolished because each one of them and their families were residing in the houses situated on the suit property. They had lived and resided as a community on the said parcel of land on or about 35 years and have been occupying and utilizing the suit parcel wherein the Deponent and seventeen others had erected their residence, rare livestock and other farming activities. (Annexed in the affidavit and marked "C" were Photographs of his house and other Plaintiff's houses situated in the suit property).
  - c. The balance of convenience tilted in favour of the Plaintiffs/Applicants who would be prejudiced if the Defendant/Respondent evicted and demolished their houses before the suit herein was heard and determined on merit.



- d. The Plaintiffs/Applicants' suit herein was competent and with a high probability of success. The Plaintiffs/Applicants' herein had each occupied a sizable piece of land in the suit parcel of land.
- e. The Defendant/Respondent was also threatening to evict the Plaintiffs/Applicants from the suit premises without a lawful Court Order.
- f. It was in the interest of justice that the Court granted the Orders sought.
- g. The suit herein would be rendered nugatory if the injunction Orders was not granted to preserve the interest of each of the Plaintiffs/Applicants which interest was the house each Plaintiffs/Applicants had constructed on a portion of the suit property.

### **III. The Defendant/Respondent's case**

5. On 12<sup>th</sup> June, 2023, the Defendant filed 30 Paragraphed Replying Affidavit sworn by LMANTIA LEADISMO and dated the same on the where he posited as follows: -
  - i. He was the duly appointed Legal Administrator of the Estate of the Late Monika Ilona Leadismo (Deceased) who died on the 4<sup>th</sup> October, 2018 at Mtwapa Kilifi County and the then owner Monikas Private Bush Safaris Limited which was their family business vehicle during their many years of marriage. Annexed in the affidavit and marked as "LL – 1" was a copy of the Grant of Letters of Administration Intestate dated 15<sup>th</sup> March, 2022.
  - ii. He conducted a civil marriage with the deceased before Mombasa Registrar of Marriages on 2<sup>nd</sup> June, 1987 and their union remained in force until her death on the 4<sup>th</sup> October, 2018. Annexed in the affidavit and marked as "LL – 2" was a copy of the Certificate of Marriage.
  - iii. On 12<sup>th</sup> October, 1987 they caused the incorporation of a company known as Monikas Private Bush Safaris, which they used to run their family businesses for years. At the time, his wife (the deceased) was the sole director. They did a lot of private safaris and display of Samburu cultural activities in various part of the world including her home country-Germany.
  - iv. They acquired most of their matrimonial properties and other assets through Monikas Private Bush Safaris Limited, the Respondent herein.
  - v. After five (5) years of operations the Company business ran into losses and thus the same remained dormant for years.
  - vi. The deceased and himself had been residing on the said suit properties since the year 1995 when the properties was purchased. They had never at any point to date been absent from the suit property. The Plaintiffs/Applicants were groups of cartels of land grabbers who had made numerous attempts to force him out of the suit properties following the death of his wife in the year 2018.
  - vii. They employed the 1<sup>st</sup> Plaintiff/Applicant (John Mbugua Mutua) as their driver. He was one of the drivers of Monikas Private Bush Safaris Limited. He was and is not a squatter in the suit properties, but he was housed as one the employees with many others.
  - viii. In the year 2001 or thereabout they discussed with his wife (now deceased) that due to her failing health they should allow Mr. John Mutua Mbugua to assist in reviving the day to day running of the company. They appointed Mr. John Mutua, the 1<sup>st</sup> Plaintiff/Applicant herein to act for them and assist his wife (deceased) to revive the Company. Pursuant to



said arrangement, they directed the 1<sup>st</sup> Plaintiff/Applicant to write to the Registrar of the Companies. Mr. Mutua, the 1<sup>st</sup> Plaintiff/Applicant herein wrote a letter dated 6<sup>th</sup> July, 2001 in which he stated thus:-

“I wish to draw your attention that the above company was dormant since way back in 1993. This was due to several problems that it faced. However, I am instructed by the Managing Director Mrs. Monica Leadismo who has been very sick to temporarily act in her place till such time she recovers.....” Annexed in the affidavit and marked as “LL – 3” was a copy of the Letter dated 6<sup>th</sup> July, 2001.

- ix. The Plaintiff/Applicant was not in adverse possession as he was their employee. On the contrary, it was the Defendant/Respondent who had been in possession of the suit properties since 1995 and none of the alleged Plaintiffs/Applicants had ever resided in the suit properties to date.
- x. Concurrent with the filing the Summons before the Court the 1<sup>st</sup> Plaintiff/Applicant herein attempted to forcefully evict the Defendant/Respondent from his properties and indeed they started to illegally deposit construction materials, digging trenches, cutting down my trees which illegal actions he reported to Mtwapa Police Station on various occasions. Annexed in the affidavit and marked as “LL – 4” were copies of the Police Abstracts and Photographs of trespass to the suit properties by the Plaintiffs/Applicants herein.
- xi. He was the legal and beneficial owner of all the suit properties claimed by the Plaintiffs/Applicants herein. These properties were acquired by his wife (deceased) and himself over a period of thirty (30)years of their marriage.
- xii. Following the death of his wife on the 4<sup>th</sup> October, 2018 some of their employees mischievously attempted to apply for Grant Letters of administration and distribution of the estate through dubious means. Some alleged that they were adopted daughters while others ridiculously alleged that they were married to the deceased. In this regard they filed the suit “Mombasa Principal Magistrate’s Court Succession Cause No. 373 of 2018. Annexed in the affidavit and marked as “LL – 5” were copies of documents filed in Mombasa Principal Magistrate’s Court Succession Cause No.373 of 2018.
- xiii. He filed an objection to the said Petition and affidavit in support of objection and the court agreed with and subsequently the Honourable Court issued him with Letters of Administration Intestate on 15<sup>th</sup> March, 2022.
- xiv. On 14<sup>th</sup> December, 2022 the Honourable Court confirmed Letter of Administration Intestate dated 15<sup>th</sup> March, 2022 and issued him with a Certificate of Confirmation of Grant dated 14<sup>th</sup> December, 2022 in which the suit properties and other properties of the deceased were distributed to him absolutely including the Monikas Private Bush Safaris Limited, the Defendant/Respondent herein.
- xv. The said certificate of confirmation dated 14<sup>th</sup> December, 2022, he was the legal owner and beneficiary of the following properties among others:-Monikas Private Bush Safaris LimitedCR. NO.33895-Plot Number MN/III/3995CR.NO.33896- Plot Number MN/III/3996CR- NO. 33900- Subdivision No.4000/SECIII/MNCR.NO. 4000Plot Number/MN/III/4001Title Number CR 4269Plot Number Sub. 1275 MtwapaCR.4269-Plot Number MN/III/93CR. 21646-Plot Number MN/III/1272CR-21046Plot Number 1532/III/MNPlot Number MN/III/3998Plot Number MN/III/3998Plot Number MN/



III/4003Plot Number MN/III/4004Plot Number MN/III/508/2Plot Number MN/III/3993Plot Number MN/III/3997Plot Number MN/III/3996Plot Number MN/III/3995Plot Number MN/III/3994Plot Number MN/III/4013Plot Number MN/III/4012Plot Number MN/III/4011Plot Number MN/III/4010Plot Number MN/III/4009Plot Number MN/III/4008Plot Number MN/III/4001Plot Number MN/III/1532Plot Number MN/III/6963Plot Number MN/III/4007Plot Number MN/III/1208

(Annexed in the affidavit and marked as “LL – 6” was a copy of the Certificate of Confirmation of Grant dated 14<sup>th</sup> December, 2022)

- xvi. Upon the Confirmation of the Grant and adoption of Schedule of Distribution of the properties of the Estate of late Monika Ilona Leadismo (Deceased), the said properties were vested in him and thus he was the legal and beneficial owner pursuant to Certificate of Confirmations of Grant dated 14<sup>th</sup> December, 2022 and the provisions of the [Law of Succession Act](#) Cap 160 Laws of Kenya.
- xvii. The Mombasa Principal Magistrate’s Court Succession Cause No. 373 of 2018 was conducted publicly and a Kenya gazette Notice dated 11<sup>th</sup> February, 2022 issued which invited the interested parties to register their objection if any. The 1<sup>st</sup> Plaintiff/Applicant and his other proxies attempted to disentitle him of the said estate, nonetheless the Honourable Court saw through their lies and dismissed their alleged claims as unjustified and baseless and he was subsequently issued with the Letters of Administration Intestate. Annexed in the affidavit and marked as “LL – 7” were copies of the Kenya Gazette dated 11<sup>th</sup> February, 2022 and Affidavits filed in Mombasa Principal Magistrate’s Court Succession Cause No.373 of 2018.
- xviii. The suit properties were still registered in the name of his company Monikas Private Bush Safaris Limited and indeed the recent Official Searches confirmed his averments. Annexed in the affidavit and marked as “LL – 8” were copies of titles documents and recent searches dated 21<sup>st</sup> May, 2023 and copies of rents/rates receipt.
- xix. The Plaintiffs/Applicants had never resided on the suit properties at any point in time as they claimed. He resided with his wife in the suit properties since early years of 1990s and there had never been any period of their absence in the said properties to warrant any allegation of adverse possession by any third party or the Plaintiffs in particular.
- xx. The attempts to evict him from his properties started in May, 2023, the 1<sup>st</sup> Plaintiff/Applicant accompanied by a number of goons invaded the suit properties and started to cut down trees, dug trenches and they had been actively attempting to forceful and illegally sub-divide his properties among themselves. He had reported this matter to the police on various occasions nonetheless, he had not received any help so far.
- xxi. On Sunday, 11<sup>th</sup> June, 2023 the 1<sup>st</sup> Plaintiff accompanied by a of number young men invaded his properties, cut down a number of trees and erected an illegal fence despite his protests. When he confronted the 1<sup>st</sup> Plaintiff/Applicant and the said group of rowdy youth they threatened to harm him and he was forced to report the matter immediately. Upon registering his complaint at the police station that he was informed of the 1<sup>st</sup> Plaintiff/Applicant filed a matter in court and he was shown the court order indicating that the matter is slated for hearing on 13<sup>th</sup> June, 2023.
- xxii. That an application for adverse possession must established the following key elements:The owner of the suit property must have been dispossessed or had discontinued the possession of



the suit properties or properties;The applicant must prove that he or she had been in exclusive possession of the land or property openly and as of a right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition;The conduct of the applicant in relation to the property must be adequate in continuity, in publicity and in extent to show that the possession was adverse to the title owner.An essential prerequisite was that the possession of the adverse possessor was neither by force or stealth or under the licence of the owner.

- xxiii. The Plaintiffs/Applicants had not established any of the elements enumerated in Paragraph 24 (a) to 24(d) for the following reasons:In respect to possession, he had been in possession of the suit properties from early 1990s when the same were purchased to date. The Plaintiffs/Applicant had never been in occupation of the suit properties of the suit properties at any time as alleged;The 1<sup>st</sup> Plaintiff was their driver until the year 2018. He was housed in one of the Estate houses as many other employees that they had. The 1<sup>st</sup> Plaintiff/Applicant's presence in the suit properties was by virtue of his employment status and thus his stay or occupation during the period of employment was permitted by him and his wife.In respect to exclusive possession-the Plaintiffs/Applicants had never occupied the suit properties for any period of time as alleged. It was only in May, 2023 before the filing the Originating Summons that the Plaintiffs/Applicants illegally, forcefully and unlawfully invaded the suit properties and attempted to erect an illegal fence, cut down trees and attempted to illegally construct some makeshift structures to aid the current matter in court;The Plaintiffs/Applicants' occupation was not adequate in continuity, in publicity and in extent to show that the possession is adverse to my title to the suit properties. The same was illegal, unlawful and amount to nothing but land grabbing from a criminal cartel;Though the Plaintiffs/Applicants had no possession at the moment or at any time in the past; there was serious attempts to forcibly occupy the suit properties without justification or any legal claim and indeed the filing of the present suit was merely meant to sanitize the Plaintiffs/Applicants' illegal, unlawful and forceful eviction of the rightful owner of the suit properties;
- xxiv. The allegations contained under the contents of Paragraphs 7, 8, 9 and 10 of the Supporting Affidavit of one John Mbugua were false. There was no lawful occupants in the suit properties other than himself. The 1<sup>st</sup> Plaintiff/Applicant and his proxies were currently actively attempting to established illegal occupation in the suit properties in order to create a ground for the proceedings for adverse possession as contained in the Originating Summon pending before the Court.
- xxv. Contrary to the allegations made out under the contents of Paragraphs 11, 12 and 13 of the Supporting Affidavit of 1<sup>st</sup> Applicant; it was actually the Plaintiffs/Applicants with a group rowdy goons who had continued to make concerted efforts to illegally evict him from his own properties; He had made numerous report at the police stations without any success.
- xxvi. The Plaintiffs/Applicants had sought for injunctive orders to stop their alleged eviction. The Plaintiffs/Applicants had not made a cogent case for grant of injunctive reliefs for the following reasons:-
- a. The Plaintiffs/Applicants had not made a prima facie case for grant of injunction. He was the legal owner of the suit properties which was further buttressed by the fact that he had been in possession since the early 1990s to date;



- b. The Plaintiffs/Applicants had not demonstrated any evidence of occupation and therefore there was no injury or irreparable harm that the Plaintiffs/Applicants would suffer that would not be atone by award of damages should they succeed in the ultimate
  - c. He had a title and possession of the suit properties and therefore the balance of convenience ought to tilt in his favour.
- xxvii. He urged the Court to dismiss the Applicants' application and the Originating Summons dated 15<sup>th</sup> May, 2023 with costs.
6. The Defendant also filed a 10<sup>th</sup> paragraph supplementary affidavit sworn by Lmantia Leadismo on 10<sup>th</sup> July, 2023 where he averred that:
- a. He was the Legal Administrator of the Estate of the Late Monika Ilona Leadismo (Deceased) who died on the 4<sup>th</sup> October, 2018 at Mtwapa Kilifi County and the then owner Monikas Private Bush Safaris Limited which was their family business vehicle during our many years of marriage.
  - b. The affidavit was a further response to the Further Affidavit of John Mbugua Mutua sworn on 16<sup>th</sup> June, 2023. He responded as follows:
  - c. The further affidavit of the 1<sup>st</sup> Plaintiff/Applicant-John Mbugua had confirmed the following facts which he addressed in his Replying Affidavit sworn on 12<sup>th</sup> June, 2023:
    - i. The Plaintiff/Applicant had confirmed that he was employed by the Respondent as a driver of the Monikas Private Bush Safaris Limited and thus his presence on the suit properties was permitted by the Respondent and thus the question of adverse possession did not arise;
    - ii. The Plaintiffs/Applicants had also confirmed that the Defendant/Respondent was the beneficiary of the Estate of Monika Ilona Leadismo (Deceased) who died on the 4<sup>th</sup> October, 2018 which entitled him to inherit the deceased estate as decreed by the Court in Mombasa Principal Magistrate's Court Succession Cause No. 373 of 2018 on 14<sup>th</sup> December, 2022;
    - iii. The 1<sup>st</sup> Plaintiff/Applicant had confirmed that he was only appointed to deal with day to day activities during the period when his wife was unwell.
    - iv. The Plaintiffs/Applicants had confirmed that indeed the suit properties belonged to the Defendant/Respondent's company.
  - d. In response to paragraph 15 of the further affidavit of John Mbugua Mutua; in Mombasa Principal Magistrate's Court Succession Cause No. 373 of 2018 on 14<sup>th</sup> December, 2022 the court vested in him all the properties of the deceased including Monikas Private Bush Safaris Limited.
  - e. The Plaintiffs/Applicants had confirmed that the Defendant/Respondent was the legal owner of the suit properties that they sought to acquire by adverse possession and the 1<sup>st</sup> Plaintiff/Applicant who was the key party had further admitted that he was an employee of the Defendant/Respondent and therefore her presence in the property was authorized by the Respondent.
  - f. In respect to Plaintiffs/Applicants' claim for adverse possession:



- i. The Plaintiffs/Applicants had not established any ground for adverse possession;
  - ii. The Plaintiffs/Applicants presence of the suit properties was authorized by the Defendant/Respondent and therefore the same was hostile and continuous as would be required of adverse possession;
  - iii. The 1<sup>st</sup> Plaintiff/Applicant had admitted on oath that suit properties belonged to the Defendant/Respondent and indeed the Respondent had never been dispossessed of the suit properties during any period at any time;
  - iv. The 1<sup>st</sup> Plaintiff/Applicant had equally admitted that he is a director of the company having been granted fifty (50) shares and if that is the case why would a sole director sue “his company” for adverse possession.
- g. Having read the Plaintiffs’ court documents and affidavits, he had struggled to understand the basis of the Plaintiffs’ claim and he urged the court to find that the same lacks basis in facts and law and the court ought to dismiss the same with costs.
- h. He urged the Honourable Court to dismiss the Applicants’ application and the Originating Summons dated 15<sup>th</sup> May, 2023 with costs.

#### **IV. Submissions**

7. On 13<sup>th</sup> June, 2023 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 15<sup>th</sup> May, 2023 be disposed of by way of written submissions. Pursuant to that the Honourable Court would only see the submission by the Defendant/Respondent by 12<sup>th</sup> October, 2023 and even at the time of penning down this Ruling. Pursuant to that, the Honourable Court reserved a ruling date reserved on notice by Court accordingly.

#### **A. The Written Submission by the Defendant/Respondent**

8. The Defendant/ Respondent through the Law firm of Messrs. Hashim & Lesaigor Associates Advocates filed their submissions dated 17<sup>th</sup> July, 2023. Mr. Lesaigor Advocate commenced its submission by stating that it would rendered in the following format:
- a. The introduction and particulars of the case;
  - b. The analysis of the Principles governing grant of injunctive reliefs;
  - c. The conclusion.
9. He provided an introduction of the submissions stated that the submissions were prepared and filed pursuant to the Courts directions issued on 13<sup>th</sup> June, 2023. The Respondent shall rely on the Replying Affidavit of LMANTIA LEADISMO sworn on 12<sup>th</sup> June, 2023, supplementary Affidavit sworn on 10<sup>th</sup> July, 2023 and submissions filed therein. The Plaintiff approached the Honourable Court through the Application dated 15<sup>th</sup> May, 2023 seeking injunctive relief against the Respondent pending the hearing of Originating Summon dated 15<sup>th</sup> May, 2023 seeking adverse possession in respect to the Defendant/Respondent’s properties. The Application was premised on the grounds on the face of it, the Plaintiffs/Applicants alleged that they had been in possession of the suit properties that their stay has never been interrupted by the Defendant/Respondent.
10. The Application was opposed through the Replying and supplementary affidavits of Lmantia Leadismo, who is the administrator of the Estate of the Late Monika Ilona Leadismo (Deceased) who



- died on the 4<sup>th</sup> October, 2018 at Mtwapa Kilifi County. The Defendant/Respondent stated that the Court in Mombasa Principal Magistrate's Court Succession Cause No.373 of 2018 on 14<sup>th</sup> December, 2022 vested in him all the suit properties including the Defendant/Respondent company Monikas Private Bush Safaris Limited.
11. The Defendant/Respondent averred that they had been on the suit properties since its purchase in the year 1994 and had never been dispossessed of the suit properties since then. It was also submitted that the 1<sup>st</sup> Plaintiff/Applicant was an employee of the Company until the year 2018 and therefore his presence of the suit property was permitted by the Defendant/Respondent who had a policy to house its employees. The Defendant/Respondent averred that the Plaintiffs/Applicants' occupation of the land amount to trespass on private properties. It was the Defendant/Respondent's submission that a trespasser was not entitled to an equitable remedy in the nature of injunctive relief. It was against the said background that the Court was invited to determine whether the Plaintiffs/Applicants' application for grant injunction is merited or not.
  12. On the relevant laws, the Learned Counsel submitted that the relevant laws were:
    - a. *The Constitution* of Kenya, 2010.
    - b. The *Environment and Land Court Act*, 2011.
    - c. The *Evidence Act*, Cap 80 Laws of Kenya.
    - d. The *Limitation of Actions Act* Cap 22 Laws of Kenya;
    - e. The *Civil Procedure Act* Cap 21 and Civil Procedure Rules, 2010.
  13. On the issues for determination precisely, the Legal analysis the Learned Counsel submitted that the Application before one sought an injunction against Defendant/Respondent for the alleged attempt to evict or demolish or interfere with the Plaintiffs/Applicants' occupation of the suit properties. The Plaintiffs/Applicants were also sought an order of inhibition against the Registrar of Lands inhibiting the dealings with the suit properties though the Registrar of Lands is not a party to the suit before the court. The Plaintiffs/Applicants alleged that they have been in possession of the suit properties for the past Thirty-Five (35) years. The Plaintiffs/Applicants had been very scanty on the details pertaining their alleged occupation of the suit properties. The copies of the title deeds to the suit properties were not annexed to demonstrate ownership of the same by the Defendant/Respondent. The Registrar of Lands who was a critical party in adverse possession proceedings is not a party. It was the Respondent's submission that the Plaintiffs/Applicants had not placed any evidentiary materials before the court to support the allegations made in the said application.
  14. The Learned Counsel submitted that the Plaintiffs/Applicants' case for grant of injunctive relief is extremely feeble to warrant the court to grant such an order. The Defendant/Respondent's Replying affidavit sworn by Lmantia Leadismo on 12<sup>th</sup> June, 2023 at Paragraphs 13 to 20 illustrated the manner in which the suit properties were acquired and further that the Defendant/Respondent had been in possession of the suit properties since its ownership in year 1994.
  15. The Learned Counsel further submitted that the suit properties including the company known as Monikas Private Bush Safaris Limited pursuant to the Court orders issued in Mombasa Principal Magistrate's Court Succession Cause No. 373 of 2018 on 14<sup>th</sup> December, 2022.
  16. On the issue of whether the Plaintiffs/Applicants was entitled to injunctive to injunctive relief sought, the Learned Counsel submitted that the leading authority on interlocutory injunction was the well-



known case of:- “Giella – Versus - Cassman Brown & Co. Ltd (1973) (CAK)”. Spry VP in his judgment put forth three (3) conditions to be satisfied before an interlocutory injunction could 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 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).”

17. Thus, the Learned Counsel argued that the onus was on the Plaintiffs/Applicants to prove satisfactorily that the aforementioned conditions were satisfied, more importantly:

- i. That there is a prima facie case with a probability of success; and
- ii. That the Applicant will suffer irreparable injury not atonable by way of damages;
- iii. The Applicant must prove his case on a balance of probabilities.

18. The Learned Counsel submitted that they shall endeavor to apply the facts of this matter to the principles set out in “Giella – Versus - Cassman Brown & Co. Ltd(Supra)”, and expounded and enriched by our courts in a number of other fundamental decisions.

19. On whether the Plaintiffs/Applicants had established “a prima facie case’, the Learned Counsel submitted that the Court of Appeal in the case of:- “MRAO Limited – Versus - First American Bank of Kenya Ltd & 2 Others CACA No. 39 of 2002” defined what prima facie case is. It was said:-

“So what is a prima facie case? I would say that in civil cases it is a case in which on material presented to the court a tribunal properly directing its self on the law and evidence will conclude that there is exist a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.” Page 8

That “.....prima facie case is more than arguable case. It is not sufficient to raise issues. The Evidence must show an infringement of a right, and a probability of success of the Applicant’s case upon trial. That is clearly a standard which is higher than an arguable case...”Page 9

20. The Concise Oxford Dictionary of Current English 8<sup>th</sup> Ed. defines “probability” as the

“....the likelihood of something of happening...the extent to which an event is likely to concur measured by the ratio of favourable cases to the whole number of cases possible...”

21. The Learned Counsel submitted that the Plaintiffs/Applicants had not established any justifiable claim to the suit properties to entitle them protection of the Honourable Court. An injunctive relief was a remedy in the province of equitable remedies and a party seeking such relief must approach the court with clean hands. It was the Defendant/Respondent’s submissions that there was no credible evidence submitted to the Honourable court to enable it conclude that there exists a right which had been infringed by the Defendant/Respondent.

22. It was the Learned Counsel’s submission which was indeed buttressed by the evidence submitted to the court that the Plaintiffs/Applicants were trespassers and land grabbers. It was submitted that the Plaintiffs/Applicants had recently invaded on the suit properties and they then cunningly approached the Honourable Court through adverse possession proceedings in an attempt to sanitize their illegal



activities. The Defendant/Respondent through the Replying Affidavit of Lmantia Leadismo sworn on 12<sup>th</sup> June, 2023 detailed how formation of the Defendant/Respondent and the manner in which the suit properties were acquired and registered in the name of the Defendant/Respondent. The Defendant/Respondent averred that suit properties were acquired in the year 1994 and/or 1995 by the Respondent's deceased wife and Defendant/Respondent himself. These properties were acquired as part of the family business and had been in their possession since the period of 1994. This assertion was equally confirmed by the 1<sup>st</sup> Plaintiffs/Applicants who admits on oath that he was employed as a driver of the Defendant/Respondent's company and thus is aware that the said properties belonged to the Estate of the Late Monika Ilona Leadismo (Deceased) who died on the 4<sup>th</sup> October, 2018 at Mtwapa Kilifi County. [See paragraphs 3, 4 and 14 of the Further Affidavit of John Mbugua sworn on 16<sup>th</sup> June, 2023].

23. It was the contention of the Counsel that the Defendant/Respondent rebutted satisfactorily the claim for adverse possession by the Plaintiffs/Applicants herein on which the request for injunctive orders was premised. The Defendant/Respondent demonstrated through credible evidence that the suit properties were vested in him pursuant to Certificate of Confirmed Grant issued by Mombasa Principal Magistrate's Court Succession Cause No.373 of 2018 on 14<sup>th</sup> December, 2022.
24. The Defendant/Respondent further adduced photographic evidence demonstrating that the Plaintiffs/Respondents trespassed into his property and cut down a number of trees and further erected illegal structures and ramshackle structures in the suitproperties. Additionally, the Defendant/Respondent did adduce documentary evidence of steps taken to protect the integrity of the suit properties including reports to Mtwapa Police Stations. [ See Paragraph 12 of the Replying Affidavit of Lmantia Leadismo sworn on 12<sup>th</sup> June, 2023].
25. The Defendant/Respondent had also shown that it had been paying rates and rent as and when due to the County Government of Kilifi, further demonstration of exercise of rights of a legal owner of a property in Kenya. This, coupled with plethora of evidence presented in the affidavits of Lmantia Leadismo illustrated that the suit property legally belongs to the Defendant/Respondent.It was the Defendant/Respondent's submission that the Plaintiffs had failed to established 'a prima facie case' to warrant the Honourable to grant injunctive relief.
26. The Learned Counsel submitted that it was a cardinal principle of law that he who alleges must prove. The *Evidence Act*, Cap 80 Laws of Kenya by dint of Section 107 provides that whoever desires any court to give Judgment as to any legal right or liability dependent on existence of facts which he asserted must prove that those facts exist. The provision of Section 108 of the *Evidence Act*, Cap. 80 was also to the effect that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side, while the provision of Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it was provided by any law that the proof of that fact shall lie on any particular person. It was the Learned Counsel's submissions that the Plaintiffs had failed to discharge this legal burden.
27. From the foregoing therefore, the Learned Counsel urged the Honourable Court that the Application was wanting in merit, not to mention that the Plaintiffs/Applicants had not demonstrated satisfactorily that they had a prima facie case. The Plaintiffs/Applicants had neither established any infringement of their rights by the Defendant/Respondent to warrantgrant of an injunction order. The Plaintiff/Applicant case had no probability of success as it was merely an abuse of the court process and should be dismissed with costs.
28. On whether the Plaintiffs/Applicant stood to suffer irreparable injury not atonable in damages if the injunction was denied, the Learned Counsel submitted that for the Honourable Court would only



entertain this second requirement and/or condition of the Giella Case only if it entertained some doubt on first condition. Justice Maraga (as he then was) in “J.M. Gichanga – Versus - Co-operative Bank (2005) eKLR” applying the finding in the court of Appeal in “Aikman – Versus - Muchoki(1984) KLR 353” stated as follows:

“My understanding of the Court of Appeal decision in Giella case is that the court proceeds to consider the second condition of irreparable harm which cannot be compensated for by an award of damages only if entertains doubt on the 1<sup>st</sup> doubt on the 1<sup>st</sup> condition of the probability of success, like when the court thinks that the Plaintiff has a fifty/fifty chance of success.”

29. In the instant case, there would be no room to consider the second limb at all. The Learned Counsel submitted that the Plaintiffs had not demonstrated that they would suffer any irreparable harm if the orders sought were not granted. The evidence adduced had shown that the Plaintiffs/Applicants were trespassers in the suit properties. Indeed, the Defendant/Respondent had been categorical that the Plaintiffs/Applicants were a cartel of land grabbers who were using the court process to sanitize their illegal occupation of the suit properties. The 1<sup>st</sup> Plaintiff/Applicant in a further affidavit dated 16<sup>th</sup> June, 2023 had admitted that suit properties belonged to the Defendant/Respondent and that he was one of the Directors of the Defendant/Respondent. It was ridiculous that alleged owner of the Company (sole director for that matter) would pursue a claim title through the land adverse possession proceedings to deprived his owner company of its properties. This turn of events was a demonstration that the Plaintiffs/Applicants were mere trespassers whose intention was to illegally and unlawfully acquire the Defendant/Respondent’s properties.
30. The Learned Counsel averred that the Plaintiffs/Applicants had not demonstrated that any rights to the suit properties that had been infringed. It had not also been shown on the part of the Plaintiffs/Applicants that they would suffer any irreparable harm that could not be remedied by award of damages should the court decline to issue orders sought and their claim for title through land adverse possession succeeded in the future. It was clear that the Plaintiffs/Applicants had not put forward a cogent case enough to disclose a proper cause of action or wrong doing against the Defendant/Respondent. In any case, it was immaterial for the court to make a determination under this limb while it was clear that the Plaintiffs/Applicants had failed to established ‘a prima facie case’ against the Defendant/Respondent. Having resolved the 1<sup>st</sup> condition as enshrined in “the Giella case” in the negative (the Plaintiffs/Applicants had failed to establish that they had ‘a prima facie case with a probability of success), venturing into the second condition would be inconsequential and a mere barren academic exercise.
31. On the issue of who the balance of convenience tilted to, the Learned Counsel submitted that the third and final condition laid down by Giella Case for grant of an interlocutory injunction was that if the court was in doubt, it was to determine in whose favour the balance of convenience tilted. To buttress on this point, the Counsel referred Court to Mabeya J. in the case of:- “Jan Bolden Nielsen – Versus - Herman Philliipus Steya also Known as Hermannus Philliipus Steyn & 2 Others (2012) eKLR” stated as follows:-

“I believe that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set out in the Giella – Versus - Cassman Brown case. The court may look at the circumstances of the case generally and the overriding objective of the law. In Suleiman- Versus - Amboseli Resort Limited (2004) 2 KLR 589 Ojwang Ag. J (as he then was) at page 607 delivered himself thus:-



“Counsel for the Defendant urged that the shape of the law governing the grant of injunctive relief was long ago, in *Giella – Versus - Cassman Brown*, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with Counsel in that point, for the law has always kept growing to greater levels of refinement, as it Hoffman in the English case of *Films Rover Internationale* (1986) 3 All ER made expands to cover new situations not exactly foreseen before. Justice 772 at page 780-781:-this point regarding the grant of injunctive relief.”

“ A fundamental principle of....that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been ‘wrong’.....”

Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in “*Giella – Versus- Cassman Brown (Supra)*”, the Court has had to consider the following questions before granting injunctive relief:-

- i. is there a prima facie case....
- ii. does the applicant stand to suffer irreparable harm.....
- iii. on which side does the balance of convenience lie?

Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice..... If granting the applicant’s prayers will support the motion towards full hearing, then should grant those prayers. I am unable to say at this point in time that the applicant has a prima- facie case with a probability of success, and this matter will depend on the progress of the main suit. Lastly, there would be a much larger risk of injustice if I found in favour of the Defendant than if I determined this application in favour of the applicant.”

32. The Learned Counsel opined that it was apparent that the Plaintiffs/Applicants having admitted on oath that the suit properties belongs to the Defendant/Respondent; the balance of convenience tilted in favour of the Defendant/Respondent (the legal owner of the suit properties). It was the Learned Counsel’s submission that it would not be prudent that the Honourable Court to decline the Plaintiffs’ application otherwise any other determination would interfere with the Defendant/ Respondent’s exercise of proprietary rights rightfully so as founded under the provision of Article 40 of *the Constitution*, 2010.
33. In a nutshell, the Plaintiffs/Applicants had consequently not established any basis for the grant of the injunction of as required by law for the following reasons:-
  - a. The Plaintiffs/Applicants had not established any cause of action against the Defendant/ Respondent and indeed the Plaintiffs/Applicants had admitted that the suit properties was registered in its name;
  - b. The Plaintiffs/Applicants had also admitted that the Defendant/Respondent had been in occupation of the suit properties since the year 1994 and there had never been any point of absence in the suit properties to justify the claim for adverse possession;
  - c. The Plaintiffs/Applicants had also admitted that some of them were employees of the Defendant/Respondent their presence in the suit properties was authorized by the Defendant/ Respondent and provided some with housing and thus there was element of the land adverse as



possession.[See Paragraphs 20 to 28 of the Affidavit of Replying Affidavit of Lmantia Leadismo sworn on 12<sup>th</sup> June, 2023].

34. He reiterated that the Plaintiffs/Applicants were trespassers to the suit properties and thus they had approached the Honourable Court with unclean hands and ought not to enjoy the remedy of equity to sanitize their illegal acts. It was now trite law that where a party approached a court of law with unclean hands, it must be denied any remedy and more importantly injunctive relief which was a remedy in the realm of equity remedies. To support this aspect of law, the Counsel cited case by the Environment and Land Court sitting in Nyeri in the case of “Samson Muthami Ndungu – Versus - Murage Karugu Murage & 2 others [2016] eKLR” while dealing with a party approaching the court with unclean hands stated as follows:

“This court finds that the Plaintiff has approached the court with unclean hands and therefore does not deserve the prohibitory orders granted on 2<sup>nd</sup> June, 2015 or further discretionary orders from this court.”

35. Flowing from the above analysis, the balance of convenience, which was 3<sup>rd</sup> pre-requisite for the grant of temporary injunction, tilted in favour of the 1<sup>st</sup> Respondent/Defendant. The Learned Counsel concluded that it was their humble prayer that that the Application be dismissed with costs.

## V. Analysis and Determination

36. I have carefully read and considered the pleadings herein, the written submission by the Defendant/ Respondent and the myriad of authorities cited thereof, made by the by the Learned Counsels and the relevant provision of *the Constitution* of Kenya, 2010 and the statutes. In order to arrive at an informed, reasonable, fair and Equitable decision, the Honorable Court has framed three (3) salient issues for its determination. These are:-
- a. Whether the Notice of Motion dated 15<sup>th</sup> May, 2023 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.
  - b. Whether the parties herein are entitled to the reliefs sought.
  - c. Who will bear the Costs of Notice of Motion application dated 15<sup>th</sup> May, 2023.

Issue No. a). Whether the Notice of Motion dated 15<sup>th</sup> May, 2023 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.

37. Primarily, the main substratum – pith and substance of this application is whether to grant or not temporary injunctive orders to the Applicants herein. Ideally, the application herein is premised under Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst the provisions of the law. Which provides as follows: -

Order 40, Rule 1

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

- a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b) that the defendant threatens or intends to remove or dispose of his property in circumstances 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.

38. 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.”

39. The three conditions set out in the “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”.

40. 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 & 2 others (2003) KLR 125”,

“So what is a prima facie case, I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself would conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

41. Now turning to the surrounding facts and inferences laid – down from the instant application. The Plaintiffs/Applicants aver that the Defendant/Respondent had been sending unknown people to the Plaintiffs/Applicants who had threatened to evict and demolish the houses belonging to the Plaintiffs/Applicants which houses are situated on the suit property. Each Plaintiff/Applicant has been living on the parcel of land known as of plot number CR 3995/111/MN, CR 33895/111/MN, CR 3996/111/MN, CR NO 4000/111/MN, CR 33900/111/MN, CR 4001/111/MN, CR 33901/111/MN Mtwapa Kilifi County and has constructed a house on a portion of the suit properties herein and each stands to suffer irreparable loss and damage, mental and psychological anguish should they be evicted and their houses demolished because each one of them and their families are residing in



the houses situated on the suit property. They further allege that the Defendant/Respondent was also threatening to evict the Plaintiffs/Applicants from the suit premises without a lawful Court Order.

42. On the other hand, it's the contention by the Defendant/Respondent through the Replying Affidavit of Lmantia Leadismo sworn on 12<sup>th</sup> June, 2023 he is the proprietor of the suit land. He has detailed how the formation and/or incorporation of the Defendant/Respondent was undertaken and the manner in which the suit properties were acquired and registered in the name of the Defendant/Respondent. The Defendant/Respondent averred that suit properties were acquired in in the years 1994 and/or 1995 by the Defendant/Respondent's deceased wife and Respondent himself. These properties were acquired as part of the family business and have been in their possession since the period of the year 1994. This assertion is equally confirmed by the 1<sup>st</sup> Plaintiff/Applicant who admits on oath that he was employed as a driver of the Defendant/Respondent's company and thus is aware that the said properties belonged to the Estate of the Late Monika Ilona Leadismo (Deceased) who died on the 4<sup>th</sup> October, 2018 at Mtwapa Kilifi County. [Noted in Paragraphs 3, 4 and 14 of the Further Affidavit of John Mbugua sworn on 16<sup>th</sup> June, 2023].
43. I discern that the Defendant/Respondent has rebutted satisfactorily the Plaintiffs/Applicants' claim for title of land adverse possession on which the request for injunctive orders is premised. Further, its my view that the Respondent demonstrated through credible evidence that the suit properties were vested in him pursuant to Certificate of Confirmed Grant issued by "the Mombasa Principal Magistrate's Court Succession Cause No.373 of 2018 on 14<sup>th</sup> December, 2022.
44. In saying this, I seek refuge from the decision 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."
45. 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."
46. As the Honourable Court will be demonstrating herein below, and without suffering the danger of being accused of holding a pre – mature judgmental position, it is of the strong view of this Court that the application by the Plaintiffs fails to meet the threshold of granting an injunctive orders.
- Issue No. b). Whether the parties herein are entitled to the reliefs sought.
47. In the present case, there are two conflicting interests by the Plaintiffs/Applicants and the Defendant/Respondent. I have intensively gone through all the attached annexures by both the Plaintiffs/Applicants and the Defendant/Respondent herein. Based on the information gathered, I am of the opinion that regarding this first condition clearly, the Plaintiffs/Applicants have not established that they are the lawful registered Proprietors of the Property. On the contrary, as shown by the Deponent of the Defendant/Respondent, to wit that his wife and himself had been in possession of the said land and that he was the legal administrator of the property of his deceased wife through the certificate of grant issued by Mombasa Principal Magistrate's Court Succession Cause No. 373 of 2018 on 14<sup>th</sup> December, 2022. The Defendant/Respondent claimed, as it is a fact to be proved during the full trial,



that they had been in the suit land since year 1994 when they bought the said property with his wife. Thus, by and large, I find that the Plaintiffs/Applicants have not established that they have a prima facie case with a probability of success. In the given circumstances and as correctly submitted by the Learned Counsel for the Defendant/Respondent, the Court ought not to proceed any further than this. But to grant the Plaintiffs/Applicants the benefit if doubt, I will still soldier on.

48. With regards to the second limb of the Court of Appeal in “Nguruman Limited (supra)”, held that:

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

49. On the issue whether the Plaintiffs/Applicants will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Plaintiffs/Applicants must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. It is not hidden that the Plaintiffs/Applicants’ property is at risk and they has a right to vacant possession. The Plaintiffs/Applicants have to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of “Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (2018) eKLR” provides an explanation for what is meant by irreparable injury and it states;

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

50. Quite clearly, the Plaintiffs/Applicants have not shown this Honourable Court that they would not be able to be compensated through damages as they have not shown the court that their rights to the suit property registration documents and transfer documents. On the other hand, the Defendant has shown that it has been paying rates and rent as and when due to the County Government of Kilifi, further demonstration of exercise of rights of a legal owner of a property in Kenya. This, coupled with plethora of evidence presented in the affidavits of Lmantia Leadismo illustrates that the suit property legally belongs to the Defendant/Respondent. The Defendant/ Respondent has made reference to the case of “J.M. Gichanga -Versus - Co-operative Bank (2005) eKLR” applying the finding in the court of Appeal in “Aikman -Versus- Muchoki (1984) KLR 353” where Justice Maraga (as he then was) stated as follows:

“My understanding of the Court of Appeal decision in Giella case is that the court proceeds to consider the second condition of irreparable harm which cannot be compensated for by an award of damages only if entertains doubt on the 1<sup>st</sup> doubt on the 1<sup>st</sup> condition of the probability of success, like when the court thinks that the Plaintiff has a fifty/fifty chance of success.”



51. Once more, I emphatically state that the Plaintiffs/Applicants have not demonstrated that they will suffer any irreparable harm if the orders sought are not granted. According to the Defendant/Respondent, the evidence adduced has shown that the Plaintiffs/Applicants are trespassers in the suit properties. The Plaintiffs/Applicants have therefore not satisfied the second condition as laid down in “Giella’s case”.

52. Thirdly, the Plaintiffs/Respondents have to demonstrate that the balance of convenience tilts in their favour. In the case of “Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (2018) eKLR” which defined the concept of balance of convenience as:

“The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the 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”.

53. In the case of “Paul Gitonga Wanjau – Versus - Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR”, the court dealing with the issue of balance of convenience expressed itself thus:-

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

54. The Plaintiffs/Applicants contends that the balance of convenience tilts in their favour because they are legal registered proprietors of the suit property while the Defendant/Respondent has argued that the balance of convenience tilts in his favour as the beneficial and registered proprietor of the suit properties. 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.”

55. I am convinced that the balance of convenience lies with the Defendant/Respondent and not the Plaintiffs/Applicants. 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 main 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 Plaintiffs/Applicants.

56. While at this point, I wish to cite 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...”

57. 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 Plaintiffs/Applicants. In view of the foregoing, I find that the Plaintiffs/Applicants as much as have not met the criteria for grant of orders of temporary injunction, the suit property is at risk of being wasted and therefore this Honourable court orders that the status quo of the suit property in the course of the hearing and determination of this suit. For these reason, I reiterate, the application and the reliefs sought by the Plaintiffs/Applicants must fail.

Issue No. c). Who will bear the Costs of Notice of Motion application 15<sup>th</sup> May, 2023.

58. It is now well established that the issue of Costs is discretionary. Costs is the award that a party is granted at the conclusion of any legal action and proceedings. The proviso of Section 27 of the [Civil Procedure Act](#) grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) 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.” The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In “Morgan Air Cargo Limited – Versus - Evrest Enterprises Limited [2014] eKLR” the court noted that;

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the [Civil Procedure Act](#) is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

59. In this case, as Court finds that the Plaintiffs/Applicants have not fulfilled the conditions set out under Order 40 Rule 1 of the Civil Procedure Rules, 2010, this Notice of Motion application dated 15<sup>th</sup> May, 2023 shall be deemed to lack merit and is hereby dismissed with costs to the Defendant.



## VI. Conclusion & Disposition

60. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Based on the principles of Preponderance of Probability, the Plaintiffs/Applicants may be having a case against the Defendant/Respondent and it is only in hearing out the evidence that the parties to this suit will be adduced. However, as facts stand, the Court will not interfere with the legal status of the land as we speak but to have the status quo maintained in the meanwhile. Therefore and in a nutshell, I proceed to order the following:-
- a. That the Notice of Motion application dated 15th May, 2023 be and is hereby found to lack merit thus it is dismissed in its entirety.
  - b. That this Honourable Court in the interest of preservation of the suit property hereby issues a Temporary injunctive orders against the Parties in this suit to maintain the status quo of the plot number CR 3995/111/MN, CR 33895/111/MN, CR 3996/111/MN, CR NO 4000/111/MN, CR 33900/111/MN, CR 4001/111/MN, CR 33901/111/MN Mtwapa Kilifi County pending the hearing hearing and determination of this suit.
  - c. That for expeditious sake the suit to be heard on 16th May, 2024. There shall be mention on 8th April, 2024 for purposes of Pre – Trial conference under Order 11 of the Civil Procedure Rules, 2010.
  - d. That the cost of the Notice of Motion application dated 15th May, 2023 are awarded to the Defendant/Respondent.

It Is So Ordered Accordingly.

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

.....

**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. No appearance for the Plaintiffs/Applicants
- c. Mr. Lesaigor Advocates for the Defendant/Respondent

