



Ndungu v Palma Plus Enterprises & another (Environment and Land Appeal 1 of 2023) [2024] KEELC 4515 (KLR) (18 March 2024) (Ruling)

Neutral citation: [2024] KEELC 4515 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 1 OF 2023**

**LL NAIKUNI, J
MARCH 18, 2024**

BETWEEN

RICHARD NGURU NDUNGU APPELLANT

AND

PALMA PLUS ENTERPRISES 1ST RESPONDENT

FIVE ELEVEN AUCTIONEERS 2ND RESPONDENT

RULING

I. Introduction

1. Before this Honourable Court for its determination is the Notice of Motion application dated 30th August 2023. It was brought by Mr. Richard Nguru Ndungu, the Appellant/Applicant herein. The application was made under the dint of the provision of Sections 1A, 1B 3A and 3B, 63 (e) of the [Civil Procedure Act](#), Cap. 21 and Order 40 Rule 1 (a) and 4(1) of the Civil Procedure Rules, 2010.
2. Upon service of the said application, the 1st Respondent herein filed their responses dated 24th January, 2024. The Honourable Court shall be dealing with the said averments indepth at a later stage.

II. The Appellant/Applicant's case

3. The Appellant/Applicant sought for the following orders:-
 - a. Spent.
 - b. Spent.
 - c. That pending hearing and determination of this appeal, the honourable court be and is hereby pleased to issue a temporary injunction restraining the 1st and 2nd Respondents, their servants, employees and or agents or anybody working under their instructions from threatening,



attaching or carting away the Appellant's goods proclaimed vide proclamation notice dated 27th February 2023 or issuing any other proclamation notice for that matter or in any way interfering with quiet possession, occupation and enjoyment of the appellant's premises situated at Bombolulu, Mombasa County.

- d. The costs of this application be in the course.
4. The application is premised on the grounds, testimonial facts and the averments made out under the 14 Paragraphed Supporting Affidavit of Richard Nguru Ndunyuthe Appellant/Applicant together with five (5) annexures marked as "RNN – 1 to 5 annexed thereto. He deponed as follows.
- a. He was the Appellant/Applicant herein and hence conversant with the matters herein and duly authorized to swear this affidavit.
 - b. On 27th February 2023 the 2nd Respondent indicating that they had instruction from the 1st Respondent to levy distress against him in respect to the suit property served him with a proclamation notice for rental arrears.
 - c. The Proclamation notice indicated that as at the date of issuance, he owned the 1st Respondent of a sum of Kenya Shillings Six Million Four Thirty Thousand Two twenty One Hundred (Kshs. 6,430,221/=).
 - d. The Appellant/Applicant denied all this allegation on the ground that there existed no Tenant - Landlord relationship between himself and the 1st Respondent.
 - e. He stated that he was the one who constructed the said shop which the 1st Respondent alleged to be letting out and subject of the distress for rent.
 - f. He maintained that he constructed the shop on part of Plot No. MN/I/281, which he claimed was given to him by his uncle Venasio Muriuki Kanyana, had been using it as his business premises for the past 9 years.
 - g. Further, he was the designated care taker of the other properties belonging to his said Uncle Mr. Kanyana situated on the same plot.
 - h. In light of the foregoing, the Appellant/Applicant filed ELC (Mombasa) CMCC E267 of 2013 Richard Nguru Ndunyu – Versus - Palma Plus Enterprises and Five Eleven Auctioneers against the Respondents before the Magistrate Court challenging the purported proclamation of his movable property on account of distress for rent.
 - i. In addition to the suit he filed an application dated 10th March 2023 seeking temporary injunctive orders against the proclamation notice pending the determination of the suit.
 - j. The trial court issued interim orders stopping the said attachment pending the hearing and determination of the said application.
 - k. However, on 11th July, 2023, the Magistrate court dismissed the said application for temporary injunction.
 - l. Being dissatisfied by the said ruling, the Appellant filed an appeal in the High Court Civil Appeal No. E188 of 2023 together with an application dated 10th August 2023 seeking temporary injunction pending the determination of the appeal.



- m. On 16th August 2023, Justice Kizito directed the file to be transferred to this court. He argued that his appeal had a high chance of success and that he has a prima facie case as to the nonexistence of a landlord-tenant relationship with the 1st Respondent.
- n. The deponent urged the court to grant the orders as prayed least he would lose his tools of trade and be rendered destitute.

III. The Responses by the Respondents

- 5. The 1st Respondent filed a 12 Paragraphed Replying Affidavit sworn by its director, Lynn Njeri on 26th January 2024 and four (4) annexures marked as “LMN 1 – 4” annexed thereto. She deponed as follows:-
 - a. She was a Director of the 1st Respondent thus competent and duly authorized to swear this affidavit hereof.
 - b. The 1st Respondent was appointed by the Legal Administrators of the Estate of the late Gabriel Mithamo Ndunya to manage and collect rent on Plot No. 281/I/MN.
 - c. They informed the Appellant of their appointment as agents and of the rent payable, which he had since refused to pay.
 - d. Despite of the constant reminders to the Appellants to pay, he refused to do so without any colour of right.
 - e. The resolved to appoint the 2nd Respondent to help in the recovery of the amount owed by the Appellant. The 2nd Respondent used due process in issuing a proclamation notice to the Appellant.
 - f. The deponent argued that the Appellant’s occupation of the suit premises was illegal.
 - g. The orders sought were discretionary and to that effect the Applicant had failed to demonstrate they were deserving of this Court discretion.
 - h. The 1st Respondent would suffer substantial and irreparable loss and injustice should this Court allow this application as prayed.
 - i. She urged the Court to dismiss the application with costs.

IV. Submissions

- 6. On 17th January, 2024 while in the presence of all the parties, they were directed by the Honourable Court to have the application dated 30th August, 2024 be disposed off by way of written submissions. Pursuant to that all the parties fully complied and the Court reserved 14th March, 2024 as the date to delivered its Ruling. However, this date was deferred to 20th March, 2024.

A. The Written Submissions by the Applicant

- 7. The Applicant through the Law firm of Messrs. Ako Advocates filed their written Submissions. Mr. Atta Advocate commenced by stating that what was before the Court was the application dated the 30th August, 2023. It was brought under the provision of Article 159 (2) (d) of *the Constitution* of Kenya, 2010, Sections 1A, 1B, 3A, 63 (e) of the *Civil Procedure Act*, Cap. 21, Order 40 Rules 1 (a) and 4 (1) of the Civil Procedure Rules, 2010. The applications sought for the orders as stated out herein before.



8. The Learned Counsel informed Court that the Appellant was served with a Proclamation Notice dated 27th February, 2023 by the 2nd Respondent. The Proclamation Notice indicated that the 2nd Respondent had instructions from the 1st Respondent to levy distress for rent with respect to the suit property standing on MN/281/1 Bombolulu Mombasa County. The Proclamation Notice indicated that at the time of issuance, the Appellant owed the 1st Respondent rent arrears at the sum of Kenya Shillings Six Million Four Thirty Thousand Two Twenty One Hundred (Kshs. 6,430,221/=). The rent arrears allegations are strange to the Appellant as the subject property, a shop where he ran his Coca cola distribution business was constructed by him and that there had been no Landlord-Tenant relation between him and the 1st Respondent at all.
9. The Learned Counsel informed Court that the empty space that the Appellant constructed the suit premises was given to him by his Uncle Kanyana. That is where he built the shop which he had been running for 9 years. The Appellant was also a care taker of other properties belonging to his uncle.
10. In view of the Proclamation Notice served, the Appellant filed Civil suit CMCC (Mombasa) No. 267 of 2023 challenging the distress for rent. The Appellant also filed an application seeking injunction orders against the Respondents but which Application was dismissed on 11th July 2023 by the Honourable Nyariki. Consequently, being aggrieved by the Ruling, the Appellant filed this Appeal and Application challenging the said decision.
11. The Learned Counsel posited that there was a pending suit being “ELC (Mombasa) No. 182 of 2018 Venasio Muriuki v the family of the late Gabriel Mithamo Ndunyu (principals of the 1st Respondent), on ownership of the suit property. The matter has a date for filing and highlighting of submissions on the 14th May, 2024 before this Honourable Court. The Appellant believed that the Respondents herein are only used to threat, harass him because of the pending ELC No. 182 of 2018.
12. The Learned Counsel informed Court that the 1st Respondent filed a Replying Affidavit sworn on the 24th January, 2024. It indicated that the 1st Respondent was appointed by the Legal Administrators of the Estate of Gabriel Mithamo Ndunyu. The 1st Respondent alleged that the Appellant as at the time of the Proclamation was in rent arrears at a sum of Kenya Shillings Six Million Four Thirty Thousand Two Twenty One Hundred (Kshs. 6,430,221/=). However, he failed to provide any tangible evidence as to how this rent accrued. No evidence of a tenancy agreement was provided to show that indeed that the Appellant was a tenant on the said premises nor had on how much and at what intervals was the rent payable by the Appellant. The Appellant had never been a tenant on the said property nor at any given time had he paid any rent to the Estate of the late Gabriel Mithamo Ndunyu. No evidence had been produced to confirm that there existed or exists a Landlord - Tenant relationship.
13. Learned Counsel submitted that the Replying Affidavit by the 1st Respondent's representative was full of hearsay and lied as there was no particular time there had been any demand made for Appellant to pay any rent. The Appellant been peacefully occupying the premises. He averred that the Appellant had met the principles for the grant of temporary orders as set out in the case of “Giella v Cassman Brown [1973] EA 358” which case was quoted in the case of “Nguruman Limited v Jan Bonde Nielsen & 2 others CA No. 77 of 2012 (2014) where the Court held that:-

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

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted and



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

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially."

14. The Appellant averred that he had established "a prima facie case'. The Respondents had not provided any sufficient evidence to justify the distress for rent. No evidence had been further placed by the Respondent to convince that the Appellant was a tenant in the suit premises. The Appellant further relied on the case of "MRAO Limited v First American Bank of Kenya Limited [2003] eKLR, where the Court of Appeal held as follows:-

"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 will 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.

15. The Appellant further argued that he would suffer irreparably if an order of temporary injunction would not be granted. He relied on the case of: "Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR where irreparable injury was defined as follows:-

"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"

16. The Appellant/Applicant reiterated that he was given an empty space where he constructed the shop in the year 2014 and had been in occupation until February, 2023 when he was served with the purported Proclamation Notice for being allegedly in rent arrears of Kenya Shillings Six Million Four Thirty Thousand Two Twenty One Hundred (Kshs. 6,430,221/=) The Respondents had proclaimed the Appellant's tools of trade which were his only source of livelihood and that of his family. Unless an injunction order was granted, he would suffer irreparable harm as the Respondent would proceed to carry away his goods for sale while executing unlawful distress for rent.

17. Lastly, the Appellant had demonstrated that the balance of convenience tilted in his favour. The case of "Pius Kipchirchir Kogo (Supra) the concept of balance of convenience was defined as:-

"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."

18. The Appellant/Applicant had successfully demonstrated that there was no Landlord - Tenant relation between him and the representative of the Late Gabriel Mithamo Ndunyu and his goods were unlawfully proclaimed. The Appellant/Applicant having sufficiently met the threshold for granting of injunction orders, the same warrants this Court exercise of its discretion and grant the prayers sought. The Appeal had high chances of success as demonstrated in the Memorandum of Appeal and failure to grant the orders herein shall render the appeal nugatory. Therefore, the Appellant prayed that the Application be allowed.

B. The Written Submissions by the 1st Respondent

19. The 1st Respondent through the Law firm of Messrs. J. Kandie Associates Advocates filed their written submissions. M/s. Kandie Advocate stated that before the Court was the application dated the 30th August, 2023 by the Appellant/Applicant. It sought for the orders as already set out herein. The Learned Counsel provided a brief background to the matter herein. She stated that Appellant/Applicant was served with a Proclamation Notice dated 27th February, 2023 by the 2nd Respondent.. The Proclamation Notice indicated that the 2nd Respondent had instructions from the 1st Respondent to levy distress for rent with respect to the suit property standing on MN/281/1 Bombolulu Mombasa County. The Proclamation Notice indicated that at the time of issuance, the Appellant/Applicant owed the 1st Respondent rent arrears in the sum of Kenya Shillings Six Million Four Thirty Thousand Two Twenty One Hundred (Kshs. 6,430,221/=).
20. For the determination by this Court, the Learned Counsel submitted on three (3) issues to be considered for the determination by the Court. Firstly, whether there was a prima facie case with a probability of success. The Learned Counsel averred that the Appellant/Applicant was properly informed by the Respondents of the rent due to be paid of which the same had not been denied. To buttress on this point, she relied on the case of: "C.Y.O v George Hannington Zephania Aduda T/A Aduda the Court of Appeal stated:

"Section 3(1) of the *Distress for Rent Act* states as follows:

"3(1) Subject to the provisions of this Act, any person having any rent service in arrears and due upon a grant, lease, demise or contract shall have the same remedy by distress for the recovery of that rent or rent service as is given by the Common Law of England in a similar case."
21. Additionally, she cited the case of: "Mrao Limited – Versus First American Bank" (Supra) the Court of Appeal in defined what amounted to "a prima facie case". The Learned Counsel argued that from the documents presented as supporting evidence by the Appellant/Applicant, never met the thresh hold of a prima facie case with high chance of success. From the Applicant's submission he never denied that due process was followed in obtaining the proclamation notice. Neither did the Applicant deny being properly served with the Notice and numerous demand to pay the amount owed.
22. The Appellant/Applicant could be equated to a drowning man who would clutch at a straw. The application by the applicant was frivolous, vexatious and misleading as the proclamation notice was properly issued and served.



23. The Court was not expected to consider the merits of the case when determining whether or not a prima facie case had been established. This position was set out in the case of:- “Nguruman Limited (Supra) where the Court of Appeal stated as follows: -

“We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini-trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right that has been or is threatened with a violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case.”

24. Secondly, on whether the Appellant/Applicant would suffer irreparable loss or injuries not adequately compensated by damages if the injunction was not granted through an award of damages, as much as the Applicant enjoy the right to property as enshrined in Article 40 of *the constitution* of Kenya, it's also important to protect the interest of the 1st Respondent.

25. From the foregoing it was clear that the Appellant/Applicant had no title proofing that he was the legitimate owner of the suit premises. However, the 1st Respondent was the appointed by the Administrators of the Estate of the Late Gabriel Mithamo Ndunyu who was the legitimate owner of the property to manage and collect rent on Plot No.281/1/MN. The Appellant/Applicant had not made any efforts to rectify or the pay the 1st Respondent the amount owed despite being properly served with a legitimate Proclamation Order. Therefore, the Appellant/Applicant would not suffer any irreparable injury if the Injunction orders sought were not issued.

26. The Learned Counsel averred that the amount owing continued to accrue interest and the Appellant/Applicant had not shown any efforts employed or was to employ to repay the amount owed as rent due. Thus, the legitimate owners of the property continued to suffer detriment and losses at the expense of the Appellant/Applicant.

27. Finally, whether the Court would decide the matter on a balance of convenience. From the fore going the 1st Respondent had demonstrated to this Honourable court that it had instructions from the legitimate owner of the property to collect rent on their behalf. On the contrary, the Appellant/Applicant had not presented any evidence to demonstrate that he owned the property or that he had made any substantial investment into the property which he would stand to lose if the orders sought were not issued and further, that the loss could not be compensated with an award of damages. From the fore going it was clear that the balance of convenience was clearly in favour of the 1st Respondent.

28. In conclusion, the Learned Counsel submitted that the Appellant/Applicant had failed to demonstrate that it was deriving orders sought. Therefore, the Counsel urged Court to dismiss the Application with costs.

VI. Analysis and Determination

29. I have carefully considered the application, the affidavit in support and the responses thereto, the written submissions, the myriad authorities cited by parties herein and the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.

30. To arrive at an informed and fair decisions, the Honourable Court has crafted three (3) main issues for determination. These are:-



- a. Whether the Appellant/Applicant through the Notice of Motion application dated 30th August, 2024 had met the threshold for granting of temporary injunction pending hearing and determination of the appeal herein.
- b. Whether the parties there are entitled to the prayers sought.
- c. Who will bear the costs of the application.

Issue No. a). Whether the Appellant/Applicant through the Notice of Motion application dated 30th August, 2024 had met the threshold for granting of temporary injunction pending hearing and determination of the appeal herein.

31. Under this Sub – title the main substrata is on whether to grant orders of stay of execution and temporary injunction order pending the hearing and determination of the appeal. The Law governing stay of execution and injunction pending the determination of an appeal is founded under the provision of Order 42 Rule 6 (6) of the Civil Procedure Rules empowers this court in the exercise of its appellate jurisdiction to grant a temporary injunction pending appeal. The Rule states:-

“Notwithstanding anything contained in Sub - rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

32. In the case of:- “Patricia Njeri & 3 Others v National Museum of Kenya [2004] eKLRr, the court discussed the principles that guide the court in granting temporary injunction pending an appeal. It was stated:-

“The Appellants did, however, pray (in the alternative) for an order of injunction pending appeal. There was no dispute that the court can, in a proper case grant an injunction pending appeal. What are the principles that guide the court in dealing with such an application?

33. In the case of ”Venture Capital” the Court of Appeal said that:-

“an order for injunction pending appeal is a discretionary matter. The discretion must, however, be “exercised judicially and not in whimsical or arbitrary fashion.” This discretion is guided by certain principles some of which are as follows:

- (a) The discretion will be exercised against an Applicant whose appeal is frivolous (See Madhupaper International Limited v Kerr [1985] KLR 840 (cited in Venture Capital). The Applicant must state that a reasonable argument can be put forward in support of his appeal (J. K. Industries v KCB [1982 – 88] KLR 1088 (also cited in Venture Capital)
- (b) The discretion should be refused where it would inflict greater hardship than it would avoid (See Madhupaper Supra).
- (c) The Applicant must show that to refuse the injunction would render his appeal nugatory (See Butt v Rent Restriction Tribunal [1982] KLR 417 (cited also in Venture Capital).



(d) The Court should also be guided by the principles in *Giella v Cassman Brown & Company Ltd* [1973] EA 358 as set out in the case of *Shitukha Mwamodo & Others* [1986] KLR 445 (also cited in *Venture Capital*).

34. The Appellant/Applicant was the Plaintiff in the Civil Case of:- “ELC (Mombasa) CMCC E267 of 2013 Richard Nguru Ndunyu – Versus - Palma Plus Enterprises and Five Eleven Auctioneers. He filed an application dated 10th March 2023 seeking a temporary injunction to restrain the Respondents from carrying away his goods proclaimed vide a proclamation notice dated 27th February 2023. Hon. Nyariki delivered its ruling on 11th July 2023 and found the application dated 10th March 2023 unmerited and dismissed it with costs.
35. The Appellant/Applicant herein dissatisfied with the said ruling filed a Memorandum of Appeal before the “HCCA No. 188 of 2023 Richard Nguru Ndunyu v Palma Plus Enterprises and Five Eleven Auctioneers, which was later transferred into this court by Kizito J on 16th August 2023. The Appellant/Applicant proceeded to file a Memorandum of Appeal before this court on 31st August 2023.
36. In his affidavit in support of the application, the Appellant claimed that there exists no landlord-tenant between himself and the 1st Respondent for them to demand a sum of Kenya Shillings Six Million Four Thirty Thousand Two Twenty One Hundred (Kshs. 6,430,221/=). He maintained that he constructed the shop on the suit premises after his Uncle Kanyana, the owner of the suit premises allowed him to do so. He further claimed to be the caretaker of other properties belonging to said uncle which are on the same suit premises. The Appellant/Applicant has not attached any evidence to prove that indeed he was granted the suit premises by Mr. Muriuki his uncle who was alleged to own LR No. 281/I/MN. The Respondent on the other hand has maintained that they have authority from the administrators of the Estate of Gabriel Mithamo Ndunyu, the owner of LR No. 281/I/MN to collect rent from the Appellant.
37. I do note that the Appellant/Applicant had only attached the application dated 10th March 2023 filed before the lower court. However, he never attached the annexures, which were the evidence used in support. For instance, in the lower court application, he referred a Plaint in a suit named as “Muriuki Kanyana v Tabitha Waruguru Ndunyu and others”. However, the said Plaint was not before court for it to determine that indeed the Respondents were being used by the Appellant’s family members to harass him as he claimed before the lower court. The court was unable to verify the nature of evidence presented before the lower court upon which the Learned Magistrate used to premise his decision. In the premises, the Appellant/Applicant had failed to present satisfactory evidence before this court that he had an arguable appeal.
38. The Appellant/Applicant was also required to answer in the affirmative the question of whether he stood to suffer irreparable injury that cannot be compensated by an award of damages. The Appellant/Applicant had argued that he stood to lose his property including his tools of trade and be rendered destitute. Irreparable injury was a question of fact that the Appellant must establish through evidence. It was held by the Court of Appeal categorically in the case of:- “Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR that speculative injury will not do. The Court held that:-

“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.”

39. The Appellant/Applicant failed to demonstrate his alleged relationship with Mr. Kanyana whom he claimed was the owner of the suit premises. In addition, there is no evidence before the court of the actual, substantial and demonstrable injury that the appellant stands to suffer if injunctive orders pending appeal are not granted. Though none of the parties herein have presented before the court documentation of ownership of the suit property, the appellant has not placed before this court any evidence to demonstrate that the balance of convenience tilts in favour of the grant of the temporary injunction sought.

Issue No. c). Who will bear the costs of the application

40. It is now well established that issues of costs is at the discretion of the Court. Costs mean the award that is granted to a party at the conclusion of the legal action or proceedings in any litigation. The proviso of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the event. By event it means the result of the legal action.

41. In the instant case where the application by the Appellant/Applicant has been unsuccessful, the 1st Respondent should be entitled to the costs of the application and appeal to be borne by the Appellant/Applicant herein.

VII. Conclusion & Disposition

42. In conclusion, I find that the Appellant/Applicant not only has failed demonstrating any prima facie case but also what irreparable damage he would suffer that cannot be compensated by an award of damages if the orders were never granted. And even if I was in doubt, which I am not, and was to determine the application on a balance of convenience, it would not tilt in his favour.

43. Consequently, I find:-

- a. That the Notice of Motion dated 30th August 2023 be and is hereby found to be devoid of merit and hence is dismissed.
- b. That in effect the matter now proceeds on with the execution accordingly as ordered by the trial court.
- c. That costs to be borne by the Appellant/Applicant to be awarded to the 1st Respondent.

It is Ordered Accordingly

RULING DELIVERED THROUGH MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 18TH DAY OF MARCH 2024

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**HON. JUSTICE L.L. NAIKUNI,
ENVIRONMENT & LAND COURT AT
MOMBASA**

Ruling delivered in the presence of:-



- a. M/s. Firdaus Mbula, the Court Assistant.
- b. M/s. Ngumbao Advocate holding brief for Mr. Attaka Advocate for the Appellant/Applicant.
- c. M/s. Kandie Advocate for the 1st Respondent.

