Said v Ebrahim (Environment & Land Case 78 of 2021)
[2024] KEELC 1672 (KLR) (13 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1672 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 78 OF 2021

LL NAIKUNI, J

MARCH 13, 2024

BETWEEN

SAID OMAR SAID ..... PLAINTIFF

AND

FAUZIA MOHAMED EBRAHIM ..... DEFENDANT

RULING

I. Introduction

1. The Plaintiff/ Applicant herein, Said Omar Said moved this Honorable Court for the hearing and determination of the Notice of Motion application dated 19th October, 2023. It was brought under a Certificate of urgency and the dint of the provisions of Order 22 Rules 22 & 25, Order 44 Rules 1,5 & 9 Of the Civil Procedure Rules, Sections 1, 1a, 3a, 63(C) &(E) Of the *Civil Procedure Act* Cap.21 Laws of Kenya, the *Land Act* Laws of Kenya, Articles 7, 40, 50 (e) of *The Constitution* of The Republic of Kenya.

2. Despite of being served with the application, I notice that the Defendants never filed any responses whatsoever. Thus, the Honourable Court will make a determination on merit.

II. The Applicant's case

3. The Applicant sought for the following orders: -

    a. Spent

    b. Spent

    c. That the Honourable Court be pleased to grant Orders in the realm and nature of conservatory Orders of unconditional stay of execution of the Orders/Ruling delivered of the Honourable Court duly issued on the 27th July 2023 pending the hearing an determination of this suit.

d. That the Honourable Court be pleased to issue an Order unconditionally restraining the Defendant/Respondent from gaining possession, occupation, enjoyment, and derivative use of the suit property to wit: Plot No. Mombasa/Block XVI/487, Majengo as pertaining prior to the Orders issued herein on the 27th July, 2023.

e. That the Honourable Court be pleased to review the Orders issued on the 27th July 2023 premised on non-disclosure of material facts, distortion of the Agreement dated the 20th June 2011 in respect of Plot No.Mombasa/Block XVI/487.

f. That the Honourable Court be pleased to issue such further Orders in the interest of justice and pertinent to the suit herewith

g. That the costs of this application be provided for.

4. The application by the Plaintiff/Applicant herein was premised on the grounds, testimonial facts and averments made out under the 17th Paragraphed Supporting Affidavit of Dr. Said Omar Said sworn and dated 19th October, 2023 with five (5) annextures marked as 'SOS - 1 to 5'. The Plaintiff/Applicant averred that:

i. There was a Ruling delivered by the Honourable Court on the 27th July 2023, which Ruling has had the cause and effect of an eviction Order as against the Plaintiff/Applicant in respect of all that premises known as Plot No.Mombasa/Block XVI/487. Annexed in the affidavit and marked as "SOS – 1' was a copy of the said Ruling.

ii. The Orders/Ruling issued by the Honourable Court had the import and effect of the undermentioned:-

a. The Orders/Ruling issued herewith effectively was an eviction Order which countenances the doctrine of natural justice of condemnation without hearing; the prayers sought herewith effectively decapitates the entire suit without granting a hearing of the parties.

b. There was a pending criminal inquiry as encapsulated in Criminal Case Number "E 1060 of 2023 – Republic v Fauzia Mohamed Ebrahim" which had immense import to these proceedings, effectively depicts the perjury, falsification of facts, material non-disclosure, which effectively has the legal parameters to set aside, discharge and review the Orders issued/Ruling delivered on the 27th July 2023.

c. The Plaintiff/Applicant had a vast divestment that was incapable of being diminished by mere allegations premised on affidavit evidence especially on the basis of there havingbeen perjury, misrepresentation of facts and non-disclosure of material facts that would have aptly assisted the Honourable Court to arrive at a judicious sound Ruling.

iii. The Defendant/Respondent had proceeded to issue threats, and actual notice to vacate consequent to the said Ruling issued herewith which was essentially an eviction Order which disenfranchises the Plaintiff/Applicant of the proprietary interestherewith, without being afforded the sacrosanct "right to be heardprior to being condemned". Annexed in the affidavit and marked as "SOS – 2" were copies of the said notices.

iv. The parameters and realm of setting aside and review had duly been satisfied hence the Honourable Court divested of the authority herewith ought to immediately converge and avoid a miscarriage of justice being permeated herewith.

v. There were good and sufficient grounds to warrant grant of the Orders sought herein.

vi. In retrospect, there was a pending application to wit: application dated the 17th June 2023 which would essentially change the matrix herewith with the vast effect of assisting the Honourable Court to understand the dispute with due regard to the criminal enterprise perpetrated by the Defendant/Applicant.

vii. The Defendant/Respondent would not suffer any prejudice in the event the Orders sought herein are granted as prayed.

viii. In tandem with paragraph (f) herein before it was indeed true that pursuant to the agreement dated the 20th June 2011, the Defendant/Respondent was drawing Rents, had borrowed loans from the Plaintiff/Applicant which essentially depict a scenario of the Defendant/Respondent having two bites at the cherry and at the same breath creating a villain out of the Plaintiff/Applicant the individual who constructed the entire dwelling situate on Plot No.Mombasa/Block XVI/487.

ix. There was immense prejudice to be suffered in essence the tenants on the premises Plot No. Mombasa/BLOCK XVI/487 were subject to live leases which shall expose the Plaintiff/Applicantto myriad of suits, precipitate action should the real threat ofeviction be carried to nominal conclusion.

x. The damage to be suffered by the Plaintiff/Applicant on a balance of scale outweighs that of the Defendant/Respondent having built from scratch the entire block of flats upon a mutually consented agreement which is now being set aside by virtue of the Ruling issued on the 27th July 2023, to attempted to re-state the Agreement dated the 20th June 2011 will be to void the same.

xi. As alluded to hereinbefore and as duly advised there were Constitutional safeguards that mandate the Honourable court to grant the Orders as herein sought specific to review the Orders as duly depicted that was subject to a public process of trial as envisaged herein.

xii. There was immense prejudice to be suffered herein in the event the Orders herewith fail to be granted, both in private regime and public interest so as to formally aid in the quest for justice.

xiii. It was in the larger interest of justice that the Honourable Court did grant the Orders sought herein.

III. Submissions

5. On 25th October, 2023 while all the parties were present in Court, they were directed to have the application dated 19th October, 2023 be disposed of by way of written submissions and all the parties complied. Pursuant to that on 18th January, 2024 a ruling date was reserved on Notice by Court accordingly.

IV. Analysis & Determination.

6. I have carefully read and considered the pleadings herein by the Plaintiff/Applicant herein, the relevant provisions of *the Constitution* of Kenya, 2010 and statures.

7. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-

a. Whether the Plaintiff has made out a case for the review the Orders issued on the 27th July 2023 premised on non-disclosure of material facts, distortion of the Agreement dated the 20th June 2011 in respect of PLOT NO.MOMBASA/BLOCK XVI/487

b. Whether a stay of execution can be granted for the orders/ ruling delivered by this Honourable Court on 27th July, 2023

c. Whether the Honourable Court has met the threshold for the grant of interlocutory injunction as pertaining prior to the Orders issued herein on the 27th July, 2023

d. Who will bear the Costs of Notice of Motion application 19th October, 2023.

IssueNo. a). Whether the Plaintiff has made out a case for the review the Orders issued on the 27th July 2023 premised on non-disclosure of material facts, distortion of the Agreement dated the 20th June 2011 in respect of Plot No.Mombasa/Block XVI/487

8. Based on the application dated 19th October, 2023, the Plaintiff/Applicant seeks for a raft of orders mainly being injunctive orders restraining the Defendant/Respondents from dealing with the suit property and review of its order granted on 27th July, 2023. On 27th July, 2023, this Honourable Court rendered itself as follows:

> 44. Consequently, upon conducting such an elaborate and detailed analysis of the framed issues herein, the Honourable Court based on the preponderance of probabilities makes the following specific findings.
>
> a. That both the Preliminary Objections dated 24th November, 2021 by the Defendant and the one dated 20th December, 2021 be and are hereby dismissed for failing to meet the threshold of law as founded in the case of "Mukisa Biscuits Manufacturing Company Limited v West End Distribution Ltd. [1969] E.A. 696 as they are not on pure issues of law but facts
>
> b. That the Notice of Motion application dated 25th November, 2021 be and is hereby allowed in terms of prayers (d) and (e) to wit:-
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> i. Injunction orders be hereby granted in favour of the Defendant herein;
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> ii. Filing of Defence and Counter Claim out of time allowed.
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> c. That the Defendant granted 21 days to file and serve Defence and Counter Claim and comply with the provision of Order 11 of the Civil Procedure Rules, 2010.
>
> d. That the Plaintiff granted leave of 14 days to file Reply to the Defence and Counter Claim and Further documents.
>
> e. That for expediency sake matter be fixed for hearing on 18th March, 2024 and there be a mention date on 30th October, 2023 for conducting a Pre - trial Conference as per Order 11 of the Civil Procedure Rules, 2010 and taking a heading date of the matter.
>
> f. That each party to bear own costs of application and objection
>
> It is so ordered accordingly.

9. To begin with on the issue of review of Court orders. The Courts have deliberated on this issue extensively and hence this Court will not be re – inventing the wheel but to go direct to the legal

perspectives – law and precedents - of it. The provision of Section 80 of the *Civil Procedure Act* Cap 21 provides as follows: -

> " Any person who considers himself aggrieved—
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> a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
>
> b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

10. While the provision of Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows:-

> " 1. (1) Any person considering himself aggrieved—
>
> a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

11. I wish to cite the case of: "Republic v Public Procurement Administrative Review Board & 2 others [2018] eKLR" it was held: -

> " Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay."

12. Further, in the case of:- "Pancras T. Swai v Kenya Breweries Limited [2014] eKLR" the Court of Appeal held: -

> " Order 44 rule 1 (now Order 45 rule 1 in the 2010 Civil Procedure Rules) gave the trial Court discretionary power to allow review on the three limps therein stated or "for any sufficient reason....."

13. Additionally in the case of:- "Sarder Mohamed v Charan Singh Nand Sing and Another [1959] EA 793" where the High Court held that Section 80 of the *Civil Procedure Act* conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate. Discussing the scope of review, the Supreme Court of

India in the case of "Ajit Kumar Rath v State of Orisa & Others, 9 Supreme Court Cases 596 at Page 608." had this to say:-

> " the power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" ..... means a reason sufficiently analogous to those specified in the rule"

14. While in the case of:- "Tokesi Mambili and others v Simion Litsanga" the Court held as follows: -

> " i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.
>
> ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion."

15. Finally, in the case of:- "Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018" John M. Mativo Judge culled out the following principles from a number of authorities: -

i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.

ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.

iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.

iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/ judgment of a coordinate or larger Bench of the tribunal or of a superior court.

vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/ decision as vitiated by an error apparent.

vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge

and even after the exercise of due diligence, the same could not be produced before the court/ tribunal earlier.

viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.

16. The Honourable Court was moved separately by the Plaintiff – Said Omar Said on the one hand and the Defendant – Fauzia Mohamed Ibrahim on the other hand for the determination of two sets of pleadings by the parties . These were the Notice of Motion application dated 25th November, 2021 and a Preliminary Objection dated 24th November 2021 both filed by the Defendant whilst there was a pending preliminary objection dated 20th December, 2021 raised by the Plaintiff herein. According to the Plaintiff in this current application, the ruling delivered on 27th July, 2023 which Ruling has had the cause and effect of an eviction Order as against the Plaintiff/Applicant in respect of all that premises known as Plot No.Mombasa/Block XVI/487.(Annexed in the affidavit and marked SOS 1 is a copy of the said Ruling).

17. According to the Plaintiff, the orders herewith effectively is an eviction Order which countenances the doctrine of natural justice of condemnation without hearing; the prayers sought herewith effectively decapitates the entire suit without granting a hearing of the parties. There was a pending criminal inquiry as encapsulate in Criminal Case Number E 1060 of 2023 Republic-versus-fauzia Mohamed Ebrahim which has immense import to these proceedings, effectively depicts the perjury, falsification of facts, material non-disclosure, which effectively has the legal parameters to set aside, discharge and review the Orders issued/Ruling delivered on the 27th July 2023. The Defendant/Respondent has proceeded to issue threats, and actual notice to vacate consequent to the said Ruling issued herewith which is essentially an eviction Order which disenfranchises the Plaintiff/Applicant of the proprietary interest herewith, without being afforded the sacrosanct "right to be heard prior to being condemned" (Annexed in the affidavit and marked SOS 2 are copies of the said notices).

18. There was no eviction order granted on 27th July, 2023 as the orders were just directions for the filing of the Defendant's pleadings including the counter claim. The Application cannot pass the Test of:

> " .....or for any other sufficient reason....."

19. In the case of "Evan Bwire v Andrew Aginda Civil Appeal No. 147 of 2006 cited fin the case of Stephen Githua Kimani v Nancy Wanjira Waruingi T/A Providence Auctioneers [2016] eKLR" the Court of Appeal held as follows:

> " An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh. In other words, I find no material

before me to demonstrate that the applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence."

20. The current Application falls under the above category. The effect of allowing it would be reexamining an application that had already been determined where there was nothing much to it. Litigation must come to an end. Parties must present all the facts, documents and evidence in Court at the appropriate time before the Court retires to write its Ruling. Time and time again Courts have advised litigants that they are bound by their pleadings and that you do not prosecute your case piecemeal. This whole time, the Plaintiff/Applicant was aware of the ruling and the application. What is demonstrated by the Application is a case of poor pleading which is not what was envisaged by the provision of Section 80 of the *Civil Procedure Act*, Cap. 21 nor the Rules under Order 45. For all these reasons, therefore, I discern that the prayer of review from the filed application by the Plaintiff/Applicant is found to lack merit and hence it must fail..

Issue No. b). Whether a stay of execution can be granted for the orders/ ruling delivered by this Honourable Court on 27th July, 2023.

21. Stay of Execution pending appeal is governed by Order 42, Rule 6 of the Civil Procedure Rules, 2010 which provides as follows: -

> "(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
>
> (2) No order for stay of execution shall be made under subrule (1) unless—
>
> (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
>
> (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
>
> (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.."

22. The power of a court to grant stay of execution is discretionary. This discretionary power must not be exercised capriciously or whimsically but must be exercised in a way that does not prevent a party from pursuing its appeal so that the same is not rendered nugatory should the appeal overturn the trial court's decision. (see "Butt - v Rent Restriction Tribunal [1979]").

23. The purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of the parties and considering the circumstances of the case. The Court of Appeal in "RWW v EKW [2019] eKLR" addressed itself on this as hereunder:-

> " The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
>
> 9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent."

24. The Court of Appeal in "Vishram Ravji Halai v Thornton & Turpin Civil Application No. Nairobi 15 of 1990 [1990] KLR 365", outlined the requirements for granting stay of execution pending appeal. It held that, whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 (as it then was) of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. But in this case this is not a stay of execution pending appeal. The Plaintiff has averred that before it is indeed true that pursuant to the agreement dated the 20th June 2011, the Defendant/Respondent is drawing Rents, has borrowed loans from the Plaintiff/Applicant which essentially depict a scenario of the Defendant/Respondent having two bites at the cherry and at the same breath creating a villain out of the Plaintiff/Applicant the individual who constructed the entire dwelling situate on Plot No.Mombasa/Block XVI/487.

25. Looking at the application I find that the Applicant has not made out a case for the stay of execution of the ruling dated 27th July, 2023. It must not succeed.

Issue No. c). Whether the Honourable Court has met the threshold for the grant of interlocutory injunction as pertaining prior to the Orders issued herein on the 27th July, 2023.

26. Under this Sub - heading the principles applicable in an application for an injunction were laid down in the celebrated case of "Giellla v Cassman Brown & Co [1973] CA 358" where the court held that in order to qualify for an injunction.

    a. First the applicant must show a prima facie case with a probability of success.

    b. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not be adequately compensated by an award of damages.

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

27. In this particular case the Court takes note that there are already injunctive orders in favour of the Defendant. The first issue for determination is whether the Plaintiff has established that he has a prima facie case with a probability of success. A prima facie case was defined by the Court of Appeal in "MRAO Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR" as follows;

> " a prima facie case in a civil application includes but is not confined to a genuine and arguable case". It is a case which, on the material presented to the court, a tribunal properly directing

itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

28. On the issue whether the Applicant has established a prima facie case with a probability of success. From the facts in the filed pleadings it's clear and admitted by the Plaintiff that the Defendant is the Owner of the two (2) ground floor of the Suit Property. Indeed, the Plaintiff has been remitting rental income from the houses to her at Tanzania. The only lingering dispute is on the ownership of the whole floor. The Plaintiff has not made out a prima facie case with a high chance of succeeding.

29. In the case of "Mbuthia v Jimba credit Corporation Ltd 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."

30. Similarly, in the case of "Edwin Kamau Muniu v 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."

31. On the issue whether the Defendant/Applicant will suffer irreparable harm which cannot be adequately compensated by award of damages, the Applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. The Court of Appeal in "Nguruman Limited v Jan Bonde Nielsen [2020] eKLR", held that:-

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

32. There seem to be a breach of the Contract or agreement between the Plaintiff and the Defendant. There was immense prejudice to be suffered in essence the tenants on the premises Plot No. Mombasa/ Block XVI/487 are subject to live leases which shall expose the Plaintiff/applicant to myriad of suits, precipitate action should the real threat of eviction be carried to nominal conclusion. According to the Plaintiff the damage to be suffered by the Plaintiff/Applicant on a balance of scale outweighs that of the Defendant/Respondent having built from scratch the entire block of flats upon a mutually consented agreement which is now being set aside by virtue of the Ruling issued on the 27th July 2023, to attempted to re-state the Agreement dated the 20th June 2011 will be to void the same. The Plaintiff has not shown how the irreparable damage cannot be compensated in any way if the orders are not granted.

33. As regards the balance of convenience the Court concluded that it tilts in favour of the Defendant/ Respondent who is not in enjoyment of the full rental income garnered from the Suit Property. I hold not being satisfied that the Plaintiff has fulfilled the ingredients as set out in the famous case of "Giella

v Cassman Brown (Supra)" case and hence ought to be granted the injunctive orders sought in order to preserve the suit property. Clearly, the application cannot succeed.

Issue No. d). Who will bear the Costs of Notice of Motion application 27th April, 2023.

34. The issue of costs is at the discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The Black Law Dictionary defines cost to means:-

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

35. The provision of Section 27 of the *Civil Procedure Act*, Cap. 21 holds that ordinarily costs 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."

36. By following the event it means the results of the legal action or proceedings. In the instant case, as this Honourable Court has opined above, although the application by the Plaintiff/Applicant has failed, it will be in the interest of justice and also taking that the Defendant/Respondent never filed any replies to the application that all parties bear their own costs.

V. Conclusion & Disposition

37. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, this court arrives at the following decision and makes below order:-

    a. That the Notice of Motion application dated 19th October, 2023 be and is found to lack merit hence it is dismissed in its entirety.

    b. That there be an order for the Status Quo to be maintained meaning all the rental income garnered from the suit premises with effect from 1st April, 2024 to be deposited and held in an Escrow Joint bank account in a reputable commercial financial institution to be held in names of both the Advocate for the Plaintiff and the Defendant the Law firm of Messers. Maulidi O.A Advocates and Wachira King'ang'ai Advocates.

    c. That an order made for the Defendant to be granted 30 days from this date hereof to put their house in order on the issue of appointment of Legal Representatives under Order 24 of the Civil Procedure Rules, 2010 and the provisions of the Laws of Succession Act, Cap. 160 or the Muslim Laws.

d. That the hearing date earlier on fixed for 18th March, 2024 be and is hereby vacated until further notice. In the meantime, there shall be a mention on 29th April, 2024 for progress made and further directions.

e. That each party to bear their own costs of the Notice of Motion application dated 19th October, 2023.

It is so Ordered Accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 13TH DAY OF MARCH 2024.

.....

HON. JUSTICE L. L. NAIKUNI,

ENVIRONMENT AND LAND COURT AT

MOMBASA

Ruling delivered in the presence of:

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

b. Mr. Edward Amballa Advocate for the Plaintiff/Applicant.

c. Mr. Muthuri Advocate for the Defendant/Respondent.