Emrose Academy Limited v Director of Surveys & 3 others (Civil Appeal 161 of 2017) [2023] KECA 1423 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1423 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 161 OF 2017

AK MURGOR, J MOHAMMED & HA OMONDI, JJA

NOVEMBER 24, 2023

BETWEEN

EMROSE ACADEMY LIMITED ..... APPELLANT

AND

DIRECTOR OF SURVEYS ..... 1ST RESPONDENT

NATIONAL LAND COMMISSION ..... 2ND RESPONDENT

JOHN MWANGI NDUTA JOSEPH KAMANDE T/A HUMAMA KOMAROCK SELF HELP GROUP ..... 3RD RESPONDENT

NAIROBI CITY COUNTY ..... 4TH RESPONDENT

(An appeal from the ruling and order of the Environment and Land Court at Nairobi (Obaga, J.) dated on 6th April, 2017 in Nairobi ELC No. 1147 of 2013)

JUDGMENT

Background

1. This is an appeal from the ruling and order of the Environment and Land Court, (ELC) (E. O. Obaga, J.) at Nairobi delivered on 6th April, 2017 which dismissed the notice of motion dated 9th November, 2015 filed by Emrose Academy Limited (the appellant) for lack of merit. The appellant was aggrieved with the said decision and lodged the instant appeal.

   Director of Surveys, National Land Commission, John Mwangi Nduta & Joseph Kamande Nduta T/A Humama Komarock Self Help Group) and Nairobi City County are the 1st to 4th respondents respectively.

2. The appellant filed a notice of motion in the ELC dated 9th November, 2015 seeking inter alia injunctive orders against the respondents. The application also sought an order of revocation of

certificates of title in respect of LR No. Nairobi/Block 121/246 and Nairobi/Block 121/247 (the suit properties) or any other certificate of titles or leases issued pursuant to the subdivision of the two titles. The appellant further sought the assistance of the Officer in Charge, (OCS), Kayole Police Station to ensure compliance of the court orders.

3. A brief background will help place the appeal in context. In the affidavit supporting the notice of motion dated 9th November, 2015 sworn by Simon Maina, it was deponed inter alia: that on 10th April, 2017 the appellant lodged a notice of appeal dated 7th April, 2017 in the ELC; that the appellant also filed an application dated 29th June, 2017 seeking an order for stay of proceedings pending the hearing and determination of the appeal; that the ELC heard the appellant's application and dismissed it vide a ruling delivered on 28th June, 2018 on the basis that an appeal to this Court does not operate as an automatic order for stay of proceedings in the court from which the order appealed from emanates.

4. The 3rd respondent opposed the notice of motion; and in a replying affidavit sworn on 29th March, 2016 by John Mwangi Nduta, it was deponed that he was the Chairman of the 3rd respondent; that he was aware of 2 pending matters over the same subject matter of the suit properties in the ELC in Nairobi; that the 3rd respondent filed High Court Civil Case No. 800 of 2014; that soon thereafter the appellant filed High Court Civil Case No. 989 of 2014; that the 3rd respondent is the rightful registered and beneficial owner of the suit properties; and would suffer irreparable loss and damages if the appellant is granted the orders sought.

5. The 4th respondent opposed the application and in a replying affidavit sworn on 16th June, 2016, Karisa Iha, the Director of Legal Affairs Department at the County Government of Nairobi deponed inter alia that the suit properties were not in existence as the same was sub-divided in 1993; that the 3rd respondents are the beneficial owners of the suit properties; and that the appellant did not go through all requisite procedures in the acquisition of the suit properties.

6. After hearing all the parties, the learned Judge held in part that:

> "In the Ruling annexed to the applicant's supporting affidavit, at paragraph 13, there was an affidavit sworn stating that the applicant in that case was "Emrose Academy" and not "Embrose Academy". It appears this is the same trick being applied here to try to show that, this suit is not subjudice. This suit will never cease to be subjudice notwithstanding the number of parties who are added or no matter how many times the applicant wants to play around with names of the applicant."

7. Aggrieved by that ruling, the appellant lodged the instant appeal and raised eleven (11) grounds to wit that, the learned Judge erred in law and in fact when he held: that the appellant's suit is subjudice; that the cause of action and the issues raised in ELC No. 1147 of 2015 are similar to those in ELC No. 989 of 2014 and ELC No. 800 of 2014; that the appellant misled the court with respect to the holding of the court in HCCC No. 695 of 2005 made on 6th May, 2013; and that for the purposes of the interlocutory L.R No. Nairobi/Block 121/245 from which the suit properties emanated did not exist.

8. Further, that the learned Judge erred: by relying on an unsworn affidavit in arriving at his decision; by holding that the allocating authority is opposing the appellant's claim to the suit property; by holding that the appellant has not been candid on how it acquired the suit property; by finding that the orders sought by the appellant are not capable of being implemented; by holding that the appellant has not established a *prima facie* case with a likelihood of success; by wrongly exercising his discretion in failing to grant the appellant injunctive orders sought in the application; and by dismissing the appellant's application dated 9th November, 2015 with costs to the 3rd and 4th respondents.

9. During the hearing of the appeal, learned counsel Mr. Timothy Njenga, appeared for the appellant; learned counsel, Ms. Schola Wanjiru appeared for the 1st respondent, Ms. Mutinda Masaa held brief for learned counsel, Mr. Ayieko for the 3rd respondent while learned counsel Ms. Bella Mosse appeared for the 4th respondent. There was no representation by counsel for the 2nd respondent despite service. Following the directions given by the court, parties filed and exchanged written submissions which they relied on entirely.

10. The appellant sought to condense the grounds of appeal into five thematic areas namely; whether the appellant's suit is sub-judice; whether the suit property exists; whether the learned Judge erred in law and fact when he relied on an unsworn affidavit in arriving at his decision; whether the appellant satisfied the criteria for grant of the injunctive orders sought; and who should bear the costs of the appeal.

11. On the question whether the appellant's suit is sub-judice, counsel submitted that the learned trial Judge found that the appellant's suit was sub-judice on the basis that the subject of Nairobi ELC No. 800 of 2014 and ELC No. 989 of 2014 stem from L.R. No. Nairobi/Block 121/245 which was later subdivided and resulted into the suit properties.

12. Counsel asserted that the learned Judge misapprehended the facts when he stated that the appellant was trying to trick the court by distinguishing itself in ELC case No. 1147 of 2015 from the two parties in ELC No. 800 of 2014 and ELC No. 989 of 2014. Counsel further asserted that Emrose Academy Limited is different from Embrose Academy Limited (the plaintiff in ELC No. 989 of 2014) and Kuria Gathoni T/A Embrose Academy (the 1st defendant in ELC No.800 of 2014).

13. Counsel further submitted that ELC No. 1147 of 2015 is not sub-judice on the basis of the existence of ELC No.989 of 2014 and ELC No. 800 of 2014 for the reasons that the issues in ELC No. 1147 of 2015 are substantially different from the issues in ELC No. 989 of 2014 and ELC No.800 of 2014 as the cause of action is trespass occasioned by an alleged entry into the suit premises without permission and erection of permanent structures on the suit property. Counsel asserted that on the other hand, the cause of action in ELC No.1147 of 2015 is trespass occasioned by the respondents' attempt to subdivide and distribute the suit property to other persons without the appellant's consent/ authorization in complete disregard of its proprietorship of L.R. No. Nairobi/Block 121/245.

14. Counsel further submitted that the parties in ELC No.1147 of 2015 are different from parties involved in ELC No. 800 of 2014 and ELC No 989 of 2014. Further, that the parties in ELC No. 800 of 2014 are; Joseph Kamande, John Mwangi Nduta (suing as the officials of the Humama Komarock Self Help Group; The Trustees Archdiocese of Nairobi vs Kuria Wa Gathoni t/a Embrose Academy Ltd and Nairobi City County while the parties in ELC No. 989 of 2014 are Embrose Academy Ltd vs Joseph Kamande, John Mwangi Nduta (suing as the officials of the Humama Komarock Self Help Group), Nairobi City County and National Land Commission. Further, that the parties in ELC No. 1147 of 2015 are Emrose Academy Ltd vs Director of Surveys, National Land Commission, John Mwangi Nduta and Joseph Kamande T/A Humama Komarock Self Help Group and Nairobi City County.

15. Counsel pointed out that the appellant is a different entity from that involved in ELC No.800 of 2014 and ELC No 989 of 2014. That the 1st defendant in ELC No.800 of 2014 is an individual that is sued trading as a limited liability company despite the fact that a limited liability company has a separate legal existence. Counsel asserted that on the other hand, in ELC No 989 of 2014 the plaintiff is a different company from the appellant. Counsel submitted that the appellant, Emrose Academy Limited and not Embrose Academy Limited is the registered proprietor of suit property as per the Certificate of Lease dated 30th July, 1993.

16. Counsel further submitted that the reliefs sought in ELC No.800 of 2014 and ELC No 989 of 2014 are different from the reliefs sought by the appellant in ELC No.1147 of 2015. Counsel emphasized that there has been no determination by any court on the issues raised by the appellant in ELC Case No.1147 of 2015 and in light of this, the appellant's case is not sub judice.

17. On the question whether the suit property is still in existence, counsel submitted that the appellant is the registered owner of the suit property as per the Certificate of Lease dated 30th July, 1993 and a further Certificate of Official search dated 15th July, 2014. Counsel asserted that as per Section 30(3) of the *Land Registration Act*, a certificate of title or certificate of lease is *prima facie* evidence of the matters shown in the certificate and the land or lease shall be subject to all entries in the register. Counsel asserted that the Certificate of Lease dated 30th July, 1993 and the Certificate of Official Search dated 15th July, 2014 which were adduced clearly show that the appellant is the registered proprietor of the suit property. Counsel further asserted that the land registry cannot have records of property that does not exist.

18. Counsel submitted that the learned Judge erred in his decision when he ignored the documentary evidence adduced by the appellant and instead relied on mere dispositions to hold that the suit property does not exist. Counsel submitted that the 3rd and 4th respondents did not adduce any documentary evidence to demonstrate that the 3rd respondent owns LR No. Nairobi/Block 121/246 and LR No. Nairobi/Block 121/247.

19. Counsel further asserted that the learned Judge erred by making a decision concerning the ownership of the suit property through a ruling in respect of an interlocutory application, before receiving evidence from both parties during a hearing. Counsel asserted that the learned Judge did not have sufficient evidence before him to make a fair determination or decision about the ownership or existence of the suit property.

20. On the question whether the appellant satisfied the criteria for grant of the injunctive orders, counsel submitted that the learned Judge found that the appellant had not established a *prima facie* case on the basis that the suit property is non-existent; and that the allocating authority does not support the appellant's ownership thereof. Counsel asserted that the 3rd respondent in the replying affidavit sworn by John Mwangi Nduta, alleged to be the rightful registered and beneficial owners of the suit property, counsel submitted that the holding by the learned Judge was erroneous as it is not backed by the evidence and claims presented to him that the appellant is the registered proprietor of the suit property. Reliance was placed on *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & others* [2015] eKLR in support of the proposition that the grant of an interim injunction is an exercise of judicial discretion, and an appellate court should not readily interfere with the exercise of judicial discretion by the High Court, unless it is satisfied that the discretion has not been exercised judiciously.

21. Counsel asserted that the appellant has clearly demonstrated that it is the registered owner of the suit property as demonstrated by a Certificate of Lease and a Certificate of Official Search that clearly shows the appellant as the proprietor of the suit property. Counsel asserted that the phrase 'rightful registered and beneficial owner' is a description that is alien to property law. Counsel submitted that the 3rd respondent cannot be allowed to contrive hitherto unknown phrases in a bid to justify its illegal occupation of the suit property. Counsel pointed out that the 3rd respondent did not attach to its replying affidavit any document demonstrating its proprietorship over L.R No. Nairobi/Block 121/246 and L.R No. Nairobi/Block 121/247. Counsel further asserted that the appellant presented sufficient evidence before the learned Judge to establish that it had a *prima facie* case with a probability of success. Counsel relied on the case *Paul Gitonga Wanjau v Gathuthi Tea Factory Ltd & 2 others* [2016] eKLR for the test for determination of irreparable loss.

22. Counsel submitted that the appellant stands to suffer irreparable loss if this Court does not intervene and issue the orders sought. That the respondents will interfere with the appellant's ownership of the suit property by causing to issue title deeds with respect to the purported illegal subdivisions of the suit property. Further, that the 3rd respondent is a group comprising numerous members; and that in the event that the title deeds are issued in their favour, the appellant will be compelled to file multiple suits to recover the suit property which exercise would be costly and take a long time to conclude.

23. Counsel further submitted that in the event that the subdivision schemes submitted by the 3rd respondent are approved and title deeds are issued, the 3rd respondent's members may put up developments on the suit property on the strength of the title deeds which would create grave inconvenience in terms of relocation of both the appellant and the 3rd respondent's members. Counsel asserted that based on this, the balance of convenience tilts in favour of the appellant and the respondents will not be inconvenienced by the grant of the orders sought by the appellant.

24. On the question who bears the costs of the appeal, counsel submitted that the general rule on costs is that costs follow the event and in this case the appellant prays that costs of the appeal abide by the outcome of ELC No.1147 of 2015.

25. In opposing the appeal, counsel for the 3rd respondent submitted that the only issue for determination in this appeal is whether or not the trial court erred in law and in fact by refusing to grant the temporary orders of injunction. Counsel submitted that the appellant filed ELC No 1147 of 2015 and in its plaint dated 9th November, 2015 prayed for orders of permanent injunction and revocation of titles in respect of the suit property or L.R No. Nairobi/Block 121/246 or L.R No. Nairobi/Block 121/247 and together with the plaint filed an interlocutory application seeking for temporary orders over the suit property.

26. Counsel submitted that the appellant admitted that the suit property was the subject of litigation in Nairobi HCCC No. 695 of 2005, ELC No. 800 of 2014 and ELC No 989 of 2014 and the instant appeal. Counsel emphasized that the trial Judge noted that the subject of all these suits stems from the suit property which was later subdivided and resulted into the suit properties. Counsel submitted that the learned trial Judge noted that in the ruling in Nairobi HCCC No. 695 of 2005 there was an affidavit stating that the applicant in that case was Emrose Academy and not Embrose Academy which was the trick being applied by the appellant to show that the suit is not sub-judice.

27. Counsel further submitted that the appellant had submitted that there was an ongoing subdivision of the suit property and had tried to stop the process in vain. Counsel asserted that L. R. No. Nairobi/ Block 121/245 was later subdivided into the suit properties and as such the appellant cannot impugn the learned trial Judge for observing that the suit property in respect of which the appellant sought an injunction is non-existent and there was no order canceling the subsequent subdivisions which are now in the hands of the 3rd respondent. Counsel further submitted that the court could not grant orders in respect of a non-existent piece of land, as it is trite that court orders cannot be made in vain.

28. In further opposition to the appeal, the 4th respondent submitted that it was its position that the learned trial Judge rightly found that the application by the appellant lacked merit and did not meet the conditions for grant of temporary injunction sought. Counsel asserted that the conditions required for the grant of an interlocutory injunction were settled in *Giella v Cassman Brown & Co. Ltd* [1973] E.A 358 to be three part test as follows:-

    (a) an applicant must show a *prima facie* case with a probability of success;

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

c. if the court is in doubt of the two above principles, it will decide an application on the balance of convenience."

29. On the question whether ELC Case No.1147 of 2015 is sub-judice, counsel submitted that it is undisputed that there exist multiple cases over the suit property which was later subdivided to Nairobi/ Block 121/246 and 247. Counsel asserted that a mere substitution of parties in a case dealing with the same subject matter does not in itself exempt the case from being sub judice. Counsel further asserted that it is trite that the principle of sub judice is classic and that it includes points or issues that ought to have been brought before the court but did not find their way due to inadvertence of the parties or their counsel. Reliance was placed on the authority of Henderson v Henderson [1843] 67 ER. 313 for the proposition that a party is required to present their entire case during the course of legal proceedings. Counsel further submitted that the appellant has not demonstrated any special circumstances that may warrant exemption from the doctrine of sub judice as pleaded. Counsel urged us to dismiss the appeal.

30. Counsel for the 1st respondent associated herself with the submissions made by counsel for the 3rd respondent.

31. In conclusion, counsel submitted that the appellant has failed to demonstrate sufficient grounds for this Court to interfere with the ruling of the trial Judge, the appeal lacks merit, is frivolous and vexatious and should therefore be dismissed with costs.

Determination

32. Upon considering the record of appeal in its entirety together with the rival submissions, the authorities cited and the law, we discern the sole issue for our determination to be whether the learned trial Judge judiciously exercised his discretion in dismissing the application dated 9th November, 2015 and holding that the appellant's suit was sub judice. We remind ourselves that we must be slow in interfering with the exercise of discretion by the court below. There are parameters which we must be guided by before we can so interfere. These parameters were succinctly enunciated by the predecessor of this Court in *Mbogo v. Shah* (1968) EA where the Court stated:

> " An appellate court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice."
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> See also *Magunga General Stores v. Pepco Distributors* [1987] eKLR.

33. The learned Judge found that the appellant's suit was sub judice on the ground that the subject of Nairobi ELC No. 989 of 2014 stems from the suit property which was later subdivided and resulted into Nairobi/Block 121/246 and L.R No. Nairobi/Block 121/247.

34. Section 6 of the *Civil Procedure Act* provides as follows:-

> " No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between

the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

35. From the record, the learned Judge found that the appellant was trying to trick the court by distinguishing itself in ELC Case No. 1147 of 2015 from the two parties in ELC No. 989 of 2014.

36. On the question whether ELC Case No. 1147 of 2015 is sub judice on the basis of the existence of ELC No. 989 of 2014 and ELC No. 800 of 2014, learned counsel for the appellant asserted that the issues in ELC Case No. 1147 of 2015 are substantially different from the issues in ELC No. 989 of 2014 and ELC No. 800 of 2014. On the one hand, from the plaint in ELC No. 800 of 2014, the cause of action is trespass occasioned by an alleged entry into the suit property without permission and erection of permanent structures on the suit property.

37. On the other hand, the appellant's cause of action in ELC Case No. 1147 of 2015 is trespass occasioned by the respondent's attempt to subdivide and distribute the suit property to other persons without the appellant's consent as the registered proprietor of the suit property.

38. From the record, it is notable that the parties in ELC Case No. 1147 of 2015 are different from the parties involved in ELC Suit No. 800 of 2014 and ELC No. 989 of 2014. The appellant in ELC Case No. 1147 of 2015 is different from the entity that is involved in ELC No. 800 of 2014 and ELC No. 989 of 2014, the 1st defendant is an individual that is sued as trading as a limited liability company. On the other hand, the plaintiff in ELC No. 989 of 2014 is Embrose Academy Limited which is a company different from the appellant herein, Emrose Academy Limited.

39. Further, from the record, Emrose Academy Limited is the registered proprietor of the suit property as per the Certificate of Lease dated 30th July, 1993. From the record, the reliefs sought in ELC Suit No. 800 of 2014 and ELC Suit No. 989 of 2014 are different from the reliefs sought by the appellant in ELC Case No. 1147 of 2015.

40. It was the appellant's counsel's submission that there is no determination by any court of law regarding the issues raised by the appellant in case No. 1147 of 2015. In the circumstances, we find that the appellant's suit is not sub judice.

41. On the question whether the suit property is still in existence, from the record, the appellant is the registered owner thereof and has a Certificate of Lease. A certificate of official search dated 15th July, 2014 indicates that the appellant is the registered proprietor of the suit property.

42. Section 30(3) of the *Land Registration Act* provides as follows:

"30 (3)

A certificate of title or certificate of lease shall be *prima facie* evidence of the matters shown in the certificate, and the land or lease shall be subject to all entries in the register."

43. In the circumstances, the Certificate of Lease in respect of the suit property clearly indicates that the appellant is the registered proprietor of the suit property. We find that the learned Judge therefore erred in his decision when he found that the suit property does not exist. From the record, there was no documentary evidence adduced by the 3rd and 4th respondents to demonstrate that the 3rd respondent is the registered proprietor of LR No. Nairobi/Block 121/246 and LR No. Nairobi/Block 121/247.

44. Further, the appellant submitted that the learned Judge erred by making a decision concerning the ownership of the suit property through a ruling in respect of an interlocutory application. We agree.

At the interlocutory stage, the learned Judge did not have an opportunity to receive evidence from both parties. He did not therefore have sufficient evidence before him to enable him make a fair determination regarding the ownership of the suit property. On the question whether the appellant satisfied the criteria for the grant of the injunctive orders sought, the learned Judge found that the appellant failed to prove by way of documentary evidence that it was the registered proprietor of the suit premises.

45. In *Vivo Energy Kenya Limited vs. Maloba Petrol Station Limited and Others* (*supra*), this Court stated that the grant of an interim injunction as an exercise of judicial discretion, and an appellate court should not readily interfere with the exercise of judicial discretion by the lower courts unless it is satisfied that the discretion has not been exercised judicially.

46. Further, in *United India Insurance Co. Ltd vs. East African Underwriters (Kenya) Limited* [1985] EA 898, Madan JA (as he then was) succinctly stated as follows:-

> " The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account, fourthly, that he failed to take account of considerations of which should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

47. With respect, in the circumstances, we find that the learned Judge misapprehended the facts when he found that the appellant had not established a *prima facie* case that the suit property was non-existent; and that the allocating authority does not support the appellant's ownership. From the record, the appellant has adduced documentary evidence in support of its claim to ownership of the suit property.

48. On the question whether a *prima facie* case has been established, this Court in *Vivo Energy Kenya Limited vs. Maloba Petrol Station Limited and 3 Others* (supra) referred to the case of *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* CA No. 77 of 2012 which 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, which has been or is threatened with 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. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

49. From the record, this Court in a ruling dated 23rd October, 2020, in Civil Application No. 161 of 2017 allowed an application for stay of proceedings in respect of the impugned ruling in ELC Civil Suit No. 1147 of 2015 pending the hearing and determination of the instant appeal. This Court found as follows:

> " Having considered the application, the grounds in support thereof, the replying affidavit and the law, we are of the considered view that the twin principles for the grant of a stay of

execution have been satisfied (see Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR.)

The applicant may have an arguable appeal as there is contestation as to the ownership of the land, the subject matter of the dispute and further the subject of dispute being land, unless stay is granted, the dynamics on the land may change."

50. In the circumstances, we find that the appellant presented sufficient evidence to establish that it had a *prima facie* case with a probability of success. We therefore find that the learned Judge erred in failing to so find.

51. On the question whether the appellant will suffer irreparable loss, we are guided by the case of *Paul Gitonga Wanjau vs. Gathuthi Tea Factory Ltd and 2 Others* [2016] eKLR where this Court held as follows:

> " The second test for determination is whether the applicant will suffer irreparable loss. The following paragraph in Halsbury's Laws of England [14] is instructive. It reads:-
>
> "It is the very first principle of injunction law that *prima facie* the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question."

52. The appellant submitted that it stands to suffer irreparable loss if this Court does not intervene and issue the orders sought as the respondents may interfere with the appellant's ownership of the suit property by causing to issuance title deeds with respect to the purported illegal subdivisions of the suit property.

53. Further, that the 3rd respondent is a group comprising numerous members. Accordingly, in the event that title deeds are issued in their favour, the appellant would be compelled to file multiple suits against them to recover the suit property which would be a costly and time-consuming exercise. Further, that if the subdivision schemes submitted by the 3rd respondent are approved and the title deeds issued, the 3rd respondent's members may put up developments on the suit property on the basis of the title deeds issued. It is the appellant's submission that this would create grave inconvenience in terms of relocation for the appellant and the 3rd respondent's members.

54. We find that in the circumstances of this case, the balance of convenience tilts in favour of granting the orders sought. In the circumstances, we find merit in the appeal and allow it with costs to the appellant.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2023.

A. K. MURGOR

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR