Dean & another v Mombasa & another; Sbm Bank (K) Limited & 2 others (Interested Parties) (Environment & Land Case 45 of 2012) [2024] KEELC 4387 (KLR) (16 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4387 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 45 OF 2012

LL NAIKUNI, J

MAY 16, 2024

BETWEEN

ZAHID IQUBAL DEAN .... 1ST PLAINTIFF

MAWANDO LIMITED .... 2ND PLAINTIFF

AND

THE REGISTRAR OF TITLES MOMBASA .... 1ST DEFENDANT

THOUSAND PALMS BEACH HOTEL LIMITED .... 2ND DEFENDANT

AND

SBM BANK (K) LIMITED .... INTERESTED PARTY

SBM BANK (K) LIMITED .... INTERESTED PARTY

SBM BANK (K) LIMITED .... INTERESTED PARTY

RULING

I. Introduction

1. This Honorable Court is tasked to make a determination onto the Notice of Motion application dated 15th January, 2024 by Thousand Palms Beach Hotel Limited, the 1st Defendant/Applicant herein. It was brought under the dint of the provision of Articles 10 (2), 25 (c), 40 & 50 (1) of the Constitution of Kenya, 2010, Sections 3, 13, 18 and 19 of The Environment & Land Court Act, 2011, Sections 1A, 1B and 3A and Orders 1, 8 & 40 Rules 1,2, 3, & 4 of the Civil Procedure Act, Cap. 21 and Rules and Rule 9 of the Advocates (Practice) Rules.

2. Upon service of the application to the Respondents, intended 4th Defendant filed their Replying Affidavit sworn and dated on 26th February, 2024 by Osman Erdnic Elsek. While the 2nd Plaintiff responded through filing of a Replying Affidavit sworn by Zahid Iqubal Dean on 8th March, 2024.

The Honourable Court shall be dealing with these pleadings accordingly at a later stage of this Ruling hereof.

II. The 1st Defendant/ Applicant's case

3. The 1st Defendant/Applicant sought for the following orders:-

   a. Spent.

   b. Spent.

   c. Spent.

   d. Pending the hearing and determination of this suit and the Counter Claim Diamond Housing Limited be restrained from using, occupying, entering, remaining upon, constructing upon or altering the character of the suit premises.

   e. Mr. John Magiya Advocate and his firms, Nyameta, Mogaka & Magiya Company Advocates and John Magiya & Co. Advocates be restrained from representing the Plaintiffs and Diamond Housing Limited in this suit and in the counter claim.

   f. The costs of this application be provided for..

4. The application by the Applicant herein was premised on the grounds, testimonial facts and averments made out under the 21 Paragraphed Supporting Affidavit of –ZULFIKAR HAIDERALI JESSA, one of the directors of the 1st Defendant/Applicant herein sworn and dated 15th January, 2024. The Applicant averred that:

   a. Under cross examination, PW - 2 (the 2nd Plaintiff) stated that the 1st Plaintiff had leased the suit premises to one by the name Elsek, a Turkish gentleman.

   b. Subsequent inquiries revealed that there were two agreements of lease dated 27th February, 2021 and 7th May, 2021 executed by the 2nd Plaintiff, Zahid Iqubal Dean as Lessor (and not the 1st Plaintiff, Mawando Limited as Lessor) and Diamond Housing Limited as Lessee. The 2nd Plaintiff had failed to disclose that he had leased the property to Diamond Housing Limited whose shareholder and director is Elsek. The Lease Agreement dated 7th May, 2021 contained an option to purchase the suit premises at the price of a sum of Kenya Shillings Thirty Five Million (Kshs. 35,000,000.00/=) per acre.

   c. Diamond Housing Limited took possession of the suit premises under the two lease agreements and constructed an hotel thereon.

   d. The Lessor in the two leases was described as Zahid Iqubal Dean, the 2nd Plaintiff who is not the registered proprietor of the suit premises. The 2nd Plaintiff therefore lied on oath when he testified that the person that leased the suit premises to a tenant was the 1st Plaintiff. Mr. John Magiya Advocate was present when that false evidence was given.

   e. The suit premises belong to Thousand Palms Beach Hotel Limited, the 1st Defendant in this suit who is the Plaintiff in the Counter Claim in which it sought vacant possession, eviction and mesne profits.

   f. The 1st Defendant by letters dated 20th September, 2023 and 2nd October, 2023 notified Diamond Housing Limited of the existence of this suit and the Counter Claim and demanded that further developments on the suit premises should have ceased forthwith.

g. By letter dated 2nd October, 2023 addressed to the 1st Defendant's Advocate by Ms. Wainaina Ireri Advocates LLP on behalf of Diamond Housing Limited that law firm sought time to seek substantive instructions and promised to revert within 14 days but they never did that. In the meantime, Diamond Housing Limited continued damaging and alienating the suit premises causing the 1st Defendant to write another letter on 7th November, 2023 to which there was no response.

h. Diamond Housing Limited had continued to interfere with the suit premises with the knowledge that the Lessor and purported seller was not the owner.

i. The two lease agreements were prepared by Messrs. John Magiya & Co. Advocates. John Magiya was the same John Magiya Advocate who is a Partner in Nyameta Mogaka & Magiya Advocates which is the law firm representing the Plaintiffs in this suit and he was the one who had been appearing in the suit for the Plaintiffs. He had a duty to disclose to the Court that he had assisted his clients to defraud the 1st Defendant but he did not. He was to be joined in the suit as a joint tortfeasor and for facilitating the fraudulent dispossession of the suit premises.

j. Mr. John Magiya, Advocate was aware of the existence of the suit and was acting for the Plaintiffs in the suit at the time he drew the lease agreements complained of. In this suit, John Magiya as a Partner at Nyameta, Mogaka & Magiya Company Advocates prepared pleadings, Witness Statements and Affidavits and led the 2nd Plaintiff in examination in chief on the allegations that the suit premises belong to the 1st Plaintiff yet he was the one that drew the lease agreements purporting that the 2nd Plaintiff is the owner of the suit premises.

k. Mr. John Magiya in his personal capacity and as a proprietor of John Magiya & Co. Advocates and a partner in Nyameta, Mogaka & Magiya Company Advocates together with his clients had perverted the course of justice and put in place measures to defeat any decree that may be passed by this Court in favor of the 1st Defendant and in particular Mr. John Magiya had violated his duty to the Court as an officer of the Court.

l. According to the deponent should John Magiya and his law firms not be restrained from acting for the Plaintiffs in this suit he will continue to pervert the course of justice and would delay and embarrass a fair trial of this suit. Additionally, he could not be an advocate for the Plaintiffs and a witness and a Defendant in the same suit.

m. The Court had power to order addition of parties and amendment of pleadings ex parte particularly under the circumstances of this case in which an advocate who was an officer of the Court had assisted his client to pervert the course of justice.

n. The Court never needed to hear Diamond Housing Limited on whether it should be sued or not as the 1st Defendant had a right to a fair trial under the provision of Article 25 (c), the right to protect property under the provision of Article 40, access to justice under the provision of Article 48 and the right to a fair hearing under the provision of Article 50 (1) of the Constitution. The orders sought were therefore merited and could be granted ex parte as those rights could not be enjoined without the addition of those necessary parties.

o. Diamond Holdings Limited had known of this suit from September 2023 and had not sought to be joined as a Party in any capacity. It continued to behave as though the suit premises belonged to the 1st Plaintiff even after being provided with copies of necessary pleadings in this suit.

p. No prejudice would be caused to John Magiya and to his other client Diamond Housing Limited if the orders sought were granted.

q. This application had been filed after all endeavors by the 1st Defendant failed. Those included giving Diamond Housing Limited and Mr. John Magiya every opportunity and time to undo the wrong complained of.

r. The suit premises were charged to the interested party. The fraud committed by the Plaintiffs and their advocates severely prejudice not only the 1st Defendant but the interested party.

s. Unless the application was granted any decree for possession and mesne profits in favor of the 1st Defendants would be rendered nugatory.

III. The 2nd Plaintiff/Respondent's Case

5. The 2nd Plaintiff/Respondent opposed the Notice of motion application dated 15th January, 2024 through a 16th Paragraphed Replying Affidavit sworn by ZAHID IQUBAL DEAN, the 2nd Plaintiff herein with one (1) annexture marked as "Z - 1" sworn on 8th March, 2024. The deponent averred as follows:-

a. He is one of the beneficiary and one of the shareholders of the 1st Defendant before the shareholding and directorship of the same were irregularly and fraudulently transferred to the applicant and some other persons including his former wife, a subject in issue herein.

b. The Applicant's application dated the 15th January, 2024, together with the supporting Affidavit of the Applicant sworn on the same date and the annexures thereto herein referred to (as the Affidavit) had been read and explained to him by his Advocates on record, and he had been advised by his Advocates on record which advise he verily believed to be true that the same was baseless, bad in law, frivolous, vexatious and an abuse of the court process and same ought to be struck out with costs.

c. The Applicant was not entitled to the orders sought especially an addition of a stranger to this suit and his Advocate herein, he had approached this court with tainted and unclean hands having committed various acts of fraud.

d. The application was mischievous, malicious and made in bad faith, it was a ploy made to delay further the hearing hereof, and on the basis that the applicant was not candid. He had chosen to mislead this Honorable Court as he had not fully disclosed the material facts that the applicant and his accomplices were serial fraudsters. He had not only unlawfully altered the directorship of the 1st Defendant, but also several other properties in Nairobi and other parts culminating onto a compromise and some Judgements. Annexed hereto are relevant documents confirming the aforesaid marked as "Z - 1".

e. Since inception/or formation of the 1st Defendant, he had been residing on the part of subject premises, L.R. No. MN/III/736, as a beneficial owner of part of the shares therein, the current directorship/shareholding and the provisional title acquired herein was coupled with fraud by the applicant herein purporting to be a director which was a subject in issue herein.

f. The subject premises/or parcel of land had on several occasions been invaded by squatters wanting to occupy and dispose of the same, it's been a thieves hideout, due to its bushy nature, his coconuts and wire cables being stolen and almost became a security threat, and to avert

away squatters and for security reasons he allowed/or licensed in Diamond Housing Limited to undertake temporary undertakings on short terms awaiting finalizing of the suit herein.

g. The said purported license in form of a lease was purely between himself and one Elsek director of Diamond Housing Limited, that is to say:-

i. He and the said Elsek negotiated the terms of the license.

ii. The drawing of the same was done by himself and Elsek and not made on advice or representations of his Advocate safe for witnessing the same.

iii. That he was the one who called the Advocate to witness the same and paid him if Elsek paid then it was on his Advice as the said Magiya was his Advocate not for Diamond Housing Limited or Elsek.

iv. The status/or the condition of the subject property was well within the knowledge of the parties a reason why it was short term and temporal, with the anticipation of future undertakings:

v. The leases were not disputed by the necessary parties thereto.

a. It was not a duty of the applicant to determine which Advocate/or firm of advocate should represent his, as other than mere allegation no obstruction of justice had been demonstrated or how the said advocate would frustrate any decree or orders passed by this Hon. Court, or any real/or substantial prejudice the applicant would suffer.

b. By joining his Advocate in this suit, the applicant was employing unorthodox means mainly intended to delay the further hearing of this matter, hence not add a necessary party to this suit.

c. The proceedings were ongoing, he had not finished to testify in this suit, parties were yet to examine & re-examine him, lying under oath as alleged by the applicant was a misplaced allegation against him and his Advocate, in actual sense it was the applicant assisted by his advocates who had in all times material through various declarations that was the title to subject property was lost, while on the other hand sue other entities for releasing the original title to himself; that he was a trespasser thereon.

d. He was a party to the suit as a principal person, whereas, his advocate works on his legal instructions, to which to which he was liable for his actions, all issues here could be resolved conclusively without his advocate being a party or made a party adding the advocate as a party was part of mischief by the applicants.

e. There were no sufficient grounds/or reasons to warrant the drastic decision to interfere with his constitutional right to be represented by a counsel of his choice, no real prejudice that had been demonstrated to warrant such orders.

f. The Advocate was a stranger with no identifiable stake in the proceedings to make him a party, whatever alleged was peripheral to the proceedings herein and never affected the issues in controversy.

g. Save for Diamond Housing Limited wanting to be joined in the suit, the other limb of allegations deponed on in the supporting affidavit were not sufficient, reasonable and/or factual to warrant the orders sought and in the interest of equity and justice, this application needed to be struck out with costs.

IV. The Respondent's case

6. The Respondent opposed the Notice of motion application dated 15th January, 2024 through a 52 Paragraphed Replying Affidavit sworn by Osman Erdinc Elsek, the Director of Diamond Housing Limited company, herein. It was together with eleven (11) annextures marked as "OEE-1 to 11" dated 26th February, 2024. The deponent averred as follows:-

   a. Diamond Housing Limited company is in the business of development, construction, production and mortgage banking, hotel business and has engaged in various projects in various parts of the country and neighboring East African countries.

   b. He leased the Plot Number 736/XI/MN registered as C.R Number 16392 (Suit Property) located along the beach front in Kikambala Area and measuring about 5.5 Acres (2.22 Hectares) of the 9.746 Hectares (24.082 Acres) Suit Property from the 1st Plaintiff whereby they executed two separate leases whereby the first Lease Agreement is dated 27th February, 2021 and the second Lease Agreement is dated 7th May 2021. Annexed in the affidavit and marked as "OEE-1" and "OEE-2" are copies of the leases.

   c. He had been looking for a property that could allow a lease to buy agreement to develop a very high end hotel for very high end foreign customers to add value to Kenyan economy which they never had similar ones like in other countries around apart from Maldives and Zanzibar. He went to his land agents who introduced him to the 2nd Plaintiff. The 2nd Plaintiff then showed him the Suit Property which he proceeded to conduct his due diligence through the neighbors because he lived and had done several housing projects around the same place. From the due diligence he gathered that the Suit Property belonged to the 2nd Plaintiff having inherited from his father who had since passed on. The 2nd Plaintiff had been residing on the Suit Property whereby he had constructed a permanent house a fact that gave him more confidence to transact on the Suit Property since it had the specifications he was looking for.

   d. Being satisfied with the ground work, he visited the 2nd Plaintiff again whom he requested to issue him with a copy of the title of the Suit Property to enable him conduct further due diligence. Indeed, the 2nd Plaintiff issued him with the original title for inspection. He then proceeded to make his copy for purposes of conducting a search. From there, he realized that the title deed was registered in the name 1st Plaintiff. Annexed in the affidavit and marked as "OEE – 3" was a copy of the title deed shown to him. He also proceeded to conduct a search of the 1st Plaintiff with the Registrar of Companies. Upon conducting the search he confirmed that the 2nd Plaintiff was indeed a majority shareholder in the company which information instilled more confidence in him. Annexed in the Affidavit and marked as "OEE - 4" was a copy of CR12 Form of the 1st Plaintiff showing that the 2nd Plaintiff was indeed a majority shareholder.

   e. He agreed with the 2nd Plaintiff to lease part of the Suit Property for 5 years and 3 months and at end of the lease to purchase the Suit Property for purchase price of a sum of Kenya Shillings Thirty Five Million (Kshs. 35,000,000/-) per acre. The 2nd Plaintiff then introduced him to his Advocate one John Magiya who was then given instructions by the 2nd Plaintiff to draft the first Lease Agreement dated 27th February, 2021. The 2nd Plaintiff and the Deponent agreed that John Magiya would be their Advocate for the purpose of the transaction.

   f. He entrusted John Magiya to conduct a search on the Suit Property. Thereafter, he informed him that the Suit Property was clean from any encumbrances. He relied on this advice and

information, and they proceeded to sign and register the leases. He paid John Magiya a sum of Kenya Shillings Seventy Thousand Only (Kshs. 70,000/-) on 29th April, 2021 for the legal services of drawing the two leases as well as having them registered at respective registries. Annexed in the affidavit and marked as “OEE - 5” was proof of payment to John Magiya. He took possession of the suit property sometimes in February 2021 where he engaged in extensive development of high-end restaurant and hotel as 14 villas,18 luxury rooms, swimming pool, spa and recreation areas. The hotel development trade under the name and style Kilifi Pearl Beach Resort.

g. During the cause of his occupancy on the Suit Property and in relation to the first Lease Agreement he had paid a total sum of Kenya Shillings Two Million One Hundred Sixty Thousand Only (Kshs. 2,160,000/-) to the 2nd Plaintiff being monthly rental lease as per the Lease Agreement for the period from March 2021 to August 2023 until he learnt that there was a dispute on land ownership. Annexed in the affidavit and marked as “OEE - 6” was proof of payment for the first lease. For the second Lease Agreement he paid the 2nd Plaintiff a total sum of Kenya Shillings Three Million Eight Hundred Forty Thousand Only (Kshs. 3,840,000/-) for the period from May 2021 to August 2023 until he learnt that there was a dispute on land ownership. Annexed in the affidavit and marked “OEE - 7” was proof of payment for the second lease.

h. Since he occupied the suit property, he paid to the 2nd Plaintiff for the one and two leases in February 2021 was a sum of Kenya Shillings Six Million Only (Kshs. 6,000,000/-). He supported the total payments with statements annexed and marked as “OEE - 8” and “OEE-9” in regards to lease one and lease two respectively. He had undertaken extensive developments on the Suit Property under the Leases which had been valued at a sum of Kenya Shillings Three Hundred Million Only (Kshs. 300,000,000/-) as per the Valuation Report dated 2nd October, 2023. He had also proof of investment by expenditures, payments, receipts to prove that amount.Annexed in the affidavit and marked as “OEE - 10” was a copy of the valuation report.

i. To extensively develop the suit property, he had had to borrow loans from individuals and friends. The development were to be part of the projects. On 19th September, 2023 his Finance Manager, Shahame Aziz Mwidani, received a call from one Mr. Kinyua who is the Advocate for the 1st Defendant and he was notified that the Suit Property was the subject of a dispute that was pending in court and the hearing had partly proceeded and that he was mentioned as the party in part possession of the Suit Property. He immediately called the 2nd Plaintiff and asked him what was happening with the Suit Property and why he never mentioned to him about a civil court case. He never responded to his query. He informed him that he would arrange for a joint meeting with his Advocate John Magiya and hanged up the call.

j. On 20th September, 2023, he received a letter from the Advocate of the 1st Defendant demanding that he vacates the Suit Property and failure to which legal action would be taken against him. Annexed in the affidavit and marked as “OEE - 11” was a copy of the said letter. On 20th September, 2023, he requested for audience with the Advocate of the 1st Defendant together with his Finance Manager to discuss the foregoing. Upon meeting him, the Advocate reiterated the position relayed on phone and further shed some light on the status of the matter pending in court. It was then when he presented copies of the two Lease Agreements to the Advocate.

k. The Advocate of the 1st Defendant Mr. Kinyua was well known to him. The said Advocate had been his personal Advocate as well as having represented him in civil litigation cases being - HCC (Mombasa) No. 70 of 2014; Civil case HCC (Milimani) Commercial No. 236 of 2015 and CMCC (Mombasa) No. 419 of 2014 on recovery of a personal debt. Strangely, from three occasions that the said Advocate had visited him with his family at his restaurant which is situated on the Suit Property, had he indicated to him that the Suit Property had a dispute on ownership issue, was pending in court and he was representing the 1st Defendant.

l. He immediately stopped the construction of the development and started to cover up the steel part with concrete to have them protected against the corrosion. He henceforth stopped any further form of developments and constructions. On the same day he sourced for a meeting with 2nd Plaintiff and Advocate John Magiya who were all evasive. Eventually they agreed for a roundtable meeting as he wanted them to shed more light on the issue touching on the Suit Property.

m. On 27th October 2023, the 1st Defendant Advocate called him. He indicated that his client's representatives were around and a meeting would be organized to solve this problem. They agreed to meet that evening. He availed himself for the meeting at Mombasa Club located next to Fort Jesus Museum in Mombasa County where he was introduced by the Advocate of the 1st Defendant, Mr. Kinyua to two men of Indian origin. They declined to give him their names. They claimed to be the owners of Thousand Palms Beach Hotel Limited, the suit property. They were the 1st Defendants.

n. At the end of the meeting, they promised him that the developed part of the land by him on the Suit Property would be sold to his company at the market price. They even told him that Zahid Iqbal Dean, the 1st Plaintiff herein was an old man that they offered him United States Dollars One Million Only (USD 1,000,000/-) and a property in Dubai for him to live forever against the withdrawal of this case. After agreeing with both Parties and their Advocates he felt secured because whichever Party won the case both promised to sell him part of the Suit Property where he invested heavily. That was why he never took any action against any Party. Therefore, he was in shock when he received the instant application filed by the 1st Defendant due to the fact that the 1st Defendant's Advocate had visited his developments on the Suit Property in three occasions in the years 2021, 2022 and 2023. Thus, he knew that the place was being developed yet he never disclosed to him about the land dispute. On the other hand, the Plaintiffs and Applicant also knew that the Suit Property which was in dispute.

o. The Applicant and their Advocate had decided to file this instant Application even after they had a meeting and entered into a verbal agreement. During the said meeting, he disclosed so much and he believed they intended to use the same against him. The 1st Defendant Advocate should recuse himself in the matter having acted as a Mediator between them and the 1st Defendant where he gathered a lot of privileged information since he trusted him as his personal Advocate.

p. No party shall suffer any prejudice if he continued utilizing the parcel of land considering the fact that he was adding value to the land and not wasting it. There was imminent threat and danger that he would be evicted from the portion of land he had developed on the Suit Property pursuant to the Lease Agreements hereinabove mentioned. Whoever the court found to be the legal owner of the Suit Property could always be compensated for the period they had been utilizing the Suit Property. He was neither aware of the matter pending before this Honourable

Court nor was he aware of the dispute over the ownership of the Suit Property which was the subject matter of this suit until 19th September, 2023.

q. Further neither the Plaintiff's Advocate nor the Plaintiffs informed him of the suit and/or of the dispute during the lease negotiations and interactions until 19th September, 2023. He had invested heavily on the portion of the Suit Property under lease being 5 acres out of the 24 acres comprising of the entire Suit Property. Any act of eviction would result on damaging, vandalism and wanton destruction of the Property. He had employed over 220 employees who were working on the Suit Property and who would be rendered jobless should the 1st Defendant action its threats.

r. He had identifiable interest on the Suit Property. It was in the interest of justice that the orders being sought by the Applicant were not granted. He had shown good will to either of the Parties that the court declared as the legal owner of the land. If this Honourable Court were to grant the Plaintiff's the orders sought, he stood to suffer irreparable damages considering the investments that he had made on the land having been a bona fide purchaser for value. The applicant herein on this instant application acted negligently/indolently by not placing a caution or caveat on the property despite knowing that there was an existing suit before this Honourable Court exposing them and law could never be used to aid the indolent.

s. He requested this Honourable Court to enjoin Diamond Housing Limited as a 2nd Interested Party in the suit as they had a substantial interest in the suit which could not be wished away. In the interest of justice he requested this Honourable Court after the admission of Diamond Housing Limited as the 2nd Proposed Interested Party to order that the subject suit to start de novo to enable Diamond Housing Limited to have privilege on the proceedings and file substantive responses. This Honourable Court order the current 1st Defendant Advocate recuses himself in the matter for the following reasons:-

    i. That the 1st Defendant Advocate had acted for the Respondent in other matters as stated on this Affidavit in HCCC (Mombasa) No. 70 of 2014; HCC Commercial (Milimani) No. 236 of 2015 and CMCC (Mombasa) No. 419 of 2014.

    ii. That for reasons not known to him the Advocate of the 1st Defendant visited the Suit Property severally and never disclosed about the suit;

    iii. The 1st Defendant Advocate acted as a Mediator between the Applicants and the Respondent. In the course of which he gathered information that may be used against the Respondent.

t. This Honourable Court disallowed the Counter - Claim against Diamond Housing Limited considering that the Applicant never had any justifiable demand against the Diamond Housing Limited. The issue in dispute was ownership of land which could only be established from the current Parties to the suit.

V. Submissions

7. On 21st February, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 15th January, 2024 be disposed of by way of written submissions. Pursuant to that all the parties obliged and a ruling date was reserved on 20th May, 2024 by Court accordingly.

A. The Written submissions of the Plaintiffs

8. The Plaintiffs through the Law firm of Messrs. Nyameta, Magola and Magiya Advocates for the Plaintiffs filed their written submissions dated 28th April, 2024. Mr. Magiya Advocate commenced the submissions by stating that the 2nd Plaintiff and the intended 4th Defendant wished to submit to the aforesaid application. This was in respect to the part of the prayers being prayer (b) in respect to amendment of pleading and seeking to amend the Counterclaim to include the 4th Defendant and the entire prayer ("e") seeking the Intended 4th Defendant and the Law firm of Messrs. Nyameta Mogaka & Magiya Advocate be restrained from representing the Plaintiff in this suit.

9. In response to the said prayers the 2nd Plaintiff filed a Replying Affidavit sworn and filed on the 8th March, 2024. From the said replies, the Respondents entirely relied on its averments/ or the contents made therein. The intended 4th Defendant had also filed Grounds of Opposition/ or Objections majorly that; the intended 4th Defendant was an Advocate/or agent of a disclosed principal who was a party herein and all issues could be conclusively determined without necessarily adding an Advocate as party, whose contribution would add nothing of value to the suit or the court.

10. The allegations that the intended 4th Defendant assisted the Plaintiff to defraud the 1st Defendant had no basis. He averred that witnessing a document between two parties who were also parties to the suit never made one fraudulent or a tortfeasor, especially when true facts were well within the party's knowledge. It was even an admission on the intended 3rd Defendant/or the intended interested party in his Further affidavit sworn on the 2nd April, 2024, paragraph 4.a-f, that he did his own/independent due diligence and negotiated their independence terms, the same admission was also contained 3rd intended Defendants Replying Affidavit sworn on 26th February, 2024 Paragraphs 6 – 10. Thus decisions and negotiations were not based on the intended 4th Defendant representations/or opinion. Besides the aforesaid the pleadings herein were long prepared and filed back in the year 2012. Hence making the allegations against the Advocate frivolous and vexatious. Further, the Plaintiff had not finished giving his testimony/or evidence and thus the allegations of assisting the party or non-disclosure to the Court by the Advocate had no basis.

11. The Learned Counsel submitted that from the documents filed in court, by the parties themselves the applicants, and his Advocates had grossly tainted hands. There were variety reports indicating that the 1st Defendant/Applicants herein were notorious fraudsters who had actuallydefrauded the 2nd Plaintiff of various commercial shares and interests in various properties. It was the applicants Advocate based on his conduct not making a disclosure to the Hon. Court and trying to obstruct or pervert justice to parties, grounds were as submitted hereunder, and based on documents and averments in various affidavits.

12. The Applicants Advocates actively casting stones on others as averred in the intended 3rd Defendant Replying Affidavit sworn on 26th February, 2024, Paragraphs 30 to 36, the 1st Defendant advocate, had been representing the intended 3rd Defendant in various other matters, trying to mediate in this matter with the ulterior motives purely creating a conflict of interests and unprofessional conduct. He had tried to woe the intended 3rd Defendant to gang up against the 2nd Plaintiff in their private meeting as averred in the said Affidavit and also offered to purchase a portion, but failed. Perhaps this was the reason for his vexatious attitude coupled with ulterior and malicious motives. This could easily be deduced from the applicants pleadings and correspondences and now could not appear to play holier thou as their hands were tainted. He ought to re-evaluate himself and do a honorable thing. The aforesaid was also emphasized in Paragraph 50 of the said Replying Affidavit.

13. The Learned Counsel further submitted that the evidence in court had not been controverted. This application herein was mere strategy to arm-twist the Plaintiff and his Advocate. It was an intimidation gimmick to waste more of the Courts precious time. Thus, it was his submissions for the Hononourable Court to dismiss the application to the extent of adding the 4th intended Defendant as a party no reasonable grounds had been adduced to so do. He wondered other than witnessing the alleged lease, what other evidence or value would the 4th Defendant add to the suit. He further queried what prejudice would the parties suffer if the 4th Defendant was not added as a party; What was the evidential value of the advocate for merely asked to witness and register the document as instructed by the parties to do, under whose instruction was the 4th Intended Defendant acting; Was the principal party to the suit property among other determinant factors to the suit.

14. Other than mere allegations, that the Plaintiff Advocate had put in place measures to defeat the decree or pervert justices were strange allegations, not demonstrated by the Applicant. It was merely being vexatious and malicious against the intended 4th Defendant with an ulterior motive. Hence, he urged the court to ignore such as whoever asserted should demonstrate or proof the same. The 1st Plaintiff had clearly demonstrated in paragraph 8 of his Affidavit that whatever done was an agreement between the parties themselves this had also been confirmed by the intended 3rd Defendant/or the interested party's Affidavit and not based on anyone's opinion or representation. Therefore, the alleged pervasion of justice, being a joint tortfeasor, and/or fraudulent had not been particularized or demonstrated. Hence the same lacked basis and merits. The 4th Intended Defendant brought nothing of value to the court or to the suit other than a mere waste of courts time. There was nothing not even a correspondence indicating that he was instructed by the Intended 3rd Defendant to act for him or under any obligations to act on his behalf besides witnessing their signatures.

15. The Learned Counsel opined that at the same time, the instant application sought that the Advocate on record for the Plaintiff be restrained from representing the Plaintiff based on grounds that the 1st Defendant presented himself as a beneficial owner and had explained himself. The reason for doing so, when the principal party testified as being a beneficial owner of the property that never made any Advocate to disqualify himself or be made a party to a suit. The rest of the issues entirely related to the principal party's interest on the subjects in issue therein, and would eventually be determined conclusively and without prejudice to any party. The Advocate as an agent of a disclosed principal had nothing to do with the suit other than representing the client. There was no conflict of interest or prejudice had been demonstrated to restrain the Advocate of the Plaintiff from representing him. To him, he had a constitutional right to have an advocate of his choice unless it was demonstrated that there would be any unfairness or injustice from such representation which was not in this case.

16. Witnessing and drawing a document never made one a party to a suit. While acting as an agent to a party unless it was demonstrated that the said Advocate actively participated in misrepresentation of facts to the parties which was not so in this case.

17. Further, the Learned Counsel submitted that, it was not the duty of the applicant to determine which Advocate represented a party. There was no allegations of fraud, prejudice or any conflict of interest had been demonstrated by the applicant against the Law firm on record for the Plaintiff or the Advocate. So representing the Plaintiff, the nature of evidence to be adduced or prejudice to be suffered by any of the parties if the said Advocate continued to represent the Plaintiff. In the matter at hand, the applicant averred that the advocate appearing for the Plaintiffs had previously drawn the purported lease agreement on behalf of the 2nd Plaintiff and the Intended 3rd Defendant, which was not in dispute.

To buttress on this point, he sought guidance from then case of:- "Guardian Bank Limited – Versus - Sonal Holdings (K) Limited & 2 others [2014] eKLR" by Hon. Gikonyo, J:-

> " ....the real questions then become: Is the testimony of the advocate relevant, material or necessary to the issues in controversy, or is there other evidence which will serve the same purpose as the evidence by Counsel. Eventually, each case must be decided on its own merits, to see if real mischief and real prejudice will result in the circumstances of the case, in applying the test, if the argument on disqualification becomes feeble and inconsistent with causing real mischief and prejudice, then a disqualification of Counsel will not be ordered......". The Court proceeded to hold that: "Given the role of the concerned advocates and the nature of the claim herein, there is no possibility of conflict of interest arising herein as it has not been shown they have any particular personal interest which will collide with their fiduciary duties as Advocates. The fraudulent intent on the part of the Defendants will have to be established from other cogent evidence but not from the evidence of the advocates whose scope was limited to drawing and attesting to the Deeds herein."

18. According to the Counsel, the right to legal representation was a fundamental principle of the Constitution. He cited the case of: "William Audi Odode & Another – Versus - John Yier & Another, Court of Appeal Civil Application No. NAI 360 of 2004", the Court held: -

> " I must state on the outset that it is not the business of the courts to tell litigants which advocate should and should not act in a particular matter. Indeed, each party to a litigation has the right to choose his or her own advocate and unless it is shown to a court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel."

19. Further, the Court of Appeal in "Delphis Bank Ltd – Versus - Channan Singh Chatthe & 6 others [2005] eKLR" laid out the test which must be demonstrated when considering an application for the disqualification of an advocate from representing a litigant. The Court of Appeal aptly held as follows:-

> " The starting point is, of course, to reiterate that most valued constitutional right to a litigant; the right to a legal representative or advocate of his choice. In some cases, however, particularly civil, the right may be put to serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality in advocate/client fiduciary relationships or where the advocate would double up as a witness. There is otherwise no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation.
>
> The test which has been laid down in authorities applied by this Court is whether real mischief or real prejudice will in all human probability result. The authorities we allude to are King Woolen Mills Ltd & Anor – Versus - M/S Kaplan & Stratton [1993] LLR 2170 (CAK),(C.A 55/93) and Uhuru Highway Development Ltd & others – Versus - Central Bank of Kenya Ltd &others (2), [2002] 2 EA 654.

20. In the instant application, the Applicant had not shown the mischief or prejudice that would result if the Advocate or the law firm of Advocates on behalf of the Plaintiffs continued to act as such.

21. From the foregoing, they submitted that the Honorable Court should find that the application dated 15th January, 2024 was devoid of any merit and the same be dismissed with costs. To him, this should be to the extent of part of prayer (b) in respect to amendment of pleading and seeking to amend the Counterclaim to include the 4th Defendant and the entire prayer ("e") seeking the Intended 4th

Defendant and the Law firm of Messrs. Nyameta Mogaka & Magiya Advocate to be restrained from representing the Plaintiff in this suit.

VI. Analysis & Determination.

22. I have carefully read and considered the pleadings herein by the Plaintiff/Applicant, the written submissions, the myriad of cases cited herein by parties, the relevant provisions of the Constitution of Kenya, 2010 and statures.

23. 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 Notice of Motion dated 15th January, 2024 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010?

    b. Whether the Law firm of Messrs. Nyameta Mogaka & Magiya Advocate be restrained from representing the Plaintiffs in this suit

    c. Who will bear the Costs of Notice of Motion application dated 15th January, 2024.

Issue No. a). Whether the Notice of Motion dated 15th January, 2024 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010

24. Under this sub title, the Honourable Court is tasked with the examination of the prayers in the application. The Applicant sought for:-

    > "Pending the hearing and determination of this suit and the Counter Claim Diamond Housing Limited be restrained from using, occupying, entering, remaining upon, constructing upon or altering the character of the suit premises."

25. The application herein is premised under the provision of Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst the numerous other provisions of the law. Which provides as follows: -

    > Order 40, Rule 1
    >
    > Where in any suit it is proved by affidavit or otherwise—
    >
    > a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
    >
    > b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

26. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of "Giella – Versus - Cassman Brown (1973) EA 358". This position has been reiterated in numerous decisions from the Courts in Kenya and more particularly in the case of

"Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014) eKLR" where the Court of Appeal held that;

> "in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates 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 rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially".

27. Consequently, the Plaintiff ought to, first, establish a prima facie case. The 1st Defendant/Applicant submitted that they have established a prima facie case and relied on the judicial decision of "Mrao Ltd – Versus - First American Bank of Kenya Ltd (2003) eKLR" in which the Court of Appeal gave a determination on a prima facie case. The court stated 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 legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

28. According to the 1st Defendant, under cross examination of PW - 2 (the 2nd Plaintiff) stated that the 1st Plaintiff had leased the suit premises to one by the name Elsek, a Turkish gentleman. Subsequent inquiries revealed that there were two agreements to lease dated 27th February, 2021 and 7th May, 2021 executed by the 2nd Plaintiff, Zahid Iqubal Dean as Lessor (and not the 1st Plaintiff, Mawando Limited as Lessor) and Diamond Housing Limited as Lessee. The 2nd Plaintiff had failed to disclose that he had leased the property to Diamond Housing Limited whose shareholder and director is Elsek. The Lease Agreement dated 7th May, 2021 contains an option to purchase the suit premises at the price of a sum of Kenya Shillings Thirty Five Million (Kshs. 35,000,000.00/=) per acre. iii. Diamond Housing Limited took possession of the suit premises under the two lease agreements and constructed an hotel thereon.

29. The Lessor in the two leases is described as Zahid Iqubal Dean, the 2nd Plaintiff who is not the registered proprietor of the suit premises. The 2nd Plaintiff therefore lied on oath when he testified that the person that leased the suit premises to a tenant was the 1st Plaintiff. Mr. John Magiya was present when that false evidence was given.

    a. The Respondents on the other hand aver that since inception/or formation of the 1st Defendant, he had been residing on the part of subject premises, L.R. No. MN/III/736,as a beneficial owner of part of the shares therein, the current directorship/shareholding and the provisional title acquired herein is coupled with fraud by the applicant herein purporting to be a director which is a subject in issue herein. The subject premises/or parcel of land has on several occasions been invaded by squatters wanting to occupy and dispose of the same, it's been a thieves hideout, due to its bushy nature, my coconuts and wire cables being stolen and almost became a security threat, and to avert away squatters and for security reasons he allowed/or licensed in Diamond Housing Limited to undertake temporary undertakings on short terms awaiting finalizing of the suit herein. The said purported license in form of a lease was purely between himself and one Elsek director of Diamond Housing Limited, that is to say:-

        i. He and the said Elsek negotiated the terms of the license.

ii. The drawing of the same was done by himself and Elsek and not made on advice or representations of his Advocate safe for witnessing the same.

iii. That he was the one who called the Advocate to witness the same and paid him if Elsek paid then it was on his Advice as the said Magiya was his Advocate not for Diamond Housing Limited or Elsek.

iv. The status/ or the condition of the subject property was well within the knowledge of the parties a reason why it was short term and temporal, with the anticipation of future undertakings:

v. The leases are not disputed by the necessary parties thereto.

30. Further on this legal issue, I seek refugee from the decision of of "Mbuthia – Versus - 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."

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

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

32. Regarding this first condition though, the Plaintiff/Applicant has established that he had an appeal with a likelihood of success. In these circumstances, I find that the Applicant has established that it has a prima facie case with a probability of success.

33. Secondly, the 1st Defendant/Respondent has to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of "Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (2018) eKLR" provides an explanation for what is meant by irreparable injury and it states;

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

34. With regards to the second limb of the Court of Appeal in "Nguruman Limited (supra)", held that,

> " On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima 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."

35. On the issue whether the Applicant will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. It is not hidden that the suit property is at risk or disposition or alienation if the orders of injunction is granted, the Applicants according to the Plaintiffs' witness PW - 2's testimony. It has to be preserved in the meantime.

36. Quite clearly, the Applicant would not be able to be compensated through damages as he has shown the court that its rights to the suit property by the by the continuous occupation. It has therefore satisfied the second condition as laid down in "Giella's case". In my view the intended 4th Defendant cannot continue to develop a property that is the main subject of a legal contention with an ongoing civil suit in Court. It is utter disrespect of the Court process and of this Honourable Court.

37. Thirdly, the Applicant has to demonstrate that the balance of convenience tilts in their favour. In the case of "Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (2018) eKLR" which defined the concept of balance of convenience as:

> " The meaning of balance of convenience will favour of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.
>
> In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".

38. Additionally, in the case of "Paul Gitonga Wanjau – Versus - Gathuthis Tea Factor Company Limited & 2 others (2016) eKLR", the court dealing with the issue of balance of convenience expressed itself thus:-

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

39. The Applicant contends that the balance of convenience tilts in its favour as the suit property stands alienation and justice will be defeated. The decision of "Amir Suleiman – Versus - Amboseli Resort

Limited [2004] eKLR" where the Learned Judge offered further elaboration on what is meant by "balance of convenience" and stated

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

40. Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit during the full trial and where all the empirical oral and documentary evidence will be adduced and finally a determination made on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to this appeal. I have also not had the opportunity to interrogate the annexures from the Respondent's replying affidavit.

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

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

42. I am convinced that if orders of temporary injunction are not granted in this suit, the properties in dispute might be in danger of being dealt in the manner set out in the application and apprehended by the Plaintiff/Applicant. In view of the foregoing, I find that the Applicants have met the criteria for grant of orders of temporary injunction. The application succeeds.

Issue No. b). Whether the firm of Nyameta Mogaka & Magiya Advocate be restrained from representing the Plaintiffs in this suit

43. Under this Sub – title it pertains an issue of the conduct of an Advocate while handling a clients matter; whether an Advocate could be barred and/or restrained by a Court of law from providing a party legal representation in a matter based on his conduct of the case and whether the Advocate should either be made a party to the suit or summonsed as a witness in a matter should need arise. From the surrounding facts and the given circumstances, the Honourable Court holds that these are those very delicate and challenging issues confronting a Court of Law in the process of its adjudication of matters and decision making process whatsoever. They are matters that requires to be handled with extreme care, prudence, caution and circumspect whatsoever. But being a Court of law, a decision has to be made whatsoever. In so doing, the Court has been compelled to cite the principles elucidated by the famous Greek Philosopher Socrates regarding a Judge. That a Judge at all times should have the following qualities:-

> " Four things belong to a Judge; to listen Courteously; to answer Wisely; to Consider Soberly and to decided Impartially"

44. The law applicable to the issues raised in the application was aptly stated in the case of "Tom Kusienya & Others – Versus - Kenya Railways Corporation & others [2013] eKLR", where Mumbi Ngugi J., thus: -

> " 19. The legal basis of the Petitioner's application in this matter is Rule 9 of the Advocates (Practice Rules) which is in the following terms:
>
> > 'No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear: Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.'
>
> 20. From the text of this Rule, it is clear that an advocate can only be barred from acting if he or she would be required to give evidence in a matter, whether orally or by way of affidavit. In determining the circumstances under which this Rule would apply, the Court of Appeal in Delphis Bank Limited – Versus - Channan Singh Chatthe and 6 Others (supra) observed as follows:
>
> > "The starting point is, of course, to reiterate that most valued constitutional right to a litigant; the right to a legal representative or advocate of his choice. In some cases, however particularly civil, the right may be put to serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality in advocate/ client fiduciary relationship or where the advocate would double up as a witness.
>
> 21. The court noted, however, that:
>
> > 'There is otherwise no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation. The test which has been laid down in authorities applied by this court is whether real mischief or real prejudice will in all human probability result.'
>
> 22. The court referred to these authorities as comprising King Woolen Mills Ltd (formerly known as Manchester Outfitters Suiting Division Ltd) and Galot Industries Ltd – Versus - Kaplan and Stratton Advocates (supra). In this case, in restraining Mr. Keith and any partner of the firm of Kaplan and Stratton Advocates from acting for the Defendant in the matter or in any litigation arising from the loan transactions in question, the court applied the test established in England in the case of Supasave Retail Ltd – Versus - Coward Chance (a firm) and Others; David Lee & Co (Lincoln) Ltd – Versus - Coward

Chance (a firm) and Others (1991) 1 ALL ER where the court had observed that

> "The English law on the matter has been laid down for a considerable period by the decision of the Court of Appeal in Rakusen – Versus - Ellis Munday and Clarke (1912) 1 Ch. 831 (1911 -1913) ALL ER Rep 813... The Law is laid down that each case must be considered as a matter of substance on the facts of each case. It was also laid down that the court will only intervene to stop such a practice if satisfied that the continued acting of one partner in the firm against a former client of another partner is likely to cause (and I use the word "likely" loosely at the moment) real prejudice to the former client. Unhappily, the standard to be satisfied is expressed in numerous different forms in Rakusen's case itself. Cozens-Hardy MR laid down the test as being that a court must be satisfied that real mischief and real prejudice will, in all human probability, result if the solicitor is allowed to act.....As a general rule, the court will not interfere unless there be a case where mischief is rightly anticipated." (Emphasis added)

23. The decision of O'Kubasu, JA in William Audi Odode & Another-vs- John Yier & Another Court of Appeal Civil Application No. NAI 360 of 2004 (KSM33/04) is also instructive with regard to Rule 9 of the Advocates Act. In declining to bar an advocate from acting for some of the parties in the matter, O'Kubasu J stated at page 3 of his ruling states as follows;

> 'I must state on (sic) the outset that it is not the business of the courts to tell litigants which advocate should and should not act in a particular matter. Indeed, each party to a litigation has the right to choose his or her own advocate and unless it is shown to a court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel.' (Emphasis added)

24. The Learned Judge of Appeal also dealt with the issue of legal representation as a constitutional right. After reviewing past decisions including the Delphis Bank and King Woolen Mill cases, O'Kubasu J observed at page 7 of his decision as follows:

> 'The Constitution of Kenya does not specifically talk about the right of representation by counsel in civil matters as it does in respect of criminal matters Section 77 (1) (d) but Section 70 (a) guarantees citizens the protection of the law and to enjoy that right fully, the right to representation by counsel in civil matters must be implicit. Accordingly for a court to deprive a litigant of that right, there must be a clear and valid reason for so doing. I can find no such clear and valid reason for depriving the applicants of their right to be represented by counsel of their choice.' (Emphasis added)

25. I wholly agree with the sentiments expressed by the Honourable Judge in the above matter. Like the provisions of Section 77 of the former constitution, the words used in Article 50(2)(g) of the Constitution make it clear that the provision relates to criminal matters:

> (2) Every accused person has the right to a fair trial, which includes the right—
>
> > (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;'

26. However, I believe that the right to legal representation by counsel of one's choice in civil matters is implicit in the constitutional provisions with regard to access to justice, particularly Articles 48, 50 (1) and 159(2) (a) of the Constitution, and it is only in exceptional circumstances that this right should be taken away."

45. Concerning the same issue, in the case of "Dorothy Seyanoi Moschioni – Versus - Andrew Stuart & another (2014) eKLR", Gikonyo J., stated:-

"(12) I will not re-invent the wheel. All the cases which have been quoted by counsels are relevant. I will not multiply them too. What I need to state is that, in applications for disqualification of a legal counsel, a court of law is not to engage a cursory look at the argument that ''these advocates participated in the drawing and attestation of the Deeds in dispute"; as that kind of approach may create false feeling and dilemmas; for it looks very powerful in appearance and quite attractive that those advocates should be disqualified from acting in the proceedings. It is even more intuitively convincing when the applicant say '' I intend to call them as witnesses". What the court is supposed to do is to thrust the essential core of the grounds advanced for disqualification, look at the real issues in dispute, the facts of the case and place all that on the scale of the threshold of the law applicable. In the process, courts of law must invariably eliminate any possibility that the arguments for disqualification may have subordinated important factual and legal vitalities in the transactions in question while inflating generalized individual desires to prevent a party from benefiting from a counsel who is supposedly should be "their counsel" in the conveyancing transaction. I say these things because that kind of feeling is associated with ordinary human sense where both parties in the suit were involved in the same transaction which was handled by the advocate who now is acting for one of the parties in a law suit based on the very transaction; and the feeling is normally expressed in an application for disqualification of the counsel concerned in the hope it will pass for a serious restriction to legal representation. But the law has set standards and benchmarks which must be applied in denying a person of legal representation of choice; the decision must not be oblivious of the centrality of the right to legal representation in the Constitution as the over-arching hanger; equally, it should not be removed from reach to the sensitive fiduciary relation between an advocate and his clients, which in transactions such as these, would prevent the advocate from

using the privileged information he received in the employ of the parties, to the detriment of one party or to the advantage of the other; it must realize that the advocate has a duty not only to himself or his client in the suit, but to the opponent and the cause of justice; but in all these, it must be convinced that real mischief and real prejudice would result unless the advocate is prevented from acting in the matter for the opponent. The real questions then become: Is the testimony of the advocate relevant, material or necessary to the issues in controversy? Or is there other evidence which will serve the same purpose as the evidence by counsel? Eventually, each case must be decided on its own merits, to see if real mischief and real prejudice will result in the circumstances of the case. And in applying the test, if the argument on disqualification becomes feeble and inconsistent with causing real mischief and prejudice, then a disqualification of counsel will not be ordered.

(23) In line with the above rendition, I do not think there was any possibility of real prejudice being occasioned to the Applicant by representation of the 1st Respondent by the said firm of advocates. And I so hold fully aware of the Applicant's desire to call them as witnesses- and I suppose only the advocate who witnessed and or drafted the agreement was to be the witness. The Rules even allow such advocate to testify on matters which are not contentious."

46. The aforesaid rule attempts to guard against conflict of interest. An advocate will be deemed to be acting in conflict of interest when serving or attempting to serve two or more interests which are not compatible or serves or attempts to serve two or more interests which are not able to be served consistently or honors or attempts to honor two or more duties which cannot be honored compatibly and thereby fails to observe the fiduciary duty owed to clients and to former clients.

47. The Black's Law Dictionary for the definition of the term "Conflict of interest", where it is stated to refer to "a situation that can undermine a person due to self-interest and public interest". That conflict of interest arises only where there was Advocate - Client relationship with the Advocate representing an opposing party, and the said Advocate is in personal knowledge of information which can be used to the detriment of that person.

48. Furthermore, that the conflict of Interest is defined in the case of "R. – Versus - Neil (2002) 3 S.C.R. 631" as follows:-

> " A conflict is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyers' duties to another current client, a former client, or a third person."

49. I dare say that, Conflict of interest can arise broadly where an advocate acts for both parties in a matters such as more parties to a conveyancing or commercial transaction; for two parties on the same side of the record in litigation; or for insured and insurer; an advocate acts against a former client having previously acted for that party in a related matter where his own interest is involved, for example where an advocate acts in a transaction in which his company or a company in which he is an associate is involved or has an interest; or where for some other reason his own interests or an associate's may conflict with his client's, such as where he may be a material witness in his client's matter.

50. Additionally, a conflict of interest may be described also as a conflict of duties or a conflict between interests or as a conflict between interest and duty. All these ways pick up different aspects of the three main ways in which the problem can arise. To act when you have a conflict of interest involves breaching

your fiduciary duty to your client or former client. In the case of "Serve in Love Africa (Silo) Trust – Versus – David Kipsang Murey & 7 Others [2017] eKLR", where conflict of interest was described as a conflict of duties or a conflict between interests or as a conflict between interest and duty. The Court went ahead to hold that to act when one had a conflict of interest involves breaching one's fiduciary duty to their client or former client. This is the basis of the conflict of interest problem. The four elements of the fiduciary duty are:-

i. The duty of loyalty to the client.

ii. The duty of confidentiality.

iii. The duty to disclose to the client or put at the client's disposal all information within your knowledge that is relevant in order to act in the client's best interests.

iv. The duty not to put your own or anyone else's interests before those of the client.

51. This Courts adds that an advocate should not act where justice must not only be done but must be seen to be done. It often makes it easier to decide whether there is or is not a conflict. The public perception of the profession and the damage that might be done to that important perception if an advocate acts having a conflict of interest should be considered. There have been attempts to categorize conflicts of interest as actual, potential or perceived. A conflict of interest is such whether or not it actually involves a breach of the fiduciary duty of confidentiality or the duty of loyalty; there is an implied suggestion that all "perceived" conflicts of interest should lead to an advocate withdrawing which is fraught with problems because many assertions of conflict of interest are misguided and many are made for tactical reasons and have no basis.

52. The provision of Rule 9 of the Advocates (Practice Rules) basically prevents an advocate appearing as advocate in a case in which it is known, or becomes apparent, that the practitioner will be required to give evidence material to the determination of contested issues before the Court.

53. The Law Society of Kenya Code of Ethics and Conduct for Advocates, 2015 Rules 82 - 86 which provides that:-

> " 82. Rule 6: The Advocate shall not advise or represent both sides of a dispute and shall not act or continue to act in a matter when there is a conflicting interest, unless he/she makes adequate disclosure to both clients and obtains their consent.
>
> 83. A conflicting interest is an interest which gives rise to substantial risk that the Advocate's representation of the client would be materially and adversely affected by the Advocate's own interests or by the Advocate's duties to another current, former client or a third party.
>
> 84. Rationale for the rule: The Advocate's ability to represent the client may be materially and adversely affected unless the Advocate's judgement and freedom of action are as free as possible from compromising influences and the relationship between the Advocate and the client is not materially impaired by the Advocate acting against the client in any other matter. Maintaining loyalty to clients promotes trust and confidence in the Advocate. Therefore. as general rule, an Advocate should not knowingly assume or remain a position in which a client s interests conflict with the interests of the Advocate, the firm's or another client. The Advocate should not represent a client if the representation involves a conflict of interest.

86. Situations in which a conflict of interest might arise include:

(a) Where the interests of one client are directly adverse to those of another client being represented by the Advocate or the firm, for instance in situations where the representation involves the assertion of a claim by one client against another client;

(b) Where the nature or scope of representation of one client will be materially limited by the Advocate's responsibilities to another client, a former client, a third person or by the personal interests of the Advocate.

(c) Where in the course of representing a client there is a risk of using, wittingly or unwittingly, information obtained from a current or former client to the disadvantage of that other client or former client."

54. In the case of "Uhuru Highway Development Limited – Versus - Central Bank Ltd [2002] 2 EA 654", the Court of Appeal injuncted a firm of advocates from representing the respondents on the ground that they had prepared security documentation that was a subject of the suit. It was held that:

> " We are satisfied that the real mischief or real prejudice was not rightly anticipated. ...we have no doubt whatsoever in our minds that in the particular circumstances of this case mainly due to the role played by counsel in bringing about the first and second Plaintiffs to agree to sign the charge, he may consciously or unconsciously or even inadvertently use the confidential information acquired during the preparation of the charge. There will no doubt be prejudice."

55. It has been upheld by various superior courts, as evidenced by the above decisions, that a court would always be reluctant to dictate which advocate may or may not represent a client in a matter, unless where there is a 'real likelihood that prejudice would arise.' In the case of "Delphis Bank Limited – Versus - Channan Singh Chatther and 6 Others; Nairobi CA. Nai 136 of 2205 (76/05 UR", it was also held that:-

> " The Constitution of Kenya does not specifically talk about the right of representation by counsel in civil matters as it does in respect of criminal matters... The right to representation by counsel in civil matters must be implicit. Accordingly, for a court to deprive a litigant of that right, there must be a clear and valid reason for so doing. I can find no such clear and valid reason for depriving the applicants of their right to be represented by counsel of their choice."

56. And Article 50(2) (g) of the Constitution of Kenya provides:-

> " Every accused person has the right to a fair trial, which includes the right to...choose, and be represented by, an advocate, and to be informed of this right promptly."
>
> Ideally, that is the whole essence of the provision of Order 9 of the Civil Procedure Rules, 2010 entitled "Recognised Agents and Advocates".

57. The above right was stressed in the case of "William Audi Odode & Another – Versus - John Yier & Another; (Court of Appeal Civil Application No. Nai 360 of 2004 (KSM33/04)", where it was stated:-

> " I must state from the outset that it is not the business of the courts to tell litigants which advocate should and should not act in a particular matter. Indeed, each party to litigation has the right to choose his or her own advocate and unless it is shown to a court of law that the interests of justice would not be served if a particular advocate was allowed to act in a matter, the parties must be allowed to choose their own counsel."

58. Now turning to the direct application of these legal principles to the instant case. This Honourable Court has considered the application and the reply of the 2nd Plaintiff and the Intended 4th Defendant. It is admitted that the Advocate in question transacted the sale on behalf of the 4th Intended Defendant; the Court did not intend to interfere with the Plaintiffs' decision of legal representation but as the Amended Counter - Claim depicts, the Learned Counsel Mr. Magiya may be a witness in this instant case due to the transaction that occurred during the pendency of this suit and while the Plaintiffs witness were giving their testimony.

59. Undoubtedly, although the Plaintiffs have a right that is so sacrosanct to be represented by their advocate of choice, that can only be taken away in exceptional circumstances. Thus if the same becomes prejudicial to the other parties and to enable the ends of justice being met. Indeed, from the submissions adduced, this fact has been robustly and graphically demonstrated by the 1st Defendant/ Applicant herein. With due respect, the Honourable Court has keenly observed the negative energy, vigour and over – enthusiasm bestowed by f Mr. John Magiya Advocate while handling this transaction. To begin with, I do take notice that the Plaintiffs and the 4th Intended Defendant entered into an sale agreement with intention of acquiring a portion of the suit property for its hospitality commercial industry.

60. According to the 1st Defendant, by letter dated 2nd October, 2023 addressed to the 1st Defendant's Advocate by Ms Wainaina Ireri Advocates LLP on behalf of Diamond Housing Limited that law firm sought time to seek substantive instructions and promised to revert within 14 days but they did not. In the meantime, Diamond Housing Limited continued damaging and alienating the suit premises causing the 1st Defendant to write another letter on 7th November, 2023 to which there was no response. Diamond Housing Limited has continued to interfere with the suit premises with the knowledge that the Lessor and purported seller is not the owner. Undisputedly, the two lease agreements, terms and conditions stipulated thereof were prepared by John Magiya & Co. Advocates. Clearly, Mr. John Magiya is the same as John Magiya Advocate who is a Partner in Nyameta Mogaka & Magiya Advocates. From the records, this is the law firm representing the Plaintiffs in this suit and he is the one who has been appearing in the suit for the Plaintiffs. In other words, the said Law firm and John Magiya Advocate acted for the Plaintiffs in both the litigation and the conveyancing transaction of the suit property. The Learned Counsel for the 1st Defendant/Applicant got completely upset by this professional arrangement and averred that Mr. Magiya Advocate had a duty to disclose to the Court that he had assisted his clients to defraud the 1st Defendant but he did not. The 1st Defendant/ Applicant sought have Mr. Magiya Advocate to be joined in the suit as a joint tortfeasor and for facilitating the fraudulent dispossession of the suit premises.

61. Be that as it may, the Honourable Court proceeds to make three (3) clear observations. Firstly, there is no doubt that Mr. John Magiya, Advocate was aware of the existence of the suit and was acting for the Plaintiffs in the suit at the time he drew the lease agreements complained of. Secondly, Mr. John Magiya Advocate as a Partner at Nyameta, Mogaka & Magiya Company Advocates, in this suit

prepared pleadings, Witness Statements and Affidavits and led the 2nd Plaintiff in examination in chief on the allegations that the suit premises belong to the 1st Plaintiff yet he is the one that drew the lease agreements purporting that the 2nd Plaintiff is the owner of the suit premises. Thirdly, Mr. John Magiya in his personal capacity and as a proprietor of John Magiya & Co. Advocates and a partner in Nyameta, Mogaka & Magiya Company Advocates together with his clients had perverted the course of justice and put in place measures to defeat any decree that may be passed by this Court in favor of the 1st Defendant and in particular Mr. John Magiya has violated his duty to the Court as an officer of the Court.

62. Having made the above observations, it is my considered view that the 1st Defendant/Applicant is purely right in raising the red flag on the conduct of Mr. Magiya in as far as conflict of interest and non disclosure of material facts expected of professional Advocate. Thence, in the fullness of time, the Learned Counsel for the 1st Defendant/Applicant has strongly convinced this Court that although the Law firm of Messrs. Nyameta, Mogaka & Magiya Company Advocates cannot really be barred from further representing the Plaintiffs but should elect another partner in the firm to act for the Plaintiff. It should be an Advocate who has not dealt with Diamond Housing Limited in this suit being that Mr. Magiya having acted for the intended Defendant. As to leave the state of affairs as they are at the moment, it will be prejudicial not only to the integrity of this Honourable Court but that of the Legal profession as well. This is in view that the said advocate stands to be an advocate if the intended Defendant is admitted to this suit. I therefore find the application to be meritorious to the extent that Mr. John Magiya cannot in his own capacity as a partner of Nyameta, Mogaka & Magiya Company Advocates and John Magiya & Co. Advocates on behalf of the Plaintiffs and the intended Defendant.

63. This Honourable Court takes cognizance that the intended Defendant in his affidavit has raised issues which may only be tackled if raised to the Court through the proper procedure and the proper chances available to litigants during the trial process. Hence, the application so succeeds.

Issue No. c). Who will bear the Costs of Notice of Motion application dated 15th January, 2024.

64. It is now well established that the issue of Costs is a 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 provision of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court "Jasbir Rai Singh – Versus - Tarchalan Singh" eKLR (2014) and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014).

65. In the case of "Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. I find this to be an appropriate case where each party to the application should bear their own costs, the provision of section 27 of the Civil Procedure Act chapter 21 of the Laws of Kenya notwithstanding..

VII. Conclusion & Disposition

66. In long analysis, while causing an indepth analysis of the framed issues, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to the Preponderance of Probabilities and the balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the application, this court arrives at the following decision and makes the orders below stated:-

a. That the Notice of Motion application dated 15th January, 2024 be and is hereby found to have merit is hereby allowed in its entirety.

b. That this Honourable Court do hereby issue an order barring the participation of Mr. John Magiya as legal counsel for the Plaintiffs in his capacity as a partner in Nyameta, Mogaka & Magiya Company Advocates or as John Magiya & Co. Advocates.

c. That this Honourable Court do hereby issue an order directing the firm of Nyameta, Mogaka & Magiya Company Advocates to appoint another lead counsel to represent the Plaintiffs in this matter.

d. That the matter proceeds on for further hearing date on 3rd and June, 2024.

e. That all the parties joined in the matter directed to fully comply with the provision of Orders 6, 7 and 11 of the Civil Procedure Rules, 2010 within 3 days before the set out hearing dates. ____

f. That arising from the manner in which this matter has been conducted, the Court shall continue holding the original Certificate of title until further notice for purposes of preserving the suit property and in order to sustain "the Doctrine of Lis Pendens".

g. That each parties shall bear their own costs of the Notice of Motion application dated 15th January, 2024.

It is so ordered accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 20TH DAY OF MAY 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. Magiya Advocate for the Plaintiff/Respondent.

c. Mr. Kinyua Kamundi Advocate for the 1st Defendant/Applicant.

d. M/s. Onyango Advocate for the Interested Party.

e. No appearance for the 2nd Defendant.

HON. LL NAIKUINI (JUDGE)