Ethics and Anti-Corruption Commission v Gathoni & 2 others (Environment & Land Case E256 of 2024) [2025] KEELC 683 (KLR) (20 February 2025) (Ruling)

Neutral citation: [2025] KEELC 683 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E256 OF 2024

OA ANGOTE, J

FEBRUARY 20, 2025

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION ..... PLAINTIFF

AND

EMMANUEL KURIA GATHONI ..... 1ST DEFENDANT

EMIROSE ACADEMY LIMITED ..... 2ND DEFENDANT

CHIEF LANDS REGISTRAR ..... 3RD DEFENDANT

RULING

1. Vide the Motion dated 28th June, 2024 brought pursuant to the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act* and Orders 40 (1) and 51(1) of the Civil Procedure Rules, the Plaintiff/ Applicant seeks the following reliefs:

    i. That pending the hearing and determination of this suit, the 2nd Defendant, their servants, employees, and/or agents be restrained from alienating, selling, charging, or further charging, leasing, developing, sub-dividing, transferring, wasting, disposing or in any other manner dealing with the parcel of land known as L.R 209/11858.

    ii. That costs of this Application be provided for.

2. The Motion is based on the grounds on the face thereof and supported by the Affidavit of Irene Sambu, the Plaintiff's investigator appointed pursuant to Section 23 of the *Anti-Corruption and Economic Crimes Act*, 2003.

3. Ms Sambu deponed that she is a member of the team that investigated allegations of unlawful and illegal transfer of land planned and alienated for a children's playground for the exclusive and private benefit of the 2nd Defendant to the detriment of the intended public interest.

4. She deponed that the Plaintiff received information that the 1st Defendant, in abuse of his power as the Director of City Planning and Architecture in the City Council of Nairobi, caused the transfer of the children's playground within Woodley Estate planned and surveyed as L.R No 209/11858 to the 2nd Defendant.

5. It was the Plaintiff's investigator's deposition that the Plaintiff commenced investigations by recording statements and collecting documents, maps and plans from the Directorates of Physical Planning, Land Administration, Surveys, and Registration in the Ministry of Lands, as well the Business Registration Services, National Registration Bureau and the National Land Commission.

6. According to Ms Sambu, the Directorate of Physical Planning furnished them with a Part Development Plan Ref 42/32/85/1 No 211 approved on the 26th February, 1986 for a proposed extension of L.R No 209/404/2 and that the approved PDP No 211 captures the existing plots with their user including the children's playground that is adjacent to L.R 209/404/2, a clear indication that the playground was planned and alienated during the planning of the Woodley area.

7. She stated that vide a letter Ref:6053/II/105 dated 29th October, 1992, the Commissioner of Lands forwarded to the 1st Defendant, being the Director of City Planning, a duly approved PDP for Woodley Estate and that the said PDP showed plots earmarked for various users including the suit parcel designated as a primary school.

8. It was deponed that the suit property was surveyed as a new grant under Survey Plan F/R No 233/19 creating L.R No 209/11858 as reflected in Deed Plan No 169010 dated 24th December, 1992, and a memorandum of transfer of a New Grant IR No 57904 for L.R 209/11858 to the Nairobi City Commission was registered on 15th February, 1993 and a New Grant issued.

9. It is the Plaintiff's case that in the course of the titling process above, the Council had, in a meeting held on the 4th August, 1992 passed a resolution following the Government's policy of reducing un-profitable and non-strategic establishments that Chief Officers of the Council be authorized to identify and dispose of non-essential and un-profitable assets with the aim of improving the Council's financial position.

10. According to the Plaintiff, in abuse of his power as the Director of City Planning and Architecture, the 1st Defendant, vide a letter dated 26th February, 1993 listed L.R No 209/11858 among plots to be disposed by the City Council of Nairobi thereby deceitfully obtaining a consent from the Commissioner of Lands to transfer the suit parcel and that it reasonably believes that the 1st Defendant took advantage of the resolution of the Council to lump the children's' playground together with plots identified as non-essential and un-profitable.

11. Further, it was deponed, the 1st Defendant took advantage of his knowledge and his office as the in-charge of the City Planning Department and custodian of approved development plans drawn by the department to fraudulently and illegally cause the transfer of the suit parcel for the exclusive private benefit of the 2nd Defendant to the detriment of the intended public interest.

12. It was deposed by the Plaintiff's investigator that a transfer between the City Council of Nairobi and the 2nd Defendant was executed on 5th March, 1993 and registered on 8th March, 1993 whereafter an entry to that effect was made in the title and that the 1st Defendant obtained consent to transfer the suit parcel 11 days after the City Council of Nairobi had been issued with the title and caused the transfer thereof to a company associated with his wife within 21 days of the issuance of the title.

13. She stated that the plot was transferred to the 2nd Defendant and is being utilized for commercial purposes in utter disregard to the user as stipulated in mandatory terms in Special Condition no 4 in Grant IR No 57904 being that the same shall only be used for educational purposes; that a children's playground is an essential utility to a community and was not meant to be a profitable asset and this plot could not fall in the category of non-essential and un-profitable assets.

14. According to Ms Sambu, a search at the Business Registration Services revealed that the 2nd Defendant has two shareholders, namely Simon Maina Kamuiru and Johnson Njoroge Kabaiku; that there is an entity known as Emrose Academy whose proprietors are the 2nd Defendant and Zion Fellowship Church Trustees namely Rose Wambui Kuria and Lily Nduta Njenga and that a search at the National Registration Bureau revealed that one of the Directors of the 2nd Defendant, Simon Maina Kamuiru is a brother to Rose Wambui Kuria and a brother in law to the 1st Defendant.

15. It is the Plaintiff's case that in a further attempt to dissipate the suit parcel, the 2nd Defendant lodged a sub-division scheme plan at the City Council of Nairobi and that the same was however not effected as the land on the ground is still whole and the title is yet to be cancelled.

16. It was deposed that vide Kenya Gazette No 15580-Vol. CXII No 124 dated 26th November, 2010 at page 4348, the Registrar of Titles published a notice of revocation of titles including L.R 209/11858 indicating that the same was reserved open space; that in 2018, the National Land Commission, reviewed the title to L.R No 209/11858 following a complaint by the City Council of Nairobi and that the National Land Commission found that the title was illegally acquired by the 2nd Defendant and revoked the same restoring the land back to the public use.

17. The Plaintiff's investigator stated that the above notwithstanding, the Plaintiff is alive to the fact that there is no provision under the Registration of Titles Act or any other Act bestowing the Registrar of Titles or the Government, the power to revoke a registered title in the absence of a Court order to that effect, hence these proceedings.

18. She urged that the Plaintiff is reasonably apprehensive that the 2nd Defendant, or persons acting under it may dispose of or otherwise alienate the suit property in order to frustrate any orders of the court regarding it; that from the foregoing, the Plaintiff has established a prima facie case against the Defendants with a pr0bability of success and that unless the orders sought are granted, the public will suffer irreparable injury which will not adequately be compensated by an award of damages.

19. In response to the Motion, the 1st and 2nd Defendants filed Grounds of Opposition dated 20th September, 2024 premised on the grounds that:

    i. The application is unmerited and defective in law.

    ii. The application is an abuse of court process and a waste of precious judicial time and resources.

    iii. The orders sought in this application are incapable of being granted in the circumstances of this case.

    iv. The application is only suitable to be dismissed with costs to the 1st and 2nd Defendants.

20. Together with the grounds of opposition aforesaid, the 1st and 2nd Defendants filed another Motion together with a Preliminary Objection both dated 20th September, 2024 seeking to have the suit struck out.

21. No directions were given on the Motion of 20th September, 2024 or indeed the Preliminary Objection. However, considering the preliminary nature thereof as well as the fact that there has been a response

thereto and both parties have submitted on the same, the Court will for purpose of expediency consider the same.

22. Vide the Motion, brought pursuant to the provisions of Order 2 Rule 15(1)(a), and Order 51 Rule 1 of the Civil Procedure Rules, the 1st and 2nd Defendants seek the following reliefs:

    i. That this Honourable Court be pleased to strike out the Plaint in this suit.

    ii. That this suit be dismissed with costs and;

    iii. That the costs of this Application be borne by the Plaintiff.

23. The Motion is based on the ground that the suit discloses no reasonable cause of action against the 1st and 2nd Defendants; that it offends the mandatory provisions of the law and is an abuse of the process of the court. The Motion is unsupported.

24. Vide the Preliminary Objection, it is contended that:

    i. The suit herein is time barred.

    ii. The suit herein is defective for misjoinder.

    iii. The Plaint offends the mandatory provisions of law.

    iv. The suit is scandalous, frivolous and vexatious; and

    v. The Jurisdiction of this Honourable Court has been improperly invoked by the Plaintiff.

25. In response to the Motion, the Plaintiff, through Investigator its investigator, swore a Replying Affidavit on 8th November, 2024, who deposed that the Motion is incompetent, fatally defective and ought to be struck out being un-supported by an Affidavit.

26. It was stated by the Plaintiff's investigator that a reasonable cause of action makes reference to an act on the part of the Defendant which gives the Plaintiff its cause of complaint and that they have vide the Plaint, outlined the fraudulent actions by the 1st and 2nd Defendants which caused the alienation of public land as aforesaid demonstrating a cause of action.

27. According to the Plaintiff's investigator, the fact that the 2nd Defendant is the registered owner and is in possession of land reserved for public purpose, having been facilitated by the 1st Defendant further demonstrates a cause of action against them and that the fact that both the Plaintiff, on behalf of the public and the 2nd Defendant have an interest in the same parcel of land, also ipso facto raises a triable issue.

28. As regards limitation, she averred that the suit is not time barred in light of Section 42(1)(d) of the *Limitation of Actions Act* which excludes proceedings to recover government land from the application of the Act; that the 1st and 2nd Defendants are properly joined in these proceedings as there are reliefs specifically sought against the 2nd Defendant and that the Motion is unmerited and should be dismissed.

29. Both parties filed submissions and a list of authorities which I have considered.

Analysis and Determination

30. Having considered the Motions, objections and submissions, the issues that arise for determination are:

i. Whether the Preliminary Objection dated the 20th September, 2024 is competent and if so, merited?

ii. Whether the Motion dated the 20th September, 2024 is fatally defective and if not, whether it is merited?

iii. Whether the Plaintiff has met the threshold for the grant of temporary injunctive orders?

31. The threshold of a Preliminary Objection was set out by the Court of Appeal in the locus classicus case of Mukisa Biscuits Manufacturing Co. Ltd. vs West End Distributors (1969) EA 696 at 700 wherein Law, JA stated as follows:

> "...a 'preliminary objection' consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

32. Newbold, P further held as follows:

> "A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing butt unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop."

33. The Supreme Court in the case of Hassan Ali Joho & Another vs Suleiman Said Shahbal & 2 Others [2014] eKLR re-affirmed the principle as set out in the Mukhisa Case(supra) stating:

> "A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

34. Vide the Objection, the 1st and 2nd Defendants allege, inter-alia, that the suit is time barred; defective for misjoinder; offends the mandatory provisions of the law; is scandalous, frivolous and vexatious and the jurisdiction of the Court has been improperly invoked by the Plaintiff.

35. Beginning with the claim that the suit is statute barred, this is a matter that goes to the jurisdiction of the court to entertain the suit. Indeed, the Mukhisa Case (supra) cites it as one of the examples of what constitutes a pure question of law. This is an objection well taken.

36. As to the allegations of misjoinder, the court opines that this does not constitute a proper preliminary question. Not only does it call upon the court to evaluate the pleadings and supporting evidence, but the same is curable by amendment. This position was affirmed by the Court of Appeal in William Kiprono Towett & 1597 Others vs Farmland Aviation Ltd & 2 Ors[2016]eKLR.

37. Similarly, claim that the suit is scandalous, vexatious and constitutes an abuse of court process is largely subjective requiring examination of pleadings and may call upon the discretion of the court in determining whether or not to strike out the suit. This too does not constitute a proper preliminary question.

38. While questions of the jurisdiction of the court are ordinarily pure points of law, the 1st and 2nd Defendants have not clarified how the court's jurisdiction has been improperly invoked and as such, this plea fails. The same fate befalls the contention that the Plaint offends mandatory provisions of the law, it being unclear which provisions are referenced.

39. As such, the only matter falling for determination in the Preliminary Objection is whether the suit is statute barred. It is the 1st and 2nd Defendants' contention in this respect that the suit has been brought more than 30 years after the cause of action arose, being sometime in the 1993, and is subsequently statute barred by virtue of Section 7 of the *Limitation of Actions Act*.

40. In response, the Plaintiff asserts that its cause of action relates to recovery of public land and is by virtue of Section 42 (1)(d) of the *Limitation of Actions Act*, precluded from the law of limitation.

41. Section 7 of the *Limitation of Actions Act* provides as follows:

> " An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

42. On the other hand, Section 42 of the same Act, sets outs proceedings which are excluded from the Act. In particular, Section 42(1)(d) provides as follows:

> " Exclusion of certain proceedings (1) This Act does not apply to— (a) criminal proceedings; or (b) matrimonial proceedings; or (c) an action to recover possession of Trust land; or (d) proceedings by the Government to recover possession of Government land, or to recover any tax or duty, or the interest on any tax or duty, or any penalty for non-payment or late payment of any tax or duty, or any costs or expense in connexion with any such recovery; or..."

43. There is no dispute that the cause of action on which the Plaintiff's suit is founded arose in the year 1993 when the suit property was transferred to the 2nd Defendant. It is also apparent that the suit is aimed at recovering the suit property which the Plaintiff asserts is alienated Government land designated as a public utility, more specifically a children's' playground in Woodley Estate.

44. It is apparent from the foregoing that the Plaintiff's suit is one in respect of which Section 42 (1) of the *Limitation of Actions Act* applies. Consequently, the cause of action is not barred by limitation as set out in the provisions thereof. [See Also: Kenya Anti-Corruption Commission vs Onyango & 4 others (Environment & Land Case 58 of 2009) [2023] KEELC 22231 (KLR) (14 December 2023) (Judgment).

45. In the end, the Court finds that the Preliminary Objection is unmerited.

46. The Plaintiff contends that the 1st and 2nd Defendants' Motion of 20th September, 2024 is fatally defective for being unsupported by an Affidavit. There has been no response to this. The Court however notes that the Motion is indeed unsupported by an Affidavit.

47. Order 51 Rule 1 of the Civil Procedure Rules which deals with applications provides as follows:

> " All applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide."

48. Whereas Order 51 Rule 4 states as follows:

> " Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served."

49. It is evident that the law anticipates instances where Motions may be filed without supporting affidavits, particularly where no evidence is sought to be adduced.

50. The impugned Motion seeks to have the Plaint struck out on the basis that it discloses no reasonable cause of action. This is provided for under Order 2 Rule 15 of the Civil Procedure Rules which states:

" 15.

> (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—(a)it discloses no reasonable cause of action or defence in law; or(b)it is scandalous, frivolous or vexatious; or(c)it may prejudice, embarrass or delay the fair trial of the action; or(d)it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

51. Subsection 2 provides:

> "(2)No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.(3)So far as applicable this rule shall apply to an originating summons and a petition."

52. It is clear from the foregoing that a Motion under Order 12 Rule 15(1)(a) such as the impugned one does not require affidavit evidence and as such, the lack of a Supporting Affidavit does not render it fatally defective.

53. Moving on to whether the Motion is merited, it seeks to have the suit struck out on the basis that it discloses no reasonable cause of action and offends the mandatory provisions of the law and is an abuse of court.

54. It is trite that striking out of pleadings is a drastic remedy and should only be undertaken in the clearest of circumstances. Speaking to this, the Court of Appeal in the case of Blue Shield Insurance Company Ltd vs. Joseph Mboya Oguttu [2009] eKLR established that striking out of pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham.

55. Similarly, in the case of Crescent Construction Co. Ltd vs Delphis Bank Ltd (2007) eKLR the same court stated thus:

> " However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any

litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter."

56. The 1st and 2nd Defendants assert that the Plaint does not disclose a reasonable cause of action, the Plaint not having disclosed any triable issues. This is refuted by the Plaintiff which asserts that the Plaint is clear and discloses facts in support of its claim for illegal allocation of alienated public land.

57. As correctly cited by the parties, the Court of Appeal in DT Dobie & Co (K) Ltd vs Muchina, [1982] KLR, defined the term reasonable cause of action thus:

> " Reasonable cause of action" to mean "an action with some chance of success when allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer. ..." .

58. In the same case, Madan JA (as he then was) expressed himself as follows:

> " The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way... no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward ...."

59. The Court has keenly considered the pleadings. The suit was instituted vide a Plaint in which the Plaintiff seeks, inter-alia, a declaration that the transfer of the suit property to the 2nd Defendant is null and void; rectification of the register by cancelling the transfer in favour of the 2nd Defendant, an order of vacant possession of the suit property and permanent injunctive orders restraining any disposal or any other interference with the suit property.

60. The Plaintiff has pleaded acts and particulars of fraud, breach of statutory and fiduciary duty, abuse of office and illegality against the 1st Defendant and particulars of fraud against the 2nd Defendant leading up to the registration of the suit property.

61. In the court's opinion, the Plaint raises serious triable issues that calls for rebuttal by the Defendants. Consequently, the allegation that the suit is frivolous, scandalous, and one which constitutes abuse of court process has no basis. In the end, the court finds that the Motion of 20th September, 2024 is unmerited.

62. Moving to the issue of a temporary injunction, the law thereof is provided for under Order 40 Rule 1 of the Civil Procedure Rules, 2010. The same provides as follows:

> " 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 if 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."

63. From the foregoing, an order of temporary injunction may issue where the court is satisfied that there is a likelihood of the suit property being wasted or alienated before the suit is heard and determined.

64. Being an application for injunctive orders, the same shall be weighed against the requisite essentials set out in the celebrated case of Giella vs Cassman Brown (1973) EA 358 thus:

> " The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

65. An Applicant is expected to meet these three principles and surmount them sequentially. This was stated by the Court of Appeal in Nguruman Limited vs Jan Bonde Nielsen & 2 Others [2014] eKLR which held as follows:

> " In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:-
>
> (a) Establish his case only at a prima facie level,
>
> (b) Demonstrate irreparable injury if a temporary injunction is not granted, and
>
> (c) Ally any doubts as to (b) by showing that the balance of convenience is in his favour.
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> These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. (See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86) If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

66. Speaking to what constitutes a prima facie case, the Court of Appeal in Mrao Ltd vs First American Bank of Kenya Ltd & 2 others [2003] eKLR stated as follows:

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

67. More recently, the Court of Appeal in the case of Nguruman Limited v Jan Bonde Nielsen & 2 others(supra) while agreeing with the definition of a prima facie case in the Mrao Case (supra) went ahead to further expound as follows:

> "We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. 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."

68. The Court is alive to the fact that in determining whether or not to grant temporary injunctive orders, it must be cautious not to conduct a mini trial to establish the merits of the case.

69. The Court notes that the 1st and 2nd Defendants did not file a substantive response to the Motion, and instead filed Grounds of Opposition. As stated by the Court in Peter O. Nyakundi & 68 others vs Principal Secreary, State Department of Planning, Ministry of Devolution and Planning & Another [2016] eKLR relied on by the Court of Appeal in Daniel Kibet Mutai & 9 Others vs Attorney General [2019]eKLR:

> "As stated earlier the Respondents did not file any Replying Affidavit to challenge and/or controvert the sworn averment by the Petitioners .....Grounds of Opposition which were filed are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath."

70. While the 1st and 2nd Defendants filed submissions in opposition to the plea for injunction, the same do not constitute pleadings. The factual averments deponed to by the Plaintiff remain unchallenged and uncontroverted.

71. The suit before this Court revolves around the ownership of the suit property. It is the Plaintiff's case that the suit property was alienated Government land and designated for a public utility, a children's playground, before it was fraudulently transferred to the 2nd Defendant by the 1st Defendant in breach of his fiduciary and statutory duty.

72. The Plaintiff has in this respect adduced extensive documentary evidence including the approved PDP No 211-Ref: 42/32/85/1 which sets out the children's' playground; the deed plan reflecting the survey of the suit property as a new Grant under Survey Plan F/R No 233/19 creating the title to the suit property; a memorandum of transfer of the new Grant aforesaid to the Nairobi City Commission and a transfer from the Nairobi City Council to the 2nd Defendant.

73. Further evidence was produced of a familial relationship between one of the 2nd Defendant's Directors and the 1st Defendant and a revocation of the title to the suit property by the NLC on account of the fact that it was a reserved open space.

74. Taking into account the foregoing, and noting that the same is unchallenged and uncontroverted, the court finds that the Plaintiff has demonstrated that there exists a clear and unmistakable right—namely, the alleged public's interest in the suit property as a children's playground that has been materially and substantively threatened by the actions of the Defendants.

75. With regard to irreparable harm, the damage caused to the Applicant should be such that it cannot be remedied by damages. In Nguruman Limited vs Jan Bonde Nielsen & 2 Others (supra)the court noted:

> "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."

76. It is the Plaintiff's case that unless the orders are granted, the property may be disposed of and the general public will suffer irreparable injury.

77. It is noted that the suit property is currently registered in the name of the 2nd Defendant who has possession thereof. If the property is disposed of or altered, the harm to the general public will be grave, substantial, and demonstrable. Indeed, the loss of the right to enjoy public space is not something that can be monetarily compensated.

78. For those reasons, the Plaintiff's application dated 28th June, 2024 is allowed as follows:

    a. The Preliminary Objection dated 20th September, 2024 is found to be unmerited and dismissed with costs.

    b. The Motion dated 20th September, 2024 is found to be unmerited and is dismissed with costs.

    c. A temporary injunction does hereby issue restraining the 2nd Defendant, its servants, employees, and/or agents from trespassing, alienating, selling, charging, or further charging, leasing, developing, sub-dividing, transferring, wasting, disposing or in any other manner dealing with the parcel of land known as L.R 209/11858 pending the hearing and determination of this suit.

    d. The 1st and 2nd Defendants shall bear the costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20TH DAY OF FEBRUARY, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Ms Kibugi for Plaintiff

Mr. Muriithi holding brief for Prof. Muigua for 1st and 2nd Defendants.

Court Assistant: Tracy