



Owino & 2 others (Suing as the officials and members of Yasego Society) v Meron Limited & another (Environment & Land Case E010 of 2024) [2024] KEELC 4839 (KLR) (13 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4839 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E010 OF 2024**

JO MBOYA, J

JUNE 13, 2024

BETWEEN

STEPHEN OTIENO OWINO 1ST PLAINTIFF

JOYCE NYAKERO 2ND PLAINTIFF

GEORGE KIMUTAI 3RD PLAINTIFF

SUING AS THE OFFICIALS AND MEMBERS OF YASEGO SOCIETY

AND

MERON LIMITED 1ST RESPONDENT

LANGTON INVESTMENTS LIMITED 2ND RESPONDENT

RULING

Introduction And Background

1. The instant Application has been filed by Stephen Otieno Owino, Joyce Nyakero and George Kimutai, respectively as the Officials and members of Yasego Society; [Plaintiff/Applicant] and in respect of which the Applicant herein has sought for the following reliefs [verbatim];
 - i. That this application be certified as urgent and that the same be heard ex parte in the first instance.
 - ii. That this Honourable Court be pleased to issue an order of injunction restraining the Defendants herein whether by themselves, agents, employees or anybody acting under them or on their instructions from selling, transferring, developing or in any manner evicting, removing or demolishing the Applicants houses and or structures within all that parcel of land known as Land Reference Numbers 28401 pending the hearing and determination of this application.



- iii. That this Honourable Court be pleased to issue an order of injunction restraining the Defendants herein whether by themselves, agents, employees or anybody acting under them or on their instructions from selling, transferring, developing or in any manner evicting, removing or demolishing the Applicants houses and or structures within all that parcel of land known as Land Reference Numbers 28401 pending the hearing and determination of this suit.
 - iv. That the OCS and OCPD Kasarani Police Station and Deputy County Commissioner Kasarani to ensure that these orders are complied with.
 - v. 5.that this Honourable Court be pleaded to give such further orders as it shall deem, m and just in the circumstances of this case.
 - vi. That the cost of this application be provided for.
2. The instant application is premised on various grounds which have been enumerated in the body thereof. Furthermore, the application beforehand is supported by inter-alia the supporting affidavit sworn by Peter Ndungu Mutiga sworn on the 14th February 2024 and the further affidavit sworn on the 7th May 2024, respectively.
 3. Other than the supporting affidavit and the further affidavit [details in terms of the preceding paragraph] which have been alluded to, the Applicants herein also adopts and relies on the replying affidavit sworn in opposition to the previous application that was filed by and on behalf of the 2nd Defendant herein.
 4. Pertinently, the Applicants contend that same [officials and members of the society] have been in occupation and possession of the suit property since the year 2004 and hence same [Applicant] has acquired adverse possessory rights to and in respect of the suit property.
 5. Upon being served with the subject application, the 2nd Defendant/Respondent filed a replying affidavit sworn on the 18th April 2024 and which affidavit has been sworn by one David Mukahi Kunyihia. Besides, the 2nd Defendant/Respondent has also sought to rely on various affidavits inter-alia the replying affidavit sworn on the 28th February 2024 and on the 14th March 2024, respectively.
 6. Furthermore, the said Defendant/Respondent herein has also sought to rely on the affidavit of Eric Nyadimo sworn on the 22nd March 2024; affidavit of Ezra Makori sworn on the 27th February 2024 and the affidavit of Evans Omulubi Anekeya, sworn on the 14th March 2024.
 7. Instructively, the 2nd Defendant/Respondent contends that same [2nd Defendant/Respondent] is the lawful and legitimate proprietor of the suit property and hence same [2nd Defendant] is obliged to take possession of the suit property.
 8. Nevertheless, the 2nd Defendant has further stated that despite being the lawful and legitimate owner of the suit property, the 1st Defendant/Respondent herein has interfered with her rights to and in respect of the suit property and as a result of the actions and omissions by the 1st Defendant/Respondent same [2nd Defendant/Respondent] filed civil proceedings vide Milimani ELC No. E139 of 2023 and wherein same [2nd Defendant] procured orders of injunction as against the 1st Defendant/Respondent herein.
 9. At any rate, the 2nd Defendant has averred that the Plaintiffs/Applicants herein have never been in occupation of the suit property and thus the suit beforehand as well as the application for temporary injunction are misconceived.
 10. Suffice it to point out that the application beforehand came up for hearing on the 29th February 2024 when same was to be heard. However, it transpired that the 2nd Defendant/Respondent had filed an



application dated the 28th February 2024 and in respect of which [2nd Defendant] sought to have the suit struck out on various grounds.

11. Arising from the nature of the application dated the 28th February 2024, the court was obliged to and indeed gave directions pertaining to the hearing and disposal of the said application. Notably, the application under reference was heard and disposed of vide ruling rendered on the 4th April 2024.
12. Upon the disposal of the application [details in terms of the preceding paragraph], the court proceeded to and issued further directions in respect of the previous application namely, the application dated the 14th February 2024. For good measure, it was directed that the said application be canvassed and disposed by way of written submissions.
13. Pursuant to the foregoing, it is imperative to state that the Plaintiff/Applicant proceeded to and filed written submissions dated the 8th May 2024 whilst the 2nd Defendant/Respondent filed written submissions dated the 15th May 2024.
14. For completeness, it suffices to point out that the 1st Defendant/Respondent neither filed any document in opposition to the subject application nor written submissions thereto.
15. For coherence, the only written submissions are the ones [details in terms of the preceding paragraphs] and which form part of the record of the court.

Parties' Submissions:

Applicants' Submissions:

16. The Applicants herein filed written submissions dated the 8th May 2024; and in respect of which same [Applicants] has adopted and reiterated the grounds at the foot of the application beforehand; and similarly reiterated the contents of the various affidavit sworn in support thereto.
17. Furthermore, learned counsel for the Applicants has thereafter proceeded to and highlighted three [3] salient issues for consideration by the court.
18. Firstly, learned counsel for the Applicants has submitted that the members of the Applicants society entered upon and took possession of the suit property sometime in the year 2004 and thereafter same [members of the society] commenced to and erected various structures on portions of the suit property.
19. Additionally, learned counsel for the Applicant has submitted that the members of the Applicant society have thereafter resided in their various structures erected on the suit property and furthermore, same [members of the Applicants society] have been undertaking farming on portions of the suit property.
20. Other than the foregoing, learned counsel for the Applicants has further submitted that the members of the Applicant society have also undertaking assorted business on the suit property and the various businesses on the suit property have been licensed by the County Government of Nairobi. For good measure, learned counsel for the Applicants has referenced various business registration certificates and tax payments receipts issued by the County Government of Nairobi.
21. Besides, learned counsel for the Applicants has also submitted that the members of the Applicant society have also built and/or constructed churches including Quicker Church on a portion of the suit property wherein the members of the Applicants' society worship.



22. In view of the foregoing, learned counsel for the Applicant has therefore submitted that the Applicant has placed before the Honourable court prima facie evidence to demonstrate the occupation and possession of the suit property by her members.
23. Furthermore, learned counsel for the Applicant has submitted that on the basis of the evidence that has been placed before the court, the Applicants herein have established a prima facie case with probability of success and thus same [Applicants] are entitled to the orders of temporary injunction in the manner sought at the foot of the instant application.
24. In support of the contention that the Applicants have established a prima facie case with probability of success, learned counsel for the Applicant has cited and relied on inter-alia the holding in the case of *Giella vs Casman Brown Ltd* [1973] EA 573; *Mrao Ltd vs First American Bank of Kenya Ltd* [2003]eKLR and *Nguruman Ltd vs Jon Bonde Nielsen & Others* [2014]eKLR, respectively.
25. Secondly, learned counsel for the Applicant has also submitted that the Applicants herein and in particular the members of the Applicant society shall be disposed to suffer irreparable loss unless the orders of temporary injunction are granted.
26. Pertinently, learned counsel has contended that unless the orders sought are granted, there exists a high likelihood that the 2nd Defendant/Respondent shall proceed and levy eviction and demolition against the members of the Applicants society. For good measure, counsel has submitted that if such eviction and demolition were undertaken, the members of the Applicants society would stand to lose not only their structures [houses] but also their lifetime investments and developments.
27. In a nutshell, learned counsel for the Applicant has contended that the consequences of the threatened eviction and demolition shall inflict irreparable loss upon the members of the Applicants society.
28. To buttress the submissions pertaining to and/or concerning irreparable loss, learned counsel for the Applicant has cited and relied upon the holding in the case of *Pius Kipchirchir Kogo vs Franc Kimeli Lenai* [2018]eKLR.
29. Learned counsel for the Applicant has submitted that in the event the determination of the application turns on the balance of convenience, the Applicants herein have laid before the court cogent evidence to warrant a finding in her [their] favor.
30. Further ad at any rate, learned counsel for the Applicant has submitted that on the 15th March 2024, the 2nd Defendant herein hired goons to go and evict the members of the Applicant from the suit property despite there being an order of the court directing the maintenance of status quo.
31. Based on the foregoing, learned counsel for the Applicant has contended that the antecedent conduct of the 2nd Defendant does not portend well with the rule of law and thus the court should find that it is in the interests of justice to grant the orders sought.
32. In support of the submissions pertaining to the issues of balance of convenience, learned counsel for the Applicants has cited and relied on the holding in the case of *Kenya Electricity Transmission Company Ltd vs Kibotu Ltd* [2019]eKLR.
33. Arising from the foregoing, learned counsel for the Applicant has therefore implored the court to find and hold that the Applicant has established and demonstrated a basis to warrant the grant/issuance of the orders sought.



2ND Defendant's Submissions:

34. The 2nd Defendant filed written submissions dated the 15th May 2024 and in respect of which same [2ND Defendant] has adopted and reiterated the contents of the replying affidavit sworn on the 18th April 2024 as well as assorted affidavits [whose details were itemized elsewhere hereinbefore].
35. Other than the foregoing, learned counsel for the 2nd Defendant has raised, highlighted and canvassed three [3] salient issues for consideration by the court.
36. First and foremost, learned counsel for the 2nd Respondent has submitted that the Applicants herein have neither established nor demonstrated the existence of a prima facie case with probability of success or at all. In this regard, learned counsel has therefore submitted that in the absence of a prima facie case, the Applicants herein are therefore not entitled to an order of temporary injunction either in the manner sought or at all.
37. Additionally, learned counsel for the 2nd Defendant has submitted that the members of the Applicant herein have never been in occupation of the suit property, either as contended or at all. For good measure, learned counsel for the 2nd Defendant has referenced the affidavit of one Eric Nyadimo sworn on the 27th March 2024 and the annexures thereto, which are stated to show that the suit property is not inhabited by any one either in the manner stated or at all.
38. Furthermore, learned counsel for the 2nd Defendant/Respondent has posited that the only structures that are existing on a portion of the suit property are the structures which were constructed and erected by the 1st Defendant herein in a bid to defeat the 2nd Defendant's title and entitlement to the suit property.
39. At any rate, it has been contended that the impugned structures and building that were constructed by the 1st Defendant were the basis upon which the 1st Defendant filed civil proceedings vide ELC No. 139 of 2023 and wherein the court [differently constituted] proceeded to and issued temporary injunction against the 1st Defendant/Respondent.
40. According to learned counsel for the 2nd Defendant/Respondent, a claim for adverse possession is dependent upon actual occupation and possession of the designated property [suit property] albeit with the knowledge of the owner. Instructively, learned counsel for the 2nd Defendant has submitted that in respect of the instant matter no plausible or cogent evidence has been placed before the court to demonstrate occupation and possession of the suit property.
41. On the other hand, learned counsel for the 2nd Defendant has also submitted that the burden of showing and/or demonstrating occupation and possession of the suit property lay on the shoulders of the Applicant herein. For coherence, counsel has cited and referenced the provisions of Section 107 and 109 of the *Evidence Act*.
42. Pertinently, learned counsel for the 2nd Defendant has contended that without prima facie evidence of occupation and possession of the suit property, the Applicant is not entitled to the orders of temporary injunction either in the manner sought or at all.
43. To buttress the foregoing submissions, learned counsel for the 2nd Defendant/Respondent has cited and relied on inter-alia the holding in the case of Benson Mukuna Muchira vs Assumption Sisters of Nairobi Registered Trustees [2016]eKLR; Titus Kigoro Munyi vs Peter Mburu Kimani Comet Radio Vision Services Ltd vs Farnell – Tandberg Ltd [1971] 1WR [1287]; respectively.



44. Secondly, learned counsel for the 2nd Defendant has submitted that the Applicant herein approached the court with unclean hands and also concealed material information from the court and hence same [Applicant] is not entitled to partake of and benefit from the equitable jurisdiction of the court.
45. Furthermore, learned counsel for the 2nd Defendant has contended that the evidence that has been placed before the court by and on behalf of the Applicant is contradictory and thus incapable of founding an order of temporary injunction. In this regard, learned counsel for the 2nd Defendant has isolated the averments where the Applicant contends that same entered upon the suit property in the year 2000; whilst in yet another affidavit, the facts are distorted and it is alleged that same [members of the Applicant] entered the suit property in the year 2004.
46. Besides, learned counsel for the 2nd Defendant has also submitted that the Applicant herein is before the court in connivance and/or collusion with the 1st Defendant with a view to defeating the orders of the court which had hitherto been granted against the 1st Defendant/Respondent.
47. Owing to the foregoing, learned counsel for the 2nd Defendant/Respondent has invited the court to find and hold that the Applicant's case is premised on conscious and deliberate misrepresentation of facts and thus such misrepresentation does not bode well with the rule of law and equity.
48. To support the foregoing submissions, learned counsel for the 2nd Defendant/Respondent has cited and referenced the holding in the case of Andrew Ouko vs Kenya Commercial Bank & 3 Others [2005]eKLR and King vs The General Commissioners for the Purposes of *Income Tax Act* for the District of Kesington [1917] 1KB 486.
49. Finally, learned counsel for the 2nd Defendant has submitted that the Applicant herein has neither demonstrated nor proved that same [Applicant] shall suffer any irreparable loss or at all. For coherence, learned counsel for the 2nd Defendant/Respondent has submitted that there is no evidence of occupation and possession which has been placed before the court.
50. Additionally, learned counsel for the 2nd Defendant has contended that the structures that are standing on the suit property and which have been referenced by the Applicant herein were erected by the 1st Defendant and in any event, the issue of ownership of such structures is well articulated in the statement recorded by one Peter Maina Mwangi at Kasarani Police Station.
51. Owing to the fact that the Applicant herein has failed to demonstrate occupation and possession, learned counsel for the 2nd Defendant/Respondent has therefore posited that no basis has been laid before the court to warrant the grant of the orders of temporary injunction.
52. Premised on the foregoing, learned counsel for the 2nd Defendant/Respondent has therefore invited the court to find and hold that the Applicant has failed to satisfy the requisite conditions for granting orders of temporary injunction. Consequently and in this regard, learned counsel for the 2nd Defendant has invited the court to find and hold that the application beforehand is devoid of merits.

1st Respondent's Submissions:

53. The 1st Respondent herein neither filed any response to the application beforehand nor did same [1st Defendant/Respondent] file any written submissions.
54. For good measure, it is imperative to state that when the matter came for mention before the court on 16th May 2024; counsel for the 1st Defendant pointed out that same shall not be filing any written submissions.



Issues For Determination:

55. Having appraised and considered the Notice of Motion Application beforehand; as well as the replies thereto and upon taking into consideration the written submissions filed on behalf of the respective parties, the following issues do crystalize [emerge] and are thus worthy of determination;
 - i. Whether the Application beforehand is competent or otherwise.
 - ii. Whether the Applicant has established and demonstrated the existence of a prima facie case with probability of success.
 - iii. What orders if any, ought to be granted?

Analysis And Determination:

Issue Number 1 Whether the Application beforehand is competent or otherwise.

56. The instant suit as well as the subject application have been filed by and on behalf of three persons, namely Stephen Otieno Owino, Joyce Nyakero and George Kimutai, respectively, [sic] on behalf of Yasego Society.
57. Pertinently, it has been contended that the three named persons [details in terms of the preceding paragraph] have filed the instant suit and the application in their capacities as officials and members of Yasego Society.
58. To my mind, the suit having been filed by the three same persons, [sic] on behalf of Yasego Society, it then means that the three named persons are the ones who were authorized and mandated by the society to act, sue and appear on behalf of the society.
59. Other than the foregoing, it is the same persons who were authorized to file the instant application and to persuade the court towards granting the temporary orders of injunction, if and where appropriate.
60. To the extent that the three named persons are the ones who were authorized to file the suit or in any event who have filed the suit, there is no gainsaying that same [three persons] are the ones who are appearing before the court on behalf of the Applicant.
61. Arising from the foregoing, the question that does arise relates to and concerns whether a person [third party] whose name does not appear in the suit papers can file inter-alia supporting affidavit and additional affidavit to support an application for temporary injunction in a matter where same [deponent] is not a party.
62. Instructively, the matter beforehand espouses a scenario where the supporting affidavit as well as the further affidavit propagating the application has been sworn by one Peter Ndugu Mutiga, who however is not one of the persons reflected on the face of the suit pleadings.
63. The question that I beg to grapple with and I beg to answer is whether the said Peter Ndungu Mutiga can swear and file affidavit[s] in respect of the subject matter and if not, whether the subject application is competent on the face of there being no affidavit by the persons whose names appear on the face of the pleadings.
64. To start with, Peter Ndungu Mutiga contends that same is a secretary of Yasego Society and that on the basis of being a secretary, same [Peter Ndungu Mutiga] is competent to swear the supporting affidavit. However, it is not lost on the court that if Peter Ndungu Mutiga [deponent] was a secretary then same ought to have been one of the parties suing on behalf of the society.



65. Suffice it to point out that a society registered under the provisions of the *Societies Act*, Chapter 108 Laws of Kenya; can only sue and be sued [if at all] through registered officials and not otherwise.
66. Secondly, the supporting affidavit and the further affidavit by Peter Ndungu Mutiga are contended to have been filed on the basis of the authority to act dated the 14th February 2024 and which has been signed by John Neko Opondo [not a party to the suit] and Stephen Otieno Owino [the 1st Applicant].
67. Be that as it may, it is important to address two pertinent issues arising from and attendant to [sic] the authority to act and which [sic] premises the basis upon which Peter Ndungu Mutiga has filed the supporting affidavit and further affidavit.
68. Firstly, there is no gainsaying that the impugned authority to act has not been signed by all the persons whose names appear on the face of the pleadings herein. For good measure, it is only Stephen Otieno Owino [1st Applicant] who has signed the authority to act and not the 2nd and 3rd Applicants.
69. The question that flows from the foregoing observations is whether a document signed by only one of the three persons whose names appear on the suit pleadings can suffice to demonstrate the existence of lawful authority in favor of the purported deponent.
70. Without belaboring the point, it is my humble view that if Peter Ndungu Mutiga were to have any authority to swear any affidavit and/or document [for whatever its worth], in respect of the instant matter then same [Peter Ndungu Mutiga] ought to have procured the authority of all the persons whose names are reflected on the face of the pleadings as the Applicants.
71. To my mind, the document that is alleged to bestow authority upon Peter Ndungu Mutiga, [Deponent] is incomplete and thus incapable of founding the purported authority in the eyes of the law, taking into account that the other Parties to the suit have not signed/ executed the same [the Document].
72. Secondly and most importantly, it is imperative to underscore that authority to act as envisaged under the provisions of Order 1 Rule 13[2] of the Civil Procedure Rules, 2010 can only be executed in favor of a co-Plaintiff or co-Defendant in respect of a particular matter and not otherwise.
73. For coherence, where there are two or more Plaintiffs or Defendants the rest of the Plaintiffs or Defendants can authorize anyone of them to act, appear and plead on their behalf; and such authority shall be exhibited vide a document in writing and which document must be filed with the pleadings in question.
74. Taking into account the importance of the provisions of Order 1 Rule 13[2] of the Civil Procedure Rules, it is apposite to reproduce the said provisions. In this regard, I do hereby reproduce same as hereunder;
 13. Appearance of one of several plaintiffs or defendants for others [Order 1, rule 13]
 - (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.
 - (2) The authority shall be in writing signed by the party giving it and shall be filed in the case.
75. My understanding of the provisions [supra] is to the effect that before one can be authorized by the rest of the co-Plaintiffs or co-Defendant; such a person must of necessity be a party to the suit. For



- coherence, a person can only be a party to a suit if his names are evident and apparent in the suit pleadings and not otherwise.
76. Arising from the foregoing, if any authority were to be given then such authority could only be given to one or more of the persons whose names appear on the face of the suit pleadings as a Plaintiff and not otherwise.
 77. Furthermore, it is only the persons whose names appear as the Plaintiffs/Applicants, who can execute and file any affidavit in support of the subject application and not any other person, irrespective of the connection or nexus that such other person has with the suit.
 78. In view of the foregoing, I hold the humble opinion that there is a disconnect between the application beforehand and the supporting affidavit and the disconnect beforehand vitiates the entirety of the application.
 79. Put differently, there being no supporting affidavit by and on behalf of the three named persons, who have filed the suit on behalf of the Plaintiff/Applicant, there is no evidential basis or foundation that has been placed before the court to anchor the application for temporary injunction.
 80. In the absence of the requisite evidence vide affidavit to support and/or anchor the suit application, I am afraid that the application beforehand is therefore premature, misconceived and otherwise incompetent, taking into account the import and tenor of Order 40 Rule 1[a] of the Civil Procedure Rules, 2010.
 81. For brevity, the provisions of Order 40 Rule 1[a] [supra] states thus;
 1. Cases in which temporary injunction may be granted [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,
 82. In my humble view, the affidavit alluded to in the provisions [supra] and upon which the court may proceed to grant the orders of temporary injunction must be the affidavit of the Applicant him/herself or such other person authorized by the Applicant in accordance with the law and not otherwise.
 83. Nevertheless, I have pointed out elsewhere herein before that the deponent of the supporting affidavit beforehand has not been authorized by the three named Applicants and nor is the deponent a party to the suit to warrant the invocation and reliance on the provisions of Order 1 Rule 13 [1] and [2] of the Civil Procedure Rules 2010.
 84. In a nutshell, my answer to issue number one [1] is twofold. Firstly, the supporting affidavit and the further affidavit which have been relied upon to premise the application beforehand are incompatible with the application beforehand.
 85. Secondly, in the absence of a compliant and lawful supporting affidavit, the application for temporary injunction has been made in vacuum and hence same [application] is legally incompetent.



Issue Number 2: Whether the Applicant has established and demonstrated the existence of a prima facie case with probability of success.

86. Pertinently, the application beforehand seeks for an order of temporary injunction to restrain the 2nd Defendant from interfering with the occupation and possession of the Applicant and her members on the suit property herein.
87. To the extent that the application beforehand seeks for orders of temporary injunction, there is no gainsaying that the Applicant herein is therefore obligated to place before the court cogent and plausible material to establish the existence of a prima facie case with probability of success.
88. As pertains to the meaning, import and tenor of what constitutes a prima facie case, it suffices to cite and take cognizance of the holding in the case of Mrao Ltd vs First American Bank of Kenya Ltd [2003]eKLR where the court stated and held thus;
4. A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.
89. Likewise, the meaning, extent and scope of a prima facie case was re-visited by the Court of Appeal in the case of Nguruman Ltd vs Jan Bode Nielsen & Others [2014]eKLR, where the court stated as hereunder;
- “Prima facie” is a Latin phrase for “at first sight”, whose legal meaning and application has been the subject of varying interpretation by courts in many jurisdictions. Phrases like “a serious question to be tried”, “a question which is not vexatious or frivolous”, “an arguable case” have been adopted to describe the burden imposed on the applicant to demonstrate the existence of prima facie case. The leading English House of Lords case of the American Cyanamid Co. Ethicon Ltd [1975] AC 396 is a case in point. The meaning of “prima facie case”, in our view, should not be too much stretched to land in the loss of real purpose. The standard of prima facie case has been applied in this jurisdiction for over 55 years, at least in criminal cases, since the decision in Ramanlal Trambaklal Hatt V. Republic [1957] E.A. 332.
90. Taking into account the observations and holdings [in terms of the decision [supra]], it is now appropriate to revert to the instant matter and to discern whether the Plaintiff/Applicant has established and demonstrated a prima facie case with probability of success.
91. To start with, there is no gainsaying that a society registered under the provisions of the Society Act, Chapter 108 Laws of Kenya can only sue through her registered officials and not otherwise.
92. Instructively, if the suit beforehand was being mounted on behalf of Yasego Society, in the manner contended, then the only persons who could bring the suit for and on behalf of the said society are the registered officials whose names are duly registered with the Registrar of society and not otherwise.
93. Having pointed out the foregoing, it is therefore imperative to interrogate the documentation placed before the court as pertains to the registered officials of the society beforehand. For coherence, the Applicants have annexed a letter dated 4th June 2018 from the office of the Registrar of society and the letter states as hereunder;

“ The secretary,



Yasego Society,
Box 77153 -00100
Nairobi.

Dear Sir.

RE: Society Act Cap 108 And Soc/71326.

Yasego Society

I refer to your letter dated the 27th May 2018 and below are the names of your societies office bearers for your onwards transmission to the manager Equity bank Kasarani Branch.

Chairman; John Neko Opondo

Secretary; Peter Ndungu Mutiga

Treasurer: Stephen Otieno Owino

Yours faithfully,

Joanne Ogola

Assistant Registrar of Society

94. From the annexure, [whose details have been highlighted in the preceding paragraph], the names of the officials of the society herein are elaborated upon and/or stated. In this regard, one would have expected that the suit beforehand would have been filed by and on behalf of the named officials.
95. For the avoidance of doubt, it is the registered officials who by virtue of the constitution or constitutive charter of the society are authorized to sue or be sued on behalf of the society.
96. However, in respect of the subject matter, there is no gainsaying that there is only one person namely, Stephen Otieno Owino whose name appears as the official of the society; but same has been joined in the instant suit by person[s] who are not official[s] of the society. Consequently, the question that does arise is whether the instant suit which anchors a claim for temporary injunction, accords with the provisions of the Societies Act, Cap 108 Laws of Kenya or otherwise.
97. I am alive to the fact that what is before me is an interlocutory application and hence I am not obliged to make any precipitate finding[s] either of fact or law. Nevertheless, there is no gainsaying that Capacity to sue [Legal Standing] is a critical question [issue] that goes to the root and competence of the suit beforehand.
98. Premised on the foregoing, I entertain grave doubts and reservations as to the competence of the suit; and hence I am unable to return a finding that the suit beforehand discloses a prima facie case with probability of success.
99. Secondly, towards proving and establishing the existence of a prima facie case with probability of success, it was incumbent upon the Applicant to place before the court credible and plausible evidence pertaining to occupation and possession of the suit property. Indeed, in an endeavor to demonstrate occupation and possession of the suit property, the Applicant has annexed a plethora of photographs to the supporting affidavit. [Same are marked as annexure PNM 4].
100. Be that as it may, I wish to point out that the photographs which have been annexed to the supporting affidavit [details in terms of the preceding paragraphs] have not been accompanied by the requisite electronic certificate in accordance of Section 106B of the Evidence Act, Cap 180 Laws of Kenya].



101. In the absence of the mandatory electronic certificate in line with the provisions of Section 106B of the *Evidence Act* [supra] it suffices to point out that the photographs under reference are devoid of probative value. Same are worthless in the eyes of the law.
102. To this end, I beg to adopt, restate and reiterate the succinct holding of the Court of Appeal in the case of County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] eKLR, where the court held thus;
 1. Section 106B of the *Evidence Act* states that electronic evidence of a computer recording or output is admissible in evidence as an original document “if the conditions mentioned in this section are satisfied in relation to the information and computer.”
 1. In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B(2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced. For ease of reference, we wish to reproduce Section 106B of the *Evidence Act* in its entirety:

“106B (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.
 - (2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—
 - (a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;
 - (b) during the said period, information of the kind contained in electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
 - (c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and
 - (d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.
 - (3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of sub section (2) was regularly performed by computers, whether—



- (a) by combination of computers operating in succession over that period; or
 - (b) by different computers operating in succession over that period; or
 - (c) in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this sections to a computer shall be construed accordingly.
- (4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—
- (a) identifying the electronic record containing the statement and describing the manner in which it was produced;
 - (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
 - (c) dealing with any matters to which conditions mentioned in sub-section (2) relate; and
 - (d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.
- (5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities.”
67. In relation to this case, the relevant conditions in that section are (a) if the computer output was recorded by a person having lawful control over the computer used; (b) if the output was recorded in the ordinary course of that person’s activities using a computer or some other electronic devise and fed into a computer that was properly operating throughout the material period; and (c) if that person gives a certificate that to the best of his knowledge, the output is an electronic record of the information it contains and describes the manner in which it was produced.
68. The *Evidence Act* does not provide the format the certificate required under sub-section 106B(2) thereof should take. The certificate can therefore take any form including averments in the affidavit of the recorder.

103. Simply put, the photographs upon which the Applicant relies to demonstrate occupation and possession are incapable of proving [sic] what the Applicant sought to achieve and/ or demonstrate.



104. Lastly, the Applicants herein have also relied on a letter written by assistant chief of Roysambu Sub-location which is stated to the administrative unit wherein the suit property is located. Instructively, the letter under reference is intended to demonstrate that the members of the Applicant are residents of the suit property.
105. Other than the letter by the assistant chief Roysambu Sub-location, the Applicant herein has also annexed to the further affidavit letters from Friends Church Quickers and head of Nyamba Kumi, whose import is to demonstrate the facts of occupation of the suit property by members of the Applicant society.
106. However, it is not lost on this court that the authors of the letters under reference have not filed any affidavit on oath to verify the contents of the letters under reference. In this regard, I hold reservation[s] as to the probative value of the letters under reference.
107. Without belaboring the point, the position of the law as pertains to the probative value of annexures akin to the letters beforehand was highlighted by the Supreme Court of Kenya [the Apex Court] in the case of Muthuuri & 4 others v Attorney General & 2 others (Petition (Application) 15 (E022) of 2021) [2022] KESC 74 (KLR) (23 June 2023) (Judgment), where the court stated thus;

[70] The pay slips on record belong to three different officers: Joash Rotich stationed at Nakuru Provincial Police Office; Esther Chepkemai Chebus of Kirinyaga OCPD; and Patrick Oyongo of Nairobi Embakasi OCPD. The pay slips show a steep rise in the salaries of these individuals upon designation as Graduate Police Constables. At some point, the earnings appear to have been reduced. What is interesting about Patrick Oyongo's pay slips is that in all of them, his designation is not indicated. Without full terms of employment, particulars of the owners of the pay slips, and in the absence of their involvement in the proceedings as witnesses or by way of express authority in the form of affidavits or other depositions, the pay slips were of no evidential significance. Further, the pay slips were not certified as true copies of the original by the 2nd respondent who is the employer of all police officers and custodian of the pay slips. In terms of Section 35 of the *Evidence Act*, the pay slips were inadmissible.

108. To my mind, what I hear the Supreme Court to be stating is that whenever a litigant, the Plaintiff/Applicant not excepted, seeks to rely on a document belonging to or authored by a third party, who is not one of the litigants, then the document in question must be verified by an affidavit.
109. Arising from the foregoing, it is therefore my humble opinion that the letters which have been similarly exhibited by and on behalf of the Applicant herein and whose purpose is to demonstrate occupation and possession, are similarly deficient.
110. In a nutshell, it is my humble view that the Applicant herein has failed to demonstrate that same has a prima facie case with probability of success which is a critical ingredient towards the grant of an order of temporary injunction.
111. For good measure, it is common ground that in the absence of a prima facie case then the court is not obligated to venture forward and consider whether or not irreparable loss would arise and/or ensue.



112. The foregoing exposition of the law is founded on the holding of the Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, where the court stated and observed as hereunder;

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.

113. Having found and held that no prima facie case with probability of success has been established, there is therefore no basis to venture forward and consider whether or not irreparable loss will ensue.

Issue number 3 What orders if any, ought to be granted?

114. The Plaintiff/Applicant herein had sought to be granted an order of temporary injunction to restrain the Defendants/Respondents from interfering with her [Applicant] occupation and possession of the suit property.
115. To be able to obtain and procure an order of temporary injunction, it was incumbent upon the Applicant to demonstrate and satisfy the requisite ingredients that underpin the issuance of an order for temporary injunction. [See *Giella v Casman Brown* [1973] EA 573]
116. However, while discussing issue number two [2] herein before, I have found and held that the Applicant has failed to demonstrate and or prove the existence of a prima facie case with a probability of success or at all.
117. Consequently and in view of the foregoing, what becomes evident and apparent is that the Plaintiff/Applicant is not deserving of the Equitable orders of injunction in the manner sought or at all.

Final Disposition:

118. In conclusion and upon analyzing the various perspectives, [details in terms of the preceding paragraphs], it is my finding and holding that the Applicant is not deserving of the orders sought.
119. Consequently and in the premises, I proceed to and do hereby make the following orders;
- i. The Application dated the 14th February 2024 be and is hereby dismissed.
 - ii. Each party shall bear own costs insofar as the pertinent issues upon which the application has been dismissed were not canvassed by the 2nd Defendant/Respondent.
120. Furthermore, the Interim Order[s] of Status Quo which had hitherto been granted be and are hereby vacated and/ or discharged.



121. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JUNE, 2024.

OGUTTU MBOYA,

JUDGE.

In the presence of:

Benson – Court Assistant

Mr. Odiwor Kenyatta for the Plaintiff/Applicant

Mr. Justus Mutunga for the 1st Defendant/Respondent

Mr. Kiragu Kimani SC and Mr. Stephen Njiru for the 2nd Defendant/Respondent

