



**Diamond Trust Bank Kenya Limited v Omwandu & 2 others; Director -
Department of Surveys (Interested Party) (Environment and Land Case Civil
Suit E189 of 2023) [2024] KEELC 5555 (KLR) (30 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5555 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E189 OF 2023
AA OMOLLO, J
JULY 30, 2024**

BETWEEN

DIAMOND TRUST BANK KENYA LIMITED PLAINTIFF

AND

EDWIN ABUSIO OMWANDU 1ST DEFENDANT

THE CHIEF LAND REGISTRAR 2ND DEFENDANT

THE DIRECTOR OF LAND ADMINISTRATION 3RD DEFENDANT

AND

THE DIRECTOR - DEPARTMENT OF SURVEYS INTERESTED PARTY

RULING

1. For determination is the notice of motion dated 24th November, 2023 brought under the provisions of Orders 40 & 51 of the *Civil Procedure Rules* 2010 and Section 1A, 1B, 3A and 63(e) of the [Civil Procedure Act](#). The Plaintiff/Applicant is asking to be granted Orders that:
 - i. Spent
 - ii. Spent
 - iii. That the Honourable Court be pleased to issue an Order directed at the Officer Commanding Station, Kangemi Police Station and Muthangari Police Station directing them and/or their duly appointed agents to execute and/or assist in executing the orders sought under prayer (2) hereinabove which assistance will include the entry upon or into all that parcel of land known as Nairobi Block 1/42 (formerly known as Land Reference 5/64 (Original Number 5/50/3)



situate within Kangemi, along Waiyaki Way in Nairobi County, within the Republic of Kenya or any part thereof.

- iv. That the Honourable Court be pleased to issue an Order directed at the Director of Criminal Investigation to directing him and/or his officers and/or agents to investigate the circumstances under which the Leases purportedly issued on 22nd September, 2022 and 4th October, 2022 over all that parcel of land known as Nairobi Block 1/42 (formerly known as Land Reference 5/64 (Original Number 5/50/3) situate within Kangemi, along Waiyaki Way in Nairobi County, within the Republic of Kenya was issued without the plaintiff's consent, authority and/or involvement and report to Court with their findings within such timeframe as the Honourable court shall deem sufficient.
 - v. That the Honourable Court be pleased to grant a temporary injunction restraining the 1st Defendant, his agents, security guards, and/or servants from trespassing, entering, taking custody, occupying, taking and remaining in possession, deploying and/or stationing security guards, alienating and/or acting in any manner which interferes with the plaintiff's quiet possession, occupation, enjoyment and/or management of all that parcel of land known as Nairobi Block 1/42 (formerly known as Land Reference 5/64 (Original Number 5/50/3) situate within Kangemi, along Waiyaki Way in Nairobi County, within the Republic of Kenya (hereinafter referred to the "suit property") pending the hearing and determination of this suit.
 - vi. That the Honourable Court be pleased to grant an order of inhibition directed at the 2nd and 3rd Defendants inhibiting the registration of any other and/or further dealings on the parcel of land known as Nairobi Block 1/42 (formerly known as Land Reference 5/64 (Original Number 5/50/3) situate within Kangemi, along Waiyaki Way in Nairobi County pending the hearing and determination of this suit.
 - vii. That the costs of this application be borne by the Defendants.
2. The application was premised on the grounds listed on the face inter alia;
- a. Vide a Kenya Gazette Notice Number 5743 dated 20th May, 2022, contained in Volume CXIV – No. 94, the Cabinet Secretary for Lands and Physical Planning notified the public that all that parcel of land known as Reference Number 5/64 had been converted and allocated and/or issued a new parcel number to wit Nairobi Block 1/42.
 - b. To date, save for the charge instrument aforesaid registered in favour of the plaintiff, the title to the aforesaid property has never been transferred to any other person or entity, let alone surrendered to the Government for issuance of a new title bearing the converted number.
 - c. However, the 1st Defendant has, in collusion with the 2nd, 3rd and 4th Defendants, illegally and/or fraudulently acquired a Certificate of Lease over the same parcel of land to wit Nairobi Block 1/42 dated 4th October, 2022 and purporting to be the registered proprietor and/or holder of the lease to the said property known as Nairobi Block 1/42 (formerly Land Reference Number 5/64 Nairobi), the 1st Defendant has deployed security guards to guard the property.
 - d. Accordingly, the plaintiff's interest and/or claim over the said piece of property is under threat from unlawful acts emanating from the 1st Defendant either by himself or through his duly authorized agents, servants and/or employees.
 - e. The plaintiff's statutory power to dispose of the property to recover the debts owed by the insolvent Nakumatt Holdings Limited is unlawfully and illegally being fettered by the 1st Defendant's unlawful acts of conversion and trespass.



- f. The 1st Defendant's actions which have been aided and/or facilitated by the 2nd, 3rd and 4th Defendants are illegal, unlawful, highhanded, smack of impunity and amount to breach and or violation of the Plaintiff's statutory right to charge property.
- g. The 1st Defendant and/or his agents have no legal, equitable, beneficial or registrable interest in the said property which was charged to the Plaintiff free from any encumbrances.
3. Wanga Mwangi swore affidavit in support of the motion deposing inter alia that Applicant carried out the necessary due diligence which establish that Ms Nakumatt Investments Ltd who was guaranteeing the borrowing was the registered owner of the suit property. that the bank has been in possession of the suit property since 2015 and has never relinquished the title of the suit property.
4. He deposed that facing financial distress, Nakumatt Holdings Limited was placed under administration vide a ruling delivered in Insolvency Cause No. 10 of 2017 in re Nakumatt Holdings Limited (Under Administration), thus crystallization the Bank's statutory power of sale.
5. The Applicant deposes that sometime in 2023, it was brought to their attention that some strangers were encroaching on their land. They carried out investigations which led the bank to discover that existed a lease over the suit property dated 20th September, 2022 and a certificate of lease issued to the 1st Defendant.
6. That the bank is reasonably apprehensive that the 1st Defendant is poised to taking, adverse action against the suit property including the unlawful acquisition of the parcel of and land in question and their Advocates on record have already made their demand to that effect. A true copy of the letter from Wambua Maseno Advocates to that effect is annexed hereto and marked as "LM9". That the fraudulent actions of the 1st Defendant, in collusion with the 2nd, 3rd and 4th Defendants, in particular the obtaining of a Lease to Nairobi Block 1/42 dated 22nd September, 2022 yet there already exists an original genuine title which has been charged to the Bank, threatens to deprive the Bank off its lawful security.
7. That as a result of the fraud perpetrated by the Defendants, the Bank cannot be compensated through any form of damages, save that the 1st Defendant be prevented from alienating, transferring and/or any other way dealing with the suit property until the issues relating to ownership be determined by this Honourable Court. That further, whenever the bank's duly appointed agents attempt to restrain the 1st Defendant agents from the aforesaid illegal activities, the said efforts have been met with real and actual violence and/or threats to cause harm and/r assault.
8. The Applicant avers that the Bank, as a financial institution with statutory duties to manage its debts and/or facilities diligently faces a real, present and justifiable risk of being exposed to the tune of over Kshs.500,000,000/- which had been advanced to M/s Nakumatt Holdings Limited and secured by the title to the said parcel of land.
9. The application is opposed. The 1st Defendant/Respondent filed a Replying Affidavit dated 6th March, 2024, 3rd May, 2024, 22nd March, 2020 and a Preliminary Objection dated 6th March, 2024. The Preliminary Objection stated that the court lacks jurisdiction to entertain this claim; the plaintiff is bereft of locus standi and the suit does not disclose any reasonable cause of action against the 1st defendant.
10. The 1st Defendant deposes that the application and the suit is fatally defective for want of a juridical persona capable of being sued before this court as the 3rd and 4th defendants are departments within a legal entity. The 1st Respondent asserts that he lawfully acquired the suit property around 2019. That



the time of acquisition, the suit property was vacant and undeveloped which his investigations revealed was unalienated government land.

11. The 1st Respondent avers that he is keen on developing the suit property as he was lawfully granted a certificate of lease, sometimes in October, 2023 his peaceful enjoyment and occupation of the suit property was rudely interrupted by the plaintiff. According to him, leasehold interest from which the Applicant derives its interest was lawfully extinguished in the year 2008.
12. He also deposes that the plaintiff has never been registered as the beneficial owner of the suit property. That the plaintiff registered a charge over the property after the lease had expired and the request for extension by Nakumatt Investments Ltd was denied. He deposed that the purported transfer of the suit property from Lajya Bhandari, the executrix of the estate of Maharaj Krishan Bhandari, to M/s Nakumatt Investments Limited and the subsequent charge of the suit property by the Plaintiff to secure a business loan facility issued to M/s Nakumatt Investments Limited cannot withstand close legal scrutiny and interrogation.
13. In opposing the application, the 2nd Respondent filed a replying affidavit sworn by Charles Kipkurui Ngetich sworn on 3rd May, 2024. That according to the government records, the suit property is currently registered in the 1st Defendant's name as of 4th October, 2022.
14. He deposed that it was first allotted to Maharaj K. Bhandari in 1952 for a leasehold term which expired in 2008. The 2nd Respondent avers that the 1st allottee applied for extension of lease sometimes in 1983 but the same was rejected for non-compliance with the development conditions.
15. Hence the purported extension of lease produced by the plaintiff is a forgery and confer no interest in the property. The deponent went into lengths to explain why the extension of lease produced by the plaintiff is a forgery including non-compliance with re-survey process.
16. That in 2015, the plaintiff purported to charge a property which had reverted to the government and Nakumatta Investments Ltd being a foreign company did not enjoy pre-emptive rights under Section 13(1) of the Land Act. The 2nd Respondent avers that Applicant did not conduct any due diligence before charging the property. Further that it charged the property for Kshs.500,000,000 which is twice the value of the suit property contrary to prudent banking principles.
17. In paragraph 28, the 2nd Respondent deposes that prior to allocation of the suit land to the 1st Defendant, the previous owner had never made any application for extension or renewal other than the one which was rejected. Mr. Ngetich also said that signatories of the Registrars appearing on entries 26 – 32 in the plaintiff's title is different from the signatures in their deed file. That the plaintiff has not attached valid documents to support the alleged allocation and registration. They urged the court to dismiss the application for not satisfying the threshold for the grant of an order of injunction.
18. In the replying Affidavit dated 22nd March, 2024 Mr. Brian Ikol swearing to issues on behalf of the 3rd Respondent, deposed to confirm that they issued a letter of allotment to the 1st Respondent dated 28th April, 2022. According to the 3rd Respondent who deposes it is wrongly sued, the lease to Maharaj Krishan who transferred to Nakumatt Investments Limited had expired. That they followed due process in allocating the land to the 1st Defendant.
19. Mr. Ikol deposed that Nakumatt Investments was a foreign Company hence it did not enjoy pre-emptive rights as far as renewal of leases is concerned.
20. Parties filed detailed written submissions which I have read and considered. Three question arise for determination;



- a. Whether this court has jurisdiction
 - b. Whether the plaintiff has locus to bring the claim
 - c. Whether the application meets the threshold for granting an order of temporary injunction.
21. The 1st Defendant in his submission merges the issue of jurisdiction with locus standi and submit that the court is bereft of jurisdiction where a party has no locus. It is held by courts in Kenya in several cases that a preliminary objection should be a pure point of law which requires no evidence to prove it (see the often-quoted decision of *Mukisa Biscuits Manufacturing Limited v West End Distributors Ltd* (1969) EA 696.
 22. Has the Preliminary Objection dated 6th March, 2024 met this threshold? The 1st Respondent began by inviting the court to consider the affidavit evidence and documents filed while determining the question if the court is lawfully dispossessed of jurisdiction. He cited the case of *Alfred Njau & Others v. City Council of Nairobi* (1983) KECA 56 which defined locus thus;

“The terms *Locus Standi* means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings.”
 23. The 1st Defendant refers to the plaint in arguing that the Applicant did not state who when and how the lease which expired in 2008 was extended. He also relied on the replying affidavit of the Deputy Chief Land Registrar which deposed that the plaintiff’s alleged chargor’s interest in the land expired in the year 2008 and the charge alleged to have been registered in the year 2014 was premised on a forged extension of lease title.
 24. Thus the question of whether the lease expired in 2008 and whether there was a charge registered in 2014 constitutes issues which are disputed and are forming the gist of the claim. It is not a set of facts which have been pleaded by one party and admitted by another. The facts set forth by the Respondents require evidence to confirm that the application for extension was rejected hence the impugned charge could not have been registered post the expiry of the lease.
 25. The 1st Respondent further submitted that the 2nd and 3rd Respondents replying affidavits swore to the fact that the suit property belongs to him. These are the facts obtaining and which are contested issues that caused the Applicant to file this suit challenging the documents of ownership by the 1st Defendant and accusing the 2nd – 4th Defendants of fraud in issuing the 1st Defendant with ownership documents.
 26. Consequently, I hold that the Preliminary Objection as raised by the 1st Defendant does not lie because; it has to be proved by affidavit evidence (on facts) and second, that it is relying on contested facts. The case of owners of the Motor Vessel “Lilian S. v Caltex Oil Kenya Ltd (1989) eKLR has been quoted out of context by the 1st Respondent in explaining want of jurisdiction based on factual and not legal provisions.
 27. Further, the issues raised by the Respondents on whether a valid charge would grant the plaintiff any ownership rights essentially goes into the merits of the suit. The prayers sought in the plaint seek inter alia; to cancel the title documents held by the 1st Defendant and the plaintiff be declared as the legal and beneficial owner of the suit property. The plaintiff’s claim may seem to be meritless in the eyes of the Defendant but the law allows each an opportunity to present their case for the just and fair determination of disputes under the principle of natural justice.



28. Thus, I safely conclude that the grounds raised in the Preliminary Objection requires proof by adduction of evidence. The Preliminary Objection fails the threshold of being a pure point of law and it is hereby dismissed with costs.
29. The next question is whether or not this application has merit. Again the often cited case of *Giella v Cassman* (1973) EA 358 clearly sets the standards to be established before an order of temporary injunction can be granted. They are; demonstration of a prima facie case, irreparable loss that cannot be compensated by an award of damages, or in whose favour the balance of convenience tilts.
30. From the pleadings filed in support of and against the grant of the orders of temporary injunction, there is no dispute that the land in dispute that is being claimed both by the plaintiff and the 1st Defendant is known and it is the same piece. The 1st Defendant claims that he was allocated the land in 2022 and which fact is corroborated by the replying affidavits of the 2nd and 3rd Respondents. The 1st Defendant has expressed intention to commence developing the suit property.
31. Both parties relied on the Court of Appeal in *Mrao Ltd v First American Bank Ltd & 2 Others* Civil Appeal No. 39 of 2002 which defines *prima facie* case thus;
- “It is a case in which on the material presented to the court a tribunal property directing itself will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
32. The Applicant avers that the title documents in the hands of the 1st Defendant were fraudulently given as it holds original title bearing the name of Nakumatt Investments Ltd by virtue of Chargee’s interests. It also pleaded that when Nakumatt holdings was declared insolvent, their statutory powers automatically accrued and so they are entitled to realize the securities. The question of ownership is pertinent and a basis has been laid how the interest of the plaintiff comes into play thus framing/ demonstrating a prima facie case.
33. Although the 1st Defendant submitted that the plaintiff has no right in the suit property that can be protected by this court but he does not deny that prior to his acquiring the suit property, it was previously owned by Nakumatt Investments Ltd who purchased it from the initial allottee. The plaintiff alleges there is an extension of lease on which their charge was registered to secure monies advanced to Nakumatt Holdings Ltd.
34. With the possibility of repeating myself, the gist of this dispute and which are triable issues are; whether the lease to Nakumatt Investment Ltd had expired so that a charge could not be registered on it; or if the extension of lease was a forgery; whether the 2nd & 3rd Respondents misrepresented facts to the Applicant when they purported to register the impugned charge and consequently, whether the plaintiff would be entitled to general damages from the 2nd & 3rd Respondent pursuant to such misrepresentation. Thus, the plaintiff has through its pleadings expressed some semblance of right over the suit property which raises a prima facie case.
35. Is the plaintiff likely to suffer irreparable loss unless the orders sought are not granted? The Plaintiff stated that the property had been used to secure a loan of Kshs.500,000,000. This means the interest of the plaintiff is ascertainable and can be compensated by an award of damages. The question would be who can the court order to give undertaking where there is no nexus and or privity of contract between the Applicant and the 1st Defendant. The Plaintiff has submitted that if the suit property is disposed of, it would have nowhere to recover their money given that Nakumatt Holdings Ltd collapsed. Thus the loss though ascertainable may not be recoverable unless the orders of injunction sought are granted.



36. Under the heading of balance of convenience, it is evident from the pleadings that the suit property is undeveloped. The justice of the case demands that the undeveloped state be maintained until the court determines who is entitled to the suit property. Although the 1st defendant deposed that it was ready to commence development having lawfully acquired it, he will have to hold in abeyance any such plans. Allowing development to commence while in the event the plaintiff's suit succeed would be costly in terms of the loss incurred in putting up such developments and subsequently undoing the structures to return the land in its current status.
37. In light of my foregoing analysis, I hold that the application is merited. It is allowed in terms of prayers 5 and 6 of the motion thus;
- a. That the Honourable Court does grant an order of temporary injunction restraining the 1st Defendant, his agents, security guards, and/or servants from entering, taking custody, deploying and/or stationing security guards, alienating and/or acting in any manner which interferes with all that parcel of land known as Nairobi Block 1/42 (formerly known as Land Reference 5/64 (Original Number 5/50/3) situate within Kangemi, along Waiyaki Way in Nairobi County, within the Republic of Kenya (hereinafter referred to the "suit property") pending the hearing and determination of this suit.
 - b. That the Honourable Court hereby grants an order of inhibition directed at the 2nd and 3rd Defendants inhibiting the registration of any other and/or further dealings on the parcel of land known as Nairobi Block 1/42 (formerly known as Land Reference 5/64 (Original Number 5/50/3) situate within Kangemi, along Waiyaki Way in Nairobi County pending the hearing and determination of this suit.
 - c. That the costs of this application in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JULY, 2024

A. OMOLLO

JUDGE

