



Juja Coffee Exporters Limited & 3 others v Bank of Africa Limited & 6 others (Environment & Land Case E049 of 2023) [2024] KEELC 5388 (KLR) (24 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5388 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E049 OF 2023**

**SM KIBUNJA, J
JULY 24, 2024**

BETWEEN

**JUJA COFFEE EXPORTERS LIMITED 1ST PLAINTIFF
TSS TRANSPORTERS LIMITED 2ND PLAINTIFF
TSS INVESTMENT LIMITED 3RD PLAINTIFF
THE EXECUTORS OF THE ESTATE OF TAHIR SHEIKH SAID
AHMED 4TH PLAINTIFF**

AND

**BANK OF AFRICA LIMITED 1ST DEFENDANT
KAAB INVESTMENTS LIMITED 2ND DEFENDANT
ABDUL MAJID MOHAMED HAJI ADAM 3RD DEFENDANT
SHAMI MOTORS LIMITED 4TH DEFENDANT
I.F.I PARADISE PROPERTIES LIMITED 5TH DEFENDANT
PETER NYAGA NJOKA 6TH DEFENDANT
HELLEN WANJIRU NYAGA 7TH DEFENDANT**

RULING

[NOTICES OF MOTION DATED 13TH DECEMBER 2023 BY PLAINTIFFS, 19TH JANUARY 2024 BY 1ST DEFENDANT AND 26TH JANUARY 2024 BY 6TH & 7TH DEFENDANTS]

1. This ruling is in respect of three notices of motion filed by the plaintiffs, 1st defendant and 6th & 7th defendants dated 13th December 2023, 19th January 2024 and 26th January 2024, are hereinafter referred to as the 1st to 3rd application, respectively. In the 1st application, the plaintiffs are seeking for



inter alia injunctive orders. The court on the 14th December 2023 granted the orders in the interim. In the 2nd application, the 1st defendant seeks for the setting aside of the interim orders issued on the 14th December 2023 in the 1st application. Through the 3rd application, the 6th & 7th defendants seeks to be struck out from this proceeding. It is therefore in order to deal with the 1st and 2nd applications together, before addressing the 3rd one.

2. The 1st application dated 13th December 2023 seeks orders inter alia that:
 - a. Temporary injunction against the 1st defendant from further advertising for sale, selling by public auction or private treaty or in any other way disposing parcels No. 526 and 527 Section XXI Mombasa Island and Title No. Mombasa/Block XXVI/381, pending hearing and determination of the suit.
 - b. Temporary injunction against the 3rd, 4th, 5th, 6th and 7th defendants from interfering with plot 147 Section XXI Mombasa Island, plot. 154 Section XXI Mombasa Island; plot. No. 44 Section XXI Mombasa Island and plot 586 Section XVII Mombasa Island, pending hearing and determination of the suit.

The application is based on the twenty-six (26) grounds on its face and is supported by the affidavit of Nurein Tahir Sheikh Said, director to 1st to 3rd plaintiffs, sworn on the 13th December 2023 inter alia deposing that the plaintiffs have at all material times been the registered owners of the said parcels of land; that the 1st defendant advertised plot No. 596 for auction on the 18th December 2023; that the plaintiffs had challenged the intended sale of the said properties in Mombasa HCCC 57 of 2016, but their application was dismissed; that the 1st defendant had kept the plaintiffs in the dark about the dealings leading to the alleged loans, and they reported to the DCI; that the DCI obtained warrants from court to investigate the complaints by the plaintiffs; that the DCI investigations revealed inter alia that the mandate issued by 1st plaintiff to 1st defendant showed only 4th defendant [sic] could issue instructions alone, while all other instructions required to be signed by two directors; that contrary to the said instructions, the 1st defendant allowed USD 5,288,331 to be transferred from the 1st plaintiffs account to the 2nd defendant's account at Imperial Bank for no apparent reason; that further the 1st defendant had no instructions to support the transfer of USD 600,000 and 885,331 on the 28th February 2012 and 11th April 2012 respectively; that the 1st defendant breached its quincecare duty of care because they knew the 2nd defendant does not engage in tea trading, and further allowed overdrawing of a poorly performing account; that a document examiner confirmed some of the signatures on the documents used in the bank transfers were forged and the audit firm of Omenye & Associates uncovered numerous anomalies and irregularities which are detailed in their report dated the 26th September 2019; that the 1st defendant could not be legally empowered to exercise the statutory power of sale, over the suit properties; that the 1st defendant purported to sell plots 147 and 154 to the 3rd & 4th defendants through illegal and unlawful auctions on the 18th November 2019 and 30th April 2018 respectively; that plot 44 and 586 were also illegally and unlawfully sold to the 5th defendant and 6th & 7th defendants by 1st defendant on the 1st April 2019 and 1st February 2022 respectively; that the plaintiffs will suffer irreparable injury if the application is not allowed because the said properties are highly valuable, and a lifelong investment by the plaintiffs as well as a source of income for the 4th plaintiff.

3. The 1st defendant opposed the 1st application through the replying affidavit sworn by Victor Keitany, Senior Recoveries Officer, sworn on the 19th January 2024. The 1st defendant also filed the 2nd application also dated the 19th January 2024 premised on sixteen (16) grounds on its face and supported



by the affidavit of the said Victor Keitany sworn on the same date. The 1st defendant seeks for inter alia the following orders:

- a. That the interim injunction order issued on 14th December 2023 be set aside/discharged.
- b. That this court do issue an injunction against the plaintiffs from filing further fresh suits or applications or appeals on this suit in any court within Kenya that is aimed at interfering or defeating the 1st Defendant's rights to statutory power of sale in relation to plot 44, 147, 1654, 526, 527, 586 and 361, Mombasa.
- c. That the first application be struck out.
- d. The firm of Muriu Mungai & Company Advocates LLP be barred from representing the plaintiffs for abuse of court process and filing multiplicity of similar suits.
- e. The plaintiffs be declared vexatious litigants and be enjoined from filing future suits without leave of court.
- f. The plaintiffs to pay the 1st defendant's costs in the application and suit on a full indemnity basis.

It is the 1st defendant's case inter alia that this court lacks jurisdiction as statutory power of sale is exclusively the jurisdiction of the High Court; that the plaintiffs lack locus standi to seek relief from the 1st defendant; that this suit is res judicata and an abuse of the court process as various issues raised by the 1st application have been dealt with in various suits; that the firm of Muriu Mungai be barred from the proceedings for gross misconduct.

4. The plaintiffs opposed the 2nd application through the replying affidavit of Nurein Tahir Sheikh Said, sworn on 25th January 2024, among others deposing that this court has jurisdiction as the subject matters are lands which were fraudulently and illegally charged to the 1st defendant, and they seek for the charges to be nullified; that some of the said properties have been fraudulently and illegally sold to the 3rd to 7th defendants, and the sales should be nullified and titles returned to the plaintiff; that the plaintiffs have locus standi as they do not seek equity of redemption, but are rather challenging the dispossession of the suit properties and seeking for their return; that this suit is not res judicata as HCC 57 of 2016 was dismissed before it could be heard on merit; that the 1st and 2nd plaintiffs were not parties in ELC 203 OF 2019, HCCC 80 of 2018, HCCC 86 of 2019, and that the plaintiffs were not parties in ELC 68 of 2022; that the firm of Muriu Mungai has represented the plaintiffs in three matters only, and that the plaintiffs' constitutional right to legal representation cannot be curtailed; that the procedure of declaring a litigant vexatious is provided in the *Vexatious Proceedings Act* Chapter 41 of Laws of Kenya, which has not been followed.
5. Abdulmajid Mohamed Haji Adam, the 3rd defendant, opposed the 1st application through his replying affidavit sworn on 26th January 2024. It is his case that the application is an abuse of the court process as he is the registered owner of plot 147 having bought the same from the 1st defendant, as chargee, at Kshs. 68,000,000 through public auction, and thus protected by section 99 of the Lands Act; that the plaintiffs have not approached the court with clean hands, and that they have not met the threshold for an injunction orders to issue.
6. The 4th defendant opposed the 1st application through the undated and affidavit of James Adhoch, accountant, that is not commissioned. I will therefore take its contents as mere statements, and not of any evidential value. I will give the reasons for this position in a more detailed way later in the analysis.



7. The 5th defendant opposed the 1st application through the replying affidavit of Iftikhar Ahmed, director, sworn on the 19th December 2023, inter alia deposing that the 5th Defendant is the owner of plot 44 having purchased it a public auction for KShs. 211,000,000 from the 1st defendant, on 1st April 2019.
8. On their part, the 6th & 7th defendants filed the 3rd application that is based on the nine (9) grounds on its face, and supported by the affidavit of Hellen Wanjiru Nyaga, the 7th defendant, sworn on the 26th January 2024, seeking for among others to be removed from this suit, or for the plaintiffs' suit against them to be struck out with costs to be paid by the plaintiffs and 1st defendant jointly and severally. It is inter alia their case that their participation is unnecessary as they have their own suit against the 1st defendant in ELCC E044 of 2023 for refund of the purchase price paid, interest, damages and costs for the aborted acquisition of plot 586, and have no interest in this suit; that they have no possession of plot 586, and none of the orders sought in this suit can issue against them; they paid for plot 586; that their further participation in this suit will cause them unnecessary and unavoidable costs and may even result in clashing decisions with ELCC Nos. E051 of 2022, E044 of 2023 and HCMISC APP No. E119 of 2022.
9. The learned counsel for the plaintiffs, the 3rd, 4th and 5th defendants filed their submissions dated the 11th April 2024, 12th April 2024, 9th April 2024, 20th March 2024 respectively, while that for the 1st defendant filed their submissions dated the 26th March 2024 and 14th May 2024 respectively, all of which the court has considered. Mr. Gikandi, Wawire, Achoka, Gakuo and Ms Muyaa, learned counsel for the plaintiffs, 1st, 4th, 5th, 6th & 7th defendants respectively highlighted their submissions on the 15th May 2024, which the court has also considered.
10. The issues for the court's determinations on the 1st to 3rd applications are as follows:
 - a. Whether this court has jurisdiction to hear and determine the issues in this suit.
 - b. Whether the plaintiffs have locus standi in the suit.
 - c. Whether the plaintiffs' application and suit are res judicata.
 - d. Whether the plaintiffs' have met the threshold for a temporary injunction order to issue as sought.
 - e. Whether the 6th & 7th defendants are necessary parties for the complete and effectual adjudication, and settling all the issues for determination in this suit.
 - f. Who pays the costs in the suit?
11. The court has after considering the grounds on each of the three applications, affidavit evidence by the parties, written and oral submissions by learned counsel, superior court decisions cited come to the following determinations:
 - a. The first three issues are in the nature of points of law, which if upheld could have the potential of summarily determining both the plaintiffs' application and or suit. Starting with the issue of jurisdiction, I refer to the decision in the case of Owners of Motor Vessel "Lilian S" Vs. Caltex oil (Kenya) Ltd [1989] eKLR where it was agreed that jurisdiction is a pure question of law and must be determined from the start, and that if a Court has no jurisdiction, it must down



its tools. Similarly, the Court of Appeal in the case of Joseph Njuguna Mwaura & 2 Others Vs. Republic [2013] eKLR while discussing the relevance of a Court's jurisdiction had this to say;

“It is incumbent upon any Court intending to render an opinion or determine a matter to first ascertain the entry point to the doors of justice, and that is jurisdiction. The authority of the Court is determined by the existence or the lack of jurisdiction to hear and determine disputes. In essence, jurisdiction is the first hurdle that a Court will cross before it embarks on its decision-making function.

In our understanding, Courts have no jurisdiction in matters over which other arms of government have been vested with jurisdiction to act”

I have carefully perused the averments in the plaintiffs' plaint dated the 13th December 2023, to understand what the dominant issues in this suit are, in view of the fierce contestations between the plaintiffs on one side, and the defendants on the other side. That the plaintiffs appear to question, and cast aspersions on the genuineness of the loan facilities offered by the 1st defendant to the 1st plaintiff on the diverse dates listed. They have disputed the receipt of the funds thereunder, and they even claim that the third loan facility was never disbursed. The plaintiffs also claim a breach of statutory duty imposed on the 1st defendant by the [Banking Act](#). The foregoing are prima facie matters of a commercial nature that ordinarily fall under the jurisdiction of the High Court.

- b. However, when it comes to the issues raised surrounding the 1st defendant's sale of suit properties particularized herein, specifically plots numbers 147, 154, 586/Section XVII/MI and 44/Block XXI/Mombasa, the plaintiffs have alleged that the sale by public auction was marred with fraud and illegalities. Section 97 of the [Land Act](#) cap 280 provides for the procedure of statutory power of sale where land is involved by a chargee. It is the 1st defendant's adherence or failure of it, to those procedures, that are being disputed by the plaintiffs. The plaintiffs' allegations of fraud and illegality towards the 1st defendant, have been buttressed by DCI's investigations findings, which inter alia allege that there was no instructions to transfer the huge sums of money to the 2nd defendant. The plaintiffs' pleadings on the alleged questionable dealings by the 1st defendant's is further backed by the document examiner's finding of elements of forgery in the documents relied upon by the 1st defendant in issuing the aforesaid loan facilities, which are basis of which it allegedly drew its statutory power of sale to deal as it allegedly did with the suit properties, and transfer to the other named defendants. Section 13 (2) (e) of the [Environment and Land Court Act](#) No. 19 of 2011 provides as follows:

“(2) In exercise of its jurisdiction under Article 162 (2) (b) of [the Constitution](#), the Court shall have power to hear and determine disputes—

(e) any other dispute relating to environment and land.”

The primary claim by the plaintiffs in this suit is that the sale of the particularized properties were illegal, unlawful and fraudulent. In my view, the primary prayers, just like the primary issues for determinations herein are not about the 1st defendant's exercise of its statutory power of sale over the charges it allegedly had with the 1st plaintiff, but those emanating or relating to the alleged fraudulent and illegal transactions by the 1st defendant. The suit therefore falls under the jurisdiction of this court.



- c. Locus standi was described in *Law Society of Kenya vs Commissioner of Lands & Others*, Nakuru High Court Civil Case No.464 of 2000, as follows:

“Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”.

Also, in the case of *Alfred Njau and Others -Vs- City Council of Nairobi* [1982] KAR 229, the Court also held that:

“the term 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”.

It behooves the court to distinguish the right under which the plaintiffs’ suit is based, as the defendants are alluding that the plaintiffs are only seeking reliefs as chargors, which is provided under section 103 of the *Land Act*. However, the prayers in the plaint are clear in the sense that the plaintiffs are seeking inter alia for the court to declare that the charges, further charges and second further charges registered against the 2nd to 4th plaintiffs’ listed properties by the 1st defendant were premised on fraud, forgery and are void and unenforceable against the 2nd to 4th plaintiffs; that the public auctions and private treaty over sale of parcels numbers 44, 147, 154 and 586 to the 3rd to 7th defendants were illegal and fraudulent; rectification of the registers of the above parcels to expunge the transfers made to the said defendants, and order for them to give vacant possession and or compensate the plaintiffs at current market values, and permanent injunction against 1st to 4th defendants. I have perused the copies of the certificates of lease and search that have been filed with the plaintiffs’ lists of documents, and noted they were in the name of the 3rd plaintiff. That I have also noted from paragraph 1 of the plaint that the 4th plaintiff is described as a joint executor of the will of Tahir Sheikh Said Ahmed, deceased, and in view of the provisions of Order 1 Rule 9 of the Civil Procedure Rules, and considering the court do not need to make any final determination on any issue of fact or law at this interlocutory stage, I find this suit as framed will not be prejudicial to the defendants, by the participation in the litigation of the plaintiffs. I therefore find the plaintiffs are with capacity/locus in the suit, and the 1st defendant contestation that the plaintiffs are vexatious litigants and their advocates should be barred to be without merit.

- d. On res judicata, section 7 of the *Civil Procedure Act*, Chapter 21 of Laws of Kenya provides as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

In the case of *Njangu vs Wambugu & Another*, Nairobi HCCC No.2340 of 1991 (unreported), the court held that:

“If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case



some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....”

In the case of *Siri Ram Kaura – Vs – M.J.E. Morgan*, CA 71/1960 (1961) EA 462 the then EACA stated that:

“The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata...

The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have ascertained by me before ...

The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.

It is therefore not permissible for parties to evade the application of Res judicata by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given in the former suit.”

The learned Counsel for the 1st defendant has submitted that plaintiffs’ application and suit herein, are res judicata to the extent of the issue relating to the charge, that the courts have already expressed its decision on in the various suits before this court, High Court and Court of Appeal. The as the issue of the suit being res judicata is being raised at the preliminary stage, I do not wish to go deep into the merits or demerits of the suit, without having an opportunity of hearing the witnesses, but will proceed to exercise my discretion judiciously, in respect of the issues raised in the applications.

- e. I have observed that the other aforementioned suits are in respect of charges allegedly registered in favour of the 1st defendant, but which the plaintiffs are challenging on grounds of fraud and illegality. It is crystal clear that the injunction orders sought by the plaintiffs over the particularized suit properties are primarily against any interference/disposal of the said plots by the new or current owners, the 3rd to 5th defendants, and not against any threatened exercise of the statutory power of sale by the 1st defendant, per se. The above leads the court to find that the suit herein, and the 1st application that premised on it, are therefore not res judicata.



- f. I wish to start by determining whether the 4th defendant's undated replying affidavit that was not commissioned, amounts to a valid response to the plaintiffs application. In the case of Z-U-DG v SJK-U (2021) eKLR the court held as follows: -

“An affidavit is a statement made on oath. It is the jurat which elevates a written statement to the status of an affidavit. Without a jurat and in absence of commissioning by a Commissioner of Oaths, a Magistrate or a notary public the statement remains a mere unsworn written document and does not have the legal value of an affidavit.”

In the case of Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 Others (2018) eKLR the Supreme Court made the observation:

“We have no hesitation in finding that the purported Replying Affidavit filed by the 1st Respondent is fatally defective as the same contravenes all the legal requirements for the making of an affidavit. Hence it has no legal value in the matter before us. We have checked all the eight copies of the Replying Affidavit as filed in the Court Registry and confirmed that none of the copies was signed, commissioned and dated. Consequently, as the same is defective, it is deemed that there is no Replying Affidavit on record filed by the 1st Respondent.”

It further held: -

“A Replying Affidavit is the principal document wherein a respondent's reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed. Absence of this foundational pleading, the Replying Affidavit, it follows that even the Written Submissions purportedly filed by the 1st Respondent on 17th August, 2018 are of no effect. Curiously, we further note that even the said Written Submissions are not dated, though this possibly might not have been fatal had the foundational document, the Replying Affidavit, been in order. From a perusal of the Written Submissions, it is clear to us that they are substantially based and relies on the undated and unsworn Replying Affidavit. Also, there are no Grounds of Objection raising any specific points of law of any preliminary or jurisdictional nature. The upshot is that as the 2nd and 3rd Respondents had categorically stated that they do not oppose the application, the Court will therefore be excused for therefore deeming the application as opposed entirely.”

From the foregoing precedents, the court do not need to consider the contents of the 4th defendant's replying affidavit, as it contravenes the applicable law and is hence defective. The said affidavit is without much ado, struck out.

- g. In determining the 1st application, it is important to remember the threshold the plaintiffs have to establish as was set in the celebrated case of Giella Versus Cassman Brown (1973) EA 358, which position was adopted in the case of Nguruman Limited versus Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that;

“in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.



These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.

What the plaintiffs need to establish for the court to find in their favour is first a prima facie with a probability of success, secondly, demonstrate the likely irreparable injury they are to suffer if the temporary injunctive orders are not granted, and thirdly allay any doubts by showing that the balance of convenience tilts towards the issuing the said orders in their favour.

- h. A prima facie case was discussed in the case of *Mrao Ltd Versus First American Bank of Kenya Ltd (2003) eKLR* in which the Court of Appeal court stated that:

“... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

I have perused the copies of the certificate of leases and certificates of searches attached by the plaintiffs among other documents, and even though not all the plaintiffs were the registered owners of the suit properties at the material times, before the alleged illegal, unprocedural and fraudulent transfers to the 3rd to 7th defendants, by the 1st defendant, I find they have shown a prima facie case with a probability of success.

- i. In the case of *Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) eKLR* the court expressed itself on what is meant by irreparable injury as follows;

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

From the availed affidavit evidence, the suit properties have been sold and transferred to the new owners. There is nothing that would stop the new owners of the said properties from further dealing with those properties, even in ways that would change their legal status, before the court determines this suit. In view of the nature of the dispute herein, and the high values of the properties involved, I find the plaintiffs have shown the likelihood of them suffering irreparable loss in case the suit properties are dealt with in a way that would place them out of reach of the court. It is therefore necessary that the injunction order to protect the legal status of the said properties is issued.

- j. If the court is in doubt on the whether or not the plaintiffs would be exposed to irreparable loss, the balance of convenience test would have come in handy. In the *Pius Kipchirchir case [supra]* the court held:

“The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the



balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.

I am satisfied that there would be a greater inconvenience if the suit properties are further disposed off to third parties, and hence it is only prudent that this court allows the injunction. This determination in respect of the plaintiffs’ application inevitably means the 2nd application by the 1st defendant for striking out the 1st application, and setting aside the interim order of 14th December 2023, is without merit.

- k. With regard to the participation of the 6th and 7th defendants, the facts presented prima facie show that it is not necessary that they participate in the proceeding. First, though they admitted in their affidavit evidence that they paid Kshs. 45,000,000 under the aborted sale agreement with the 1st defendant, they claimed that they were never registered as proprietors or took possession of the particularized land. That was because of an order in HCMISC APP No. E119 of 2022, and the fact that the Assets and Recovery Agency, had placed a restriction over its title. Further, that they have filed ELC No. E044 of 2023 against the 1st defendant with regards to the suit property 586, which fact I have confirmed through the Case Tracking System. That suit being number E044 of 2023 was filed before this suit, E049 of 2023. There is however nothing to show that the plaintiffs knew of the existence of EO44 of 2023 when they filed the instant suit against the 6th & 7th defendants and others. However, now that the plaintiffs know of the existence of that suit, they should take legal advice on whether they have a specific claim that they would rather pursue through that other suit in view of the disclosed facts. I therefore find there being no specific relief sought against the 6th & 7th defendants by the plaintiffs, they are not necessary parties for the issues herein to be effectually and completely determined. The 3rd application by the 6th and 7th defendants has merit. Had evidence been availed that the plaintiffs knew of the existence of E044 of 2023, by the time they filed this suit, I would have condemned them to pay the costs of the 3rd application to the 6th and 7th defendants. I see no basis of directing the 1st defendant to pay the 6th & 7th defendants costs in the application when it was not the one that sued or joined them in the suit and or application.
- l. Under Section 27 of the *Civil Procedure Act* Chapter 21 of Laws of Kenya, costs always follow the event unless where there is a good reason to depart from the general rule. This position was reiterated in *Party of Independent Candidate of Kenya vs Mutula Kilonzo & 2 Others, HC EP No. 6 of 2013* where the court held inter alia that: -

“It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is a matter in which the trial Judge is given discretion.But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

Having found that the plaintiffs and the 6th & 7th defendants were successful in their respective applications, and that the 1st defendant was not, and in view of the contestations between the



parties herein, I find it is in the best interest of justice in the suit that costs abide the outcome of the suit.

12. Flowing from the foregoing, the court finds and orders as follows:

- a. That the plaintiffs' application dated 13th December 2023 is with merit and is hereby allowed in terms of prayers (4) and (5).
- b. That the 1st defendant's application dated 19th January 2024 is without merit and hereby dismissed.
- c. That the 6th & 7th defendants application dated 26th January 2024 is with merit and is allowed in terms of prayer (b) and their names hereby struck out from this suit.
- d. Costs in each application to abide the outcome of the suit.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 24TH DAY OF JULY 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Plaintiffs : Mr Kongere

Defendants : Mr Wawire for 1st Defendant

M/s Nafula for 3rd Defendant.

Mr Achoka for 4th Defendant.

M/s Njuguna for 5th Defendant.

M/s Muyaa for 6th & 7th Defendants

Leakey – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

