



REPUBLIC OF KENYA



**Maina v Nyangweso & 5 others (Environment & Land Case
E012 of 2024) [2024] KEELC 6016 (KLR) (18 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6016 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E012 OF 2024
LL NAIKUNI, J
SEPTEMBER 18, 2024**

BETWEEN

EPHRAIM MWANGI MAINA PLAINTIFF

AND

GEORGE NYANGWESO 1ST DEFENDANT

LAND REGISTRAR MOMBASA 2ND DEFENDANT

LIKONI POLICE STATION 3RD DEFENDANT

ALI SHEIKHAH SALIM 4TH DEFENDANT

AMBROSE MGHENYI MWALUMA 5TH DEFENDANT

ALI RAMADHAN JUMA 6TH DEFENDANT

RULING

I. Introduction

1. The Honourable Court is tasked with the hearing and determination of the Notice of Preliminary objection dated 22nd May, 2024 and filed in Court on 6th June, 2024 by Ali Ramadhan Juma, the 5th Defendant herein. At the same time, the Honourable Court is also caused to make a determination of the Notice of Motion application dated 20th February, 2024 by Ephraim Mwangi Maina, the Plaintiff/Applicant herein brought under the dint of the provision of Sections 1A, 1B and 3A of the *Civil Procedure Act* Cap. 21 and Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 respectively. Ideally, for convenience sake, the Honourable Court has decided to tackle with all these twin pleadings simultaneously and deliver one omnibus ruling.
2. Upon service of the Notice of Preliminary objection and the Notice of Motion application dated 20th February, 2024, the 5th Defendant responded through filing of Replying Affidavit sworn on 22nd May,



2024. Additionally, the 3rd Defendant also responded to the Notice of Motion application through filing of a Replying Affidavit opposing the application.

II. The Plaintiff's Application

3. The Plaintiff/ Applicant sought the following orders:-
 - i. Spent.
 - ii. Spent.
 - iii. That upon inter - partes hearing on a date to be ordered by the Court, an Order of interlocutory mandatory injunction be granted ordering the 3rd, 4th and 5th Respondents whether by themselves or through their servants, agents and/or employees to vacate and be removed and/or evicted from the Applicant's parcel of land Title No. Mombasa /Mainland South/ Block V/ 48 pending the hearing and determination of this suit.
 - iv. That costs of this application be provided for.
4. The application is supported by the grounds, testimony and the 21 paragraphed supporting affidavit of Ephraim Mwangi Maina, the Plaintiff/Applicant herein accompanied with five (5) annexures marked as "EMM - 1 to 5" annexed thereto. He averred that:-
 - a. He was the lawful and absolute registered legal proprietor of all that land Title No. Mombasa/ Mainland South/ Block V / 48 measuring approximately 1.44 acres since 11th June, 1997. Annexed hereto and marked as "EMM - 1" a copy of the Title.
 - b. He had been in use and exclusive quite possession and occupation of the aforesaid land since 11th June 1997 without any interruption.
 - c. On 12th February, 2024 and on diverse dates in the month of February 2024 his aforesaid land was attacked and invaded by the 2nd and 3rd Defendants/Respondents accompanied by goons and unknown other persons and forcefully and violently evicted him and his servants and/or employees from his land.
 - d. The raid and forceful invasion of his property by the 2nd and 3rd Defendants/Respondents accompanied by goons and other persons unknown to him was unlawful, illegal and flagrant violation of his Constitutional right of secure protection of his property.
 - e. Using violence and force with the assistance and protection from the 2nd Defendant/ Respondent who was a DCIO at Likoni Police Station Mombasa, the 3rd Defendant/ Respondent was installed in his parcel of land known as Title No. Mombasa/Mainland South/ Block V/ 48 and had forcefully taken occupation of the said parcel of land and to date the 3rd Respondent remains in forceful, violent, illegal and unlawful occupation of his property. The land was currently barricaded by hired guards to prevent him to access it.
 - f. The 3rd Defendant/Respondent produced and paraded a copy of Title No. Mombasa / Ms / Block V/48 issued and registered in favour of 3rd Respondent on 15th January 2024 by the 1st Respondent. Annexed in the affidavit and marked as "EMM - 2" a copy of the said Title.
 - g. The title No. Mombasa/ Ms/ Block V/ 48 was fraudulent and does not relate to his land being Title No. Mombasa/ Mainland South/ Block V/ 48.
 - h. He came to learn that the 4th and 5th Respondents claimed and obtained ex parte orders for title described as Title No. CR. 8831, Subdivision No. 48 (org. No. 9/3 Of Section V Mainland



South through a suit filed in the Chief Magistrate Court Mombasa as CMCC ELC NO E3 (O.S) OF 2020 and later through Mombasa High Court ELC MISC. Application [No. E037 Of 2022](#) which was filed by 4th and 5th Defendants/Respondents against the 1st Respondent and others seeking a committal Order to civil jail against the 1st Defendant/Respondent and others for disobedience to comply with the Orders issued by the Chief Magistrate on 18th March 2021 in CMCC ELC NO. E3 (O.S) of 2020. Annexed in the affidavit and marked together as “EMM - 3 (a) and (b)” and “EMM - 4” were copies of the said Orders issued by the Chief Magistrate and the Ruling of High Court, respectively.

- i. The land which was the subject matter in both Chief Magistrate CMCC ELC NO. E3 (O.S) of 2020 and in the High Court ELC Misc Application [On No. E037 of 2022](#) was described as land parcel Subdivision No. 48 (original No. 9/3), Section V, Mainland South, CR NO. 8831. The aforesaid land is not the same land as his land Title No. Mombasa/ Mainland South/block V/ 48. Annexed in the affidavit and marked as “EMM - 4” a copy of Ruling in High Court ELC Misc Application [No. E037 of 2022](#) and Orders issued by the Chief Magistrate on 18th March 2021 in CMCC ELC NO.E3 (O.S) of 2020 as annexed in paragraph 9 showing the description of the said land.
- j. The 3rd Defendant/Respondent has fraudulently claimed to have purchased land parcel SUB - Division No. 48 (original No. 9/3), Section V, Mainland South, Cr No. 8831 from the 4th and 5th Defendants/Respondents and issued with Land Title No. Mombasa/ Ms/ Block V/ 48 by the 1st Defendant/Respondent. This allegation is plainly fraudulent.
- k. The suit land and subject matter in both the CMCC ELC NO.E3 (O.S) of 2020 and High Court ELC MISC Application No. E037of 2022 was not land Title No. Mombasa/ MS/ Block V/ 48 which title the 1st Defendant/Respondent issued to the 3rd Defendant/ Respondent on 15th January 2024. The title of land in those suits was land parcel Sub - Division No. 48 (original No. 9/3), Section V, Mainland South, Cr No.8831. Annexed in the affidavit and marked as “EMM - 5” was a copy of the said Title.
- l. The 1st Defendant/Respondent knowingly, recklessly, negligently and in willfully breach of his statutory duty caused to issue Title No. Mombasa/ms/block V/48 to the 3rd Respondent purporting to enforce the Order and/or Decree given in Chief Magistrate Court CMCC ELC NO. E3 (O.S) of 2020 and High Court ELC MISC. Application [No. e037 of 2022](#), which was not the case.
- m. On diverse dates between 1st February and 12th February 2024 the 2nd Defendant/ Respondent negligently without lawful authority together with the 3rd Defendant/ Respondent accompanied by goons forcefully and violently entered and trespassed upon his aforesaid land and evicted his caretakers/ servants and/or employees from his land and wantonly destroyed and damaged his properties on the land and had taken occupation of the said land claiming the land belonged to the 3rd Defendant/Respondent upon strength of Title No. MOMBASA / MS / BLOCK V/48 issued by the 1st Defendant/Respondent to the 3rd Defendant/Respondent and remain in forceful and illegal occupation of the land which has been barricaded both by the 2nd and 3rd Defendants/Respondents and other unknown goons.
- n. The 2nd Defendant/Respondent had conspired with the 1st, 3rd, 4th and 5th Defendants/ Respondents to dispose off and/or sell his land Title No. Mombasa/ Mainland South/ Block V/ 48 by using fraudulent Title No. Mombasa/MS/ Block V/ 48 and purporting it to refer to his land. A number of interested purchasers have frequently come to inspect his land with



intent to purchase it. His servants and/or employees had been thrown off his land which was currently cordoned by goons hired by 3rd Defendant/Respondent with the knowledge and nod from the 2nd Defendant/Respondent.

- o. The 3rd Defendant/Respondent had no right or interest in his property and his unlawful forceful eviction of himself, servants and/or employees from his property and his subsequent occupation thereof was a flagrant violation and breach of his property rights guaranteed under the law and the Constitution in the Bill of Rights.
- p. The 1st Defendant/Respondent had ignored and/or refused to issue a Search Certificate upon request and application in respect of his parcel of land being Title No. Mombasa/ Mainland South/ Block V/48.
- q. The 3rd Defendant/Respondent violently trespassed to his parcel of land Title No. Mombasa/ Mainland South/ Block V/ 48 with the assistance of the 2nd Defendant/Respondent was a flagrant oppressive act of impunity.
- r. Accordingly, unless restrained and ordered to restore his possession and occupation of the land by way of a mandatory injunction Order of this Court, ordering the 3rd, 4th and 5th Defendants/ Respondents together with their servants and/or agents from trespassing, entering, evicting and occupying his parcel of land Title No Mombasa/mainland South / Block V/ 48 his property rights guaranteed under the law and the Constitution were breached and violated and he had suffered severe in compensable loss and damage.
- s. The Affidavit was sworn in support of the prayers sought in the Notice of Motion dated 20th February 2024.

III. The 5th Defendant's response to the Notice of Motion application dated 20th February, 2024

- 5. The 5th Defendant opposed the Application through a 17th Paragraphed Replying Affidavit sworn by ALI RAMADHAN JUMA, the 5th Defendant/ Respondent herein on 22nd May, 2024 with six (6) annexures marked as "ASS - 1 – 6". The 5th Defendant deponed that:-
 - i. The 4th Defendant who was now deceased and himself had been living on Plot Title Number CR 8831, Subdivision No.48 (Orig No 9/3 Section V Mainland South) uninterrupted for a period of over 12 years.
 - ii. After the lapse of the 12 years they filed Mombasa CMCC ELC No. E003 of 2020 (O.S): Ali Ramadhan Juma & Ano – Versus - Forest Houdon Megson & Another seeking for orders that we be declared proprietors and their interests be registered adversely against the registered proprietors Forest Houdon Megson and Patricia Philomena Megson. (See Annexure marked as "EMM – 3" of the Plaintiffs Supporting Affidavit) that the 4th Defendant (now deceased) and the 5th Defendants were residing on Plot Title Number CR 8831, Sub - division No. 48 (Orig No 9/3 Section V Mainland South) for a period of over 12 years uninterrupted from the registered owners Forrest Houdon Megson and Mary Patricia Philomena Megson;
 - iii. The case proceeded for hearing and Judgment was delivered on 12th March, 2021 in their favour. (See Annexure marked as "ASS 7" on the 3rd Defendant's Replying Affidavit).
 - iv. Pursuant to the aforesaid Judgment being delivered, they proceed to register the property under their names and obtain a title from the 1st Defendant's offices;



- v. They engaged a surveyor Pimatech Land Surveyors who conducted a survey on the property and prepared a survey report and it was noted and found that the parcel of land known as Title Number CR 8831, Sub - division No. 48 (Orig No. 9/3 Section V Mainland South was one and the same parcel known as LR Number Mombasa/Mainland South/Block V/48, (See Annexure marked as “ASS – 8” on the 3rd Defendant’s Replying Affidavit).
- vi. The surveyor further noted that the change of the title was due to the conversion that was done by the Ministry of Lands to convert titles registered under the old regime of the land from the Registration of title Act (RTA) regime to the Land Registration Act (LRA) regime.
- vii. They then proceeded to obtain the title under the new land law regime being LR Number Mombasa/Mainland South/Block V/48.
- viii. For the avoidance of doubt, the Surveyor one Mr. B.C. Mwanyungu in his Report dated 23rd September 2021 observed as follows:
 - a. They hereby confirmed that the property they visited was parcel 48, Block V Mainland South, formerly MS/V/48;
 - b. The survey showed that parcel number 48, Block V mainland south on the RIM sheet number 9 201/1 was one and the same parcel number MS/V/48 on Deed Plan no.34629;
 - c. It was noted that the parcel of land was a subject of conversion to repealed Registration of Land Act (RLA).
- ix. After obtaining the title in their favour, they entered into a transaction on 18th May 2023 with the 3rd Defendant who conducted due diligence on the property including but not limited to:-
 - a. conducting a search at the 1st Defendant’s offices;
 - b. physical inspection of the property and found that we were the registered proprietors and in actual physical possession of the suit property;
 - c. perusing the court documents in Mombasa Chief Magistrates Court being MCELC E003 of 2020: Ambrose Mghenyi Mwaluma & Another -vs- Forrest Houdon Megson & Another
- x. They then proceeded to transfer the property to the 3rd Defendant for value which was lodged at the 1st Defendant’s offices and thereafter the 3rd Defendant obtained title of the property in his favour. (See Annexures marked as “ASS 2 – 6” on the 3rd Defendant’s Replying Affidavit).
- xi. Due process was followed right from the start in instituting an adverse possession claim against the registered owners of the Title Number CR 8831, Subdivision No. 48 (Orig No. 9/3 Section V Mainland South) currently known as LR Number Mombasa/ Mainland South/ Block V/48 upto obtaining a title in their favour.
- xii. The Plaintiff had failed to established a prima facie case with a probability of success, had failed to establish that if the injunction was not granted, it will suffer irreparable injury that could not be compensated by an award or damages and the balance of convenience lies in favour of the Defendants.
- xiii. From the foregoing, the present application was an abuse of the court process, unmeritorious, mala fides and should be dismissed with costs.



IV. The 5th Defendant's Preliminary Objection

6. The 5th Defendant/Applicant raised a 5 paragraphed Preliminary objection on points of law on the grounds that:-
 - a. That prayer (iii) of the Plaint is incapable of being granted as it seeks a Judicial Review order by way of a Plaint;.
 - b. That there is an already existing Court Order in CMCC ELC No. E003 of 2020 (OS) and ELC Misc ApplicatiOn No. E037 of 2022 effectively endorsing the 4th and 5th Defendants as the proprietors of the suit property Mombasa/MS/Block V/48 which orders have not been appealed against.
 - c. That in filing a fresh claim, the Plaintiff seeks this Honourable Court to sit on an appeal from the decision made in CMCC ELC No. E003 of 2020 (O.S) without following the set up mechanism for a grievant to seeks redress through an appeal.
 - d. That as such, this Honourable Court's jurisdiction has not been properly invoked thus lacking the necessary jurisdiction to entertain this claim.
 - e. That the Plaint is thus fatally defective and as such ought to be struck out with costs.

V. Submissions

7. On 12th June, 2024 while all the parties were present in Court, they were directed to have both the Notice of Preliminary objection and the Notice of Motion application dated 20th February, 2024 disposed of simultaneously by way of written submissions and all the parties complied. Unfortunately, at the time when the Court retired to write this ruling none of the parties had filed their written submissions. Thus, the Court proceeded and thereby reserved the ruling on its merit to be delivered on Notice.

VI. Analysis and Determination

8. I have carefully read and considered the pleadings herein and the relevant provisions made by the by the Learned Counsels. In order to arrive at an informed, reasonable and Equitable decision, the Honorable Court has six (6) framed the following issues for determination. These are:-
 - a. Whether the Notice of Preliminary objection meets the threshold on pure points of law as required by Law and precedents?
 - b. Whether the suit as filed offends the mandatory provisions on grant of Judicial Review orders being that it is a Plaint?
 - c. Whether the suit offends the mandatory provisions of Section 7 of the Civil Procedure Act for being res judicata?
 - d. Whether in filing a fresh claim, the Plaintiff seeks this Honourable Court to sit on an appeal from the decision made in CMCC ELC No. E003 of 2020 (O.S) without following the set up mechanism for a grievant to seek redress through an appeal
 - e. Whether the Plaintiff Applicant has met the threshold for granting of orders of interlocutory mandatory injunction and whether the same are in line with Order 4O Rule 1 of the Civil Procedure Rules, 2010



- f. Who bears the Costs of the Notice of Preliminary objection dated 22nd May, 2024 and the Notice of Motion application dated 20th February, 2024.

Issue No. a). Whether the Notice of Preliminary objection meets the threshold on pure points of law as required by Law and precedents?

9. Under this sub - title, the Honourable Court shall examine the merits of the Preliminary objection. According to the Black Law Dictionary a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”The above legal preposition has been made graphically clear in the now famous case of Mukisa Biscuits Manufacturing Co. Limited (Supra) where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure points of law. The Learned Judge then held that:-“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

10. In furtherance of this point, I wish to cite the case of “Attorney General & Another – Versus - Andrew Mwaura Githinji & another [2016] eKLR”:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-

- i. A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
- ii. A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
- iii. The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

11. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. In determining this instant Notice of Preliminary Objection, the Court will first consider what amounts to a Preliminary Objection and then Juxtapose the said description herein and come up with a finding on whether what has been raised herein fits the said description.

12. The above legal preposition has been made graphically clear in the now famous case of “Mukisa Biscuits – Versus - Westend Distributor Ltd [1969] EA 696”, the court observed that: -

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. ”.



13. The same position was held in the case of “Nitin Properties Ltd – Versus - Jagjit S. Kalsi & another Court of Appeal No. 132 of 1989[1995-1998] 2EA 257” where the Court held that;

“ A preliminary Objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of Judicial discretion.”

14. Similarly in the case of “United Insurance Company LTD – Versus - Scholastica A Odera Kisumu HCC Appeal No. 6 of 2005(2005) LLR 7396”, the Court held that;

“ A preliminary Objection must be based on a point of law which is clear and beyond any doubt and Preliminary Objection which is based on facts which are disputed cannot be used to determine the whole matter as the facts must be precise and clear to enable the Court to say the facts are contested or disputed .”

15. Therefore from the above holdings of the Courts, it is clear that a preliminary Objection must be raised on a pure point of law and no fact should be ascertained from elsewhere. See also the case of “In the matter of Siaya Resident Magistrate Court Kisumu HCCMisc. [App No. 247 of 2003](#)” where the Court held that;

“ A Preliminary Objection cannot be raised if any facts has to be ascertained.”

16. Taking into account the above findings and holdings of various Courts on what amounts to a preliminary Objection, the Court now turns to the grounds raised by the 5th Defendant herein which are that prayer (iii) of the Plaint is incapable of being granted as it seeks a judicial review order by way of a Plaint; there is an already existing Court Order in CMCC ELC No. E003 of 2020 (OS) and ELC MIsc application [No. E037 of 2022](#) effectively endorsing the 4th and 5th Defendants as the proprietors of the suit property Mombasa/MS/Block V/48 which orders have not been appealed against; in filing a fresh claim, the Plaintiff seeks this Honourable Court to sit on an appeal from the decision made in CMCC ELC No. E003 of 2020 (O.S) without following the set up mechanism for a grievant to seeks redress through an appeal and as such, this Honourable Court's jurisdiction has not been properly invoked thus lacking the necessary jurisdiction to entertain this claim. The 5th Defendant also contended that the Plaint was thus fatally defective and as such ought to be struck out.

17. In this case, I am satisfied that the objection raises pure points of law in that the preliminary objection is the doctrine of res judicata and the jurisdiction of the court. However, the Court will now proceed to consider whether the said Preliminary Objection is or not sustainable in the given circumstances.

ISSUE No. b). Whether the suit as filed offends the mandatory provisions on grant of judicial review orders being that it is a plaint.

18. Under this sub title, the issue raised for determination a party can seek judicial review orders in a plaint and if that act renders the suit defective. the Court finds it useful to add that prayer (iii) sought in the suit is a declaratory one. The provision of Order 3 Rule 9 of Civil Procedure Rules, 2010, states as follows:-

“No suit shall be open to objection on the ground that a merely declaratory order is sought thereby, and the court may make a binding declaration of right whether any consequential relief is or could be claimed or not.”



19. Further in the case of “Nicholas Njeru – Versus – Attorney General & 8 Others [2013] eKLR”, an argument or objection similar to the one raised in this case was rejected and the court while doing so observed as follows:

“We agree these prayers could have perfectly fitted the bill under judicial review as they seek to supervise the powers of persons exercising public authority. However, we do not entirely agree with the learned Judges observations that the court had no jurisdiction to grant a declaratory order. We know of no limit to the powers of the court to grant a declaratory order except such limit as may in its discretion impose upon itself.”

20. It appears to this Court that suits in which declaratory orders are sought enjoy a special place as regards their hearing on merits. Therefore, it is manifest that objections seeking to end them preliminarily are in law discouraged. Thus, I discern that under this ground the Preliminary objection is outrightly overruled as it is not sustainable whatsoever.

Issue No c). Whether the suit offends the mandatory provisions of Section 7 of the Civil Procedure Act, Cap. 21 for being Res Judicata

21. Under this Sub heading, the main substratum is whether this suit offends “the Doctrine of Res Judicata” and thus should be struck out altogether. The Honourable Court now wishes to apply the able legal principles, the provision of Section 7 of the Civil Procedure Act, Cap. 21 provides:-

“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”

22. This Court has previously held in the case of “Kenya Anti – Corruption Commission – Versus - Lobo & another (Sued as legal representative/administrator of the Estate of Paul Lobo Benard Atati) & another (Environment & Land Case 175 of 2009) [2024] KEELC 5261 (KLR)”, that:-

“The doctrine of res judicata is founded on public policy and is aimed at achieving two objectives namely; that there must be finality to litigation and the individual should not be harassed twice with the same account of litigation. This was stated in the Court of Appeal case of “Nicholas Njeru – Versus - the Attorney General and 8 Others Civil Appeal No. 110 of 2011 [2013] eKLR”.”

23. The Black’s law Dictionary 10th Edition defines “Res Judicata” as

“An issue that has been definitely settled by judicial decision...the three essentials are

1. an earlier decision on the issue,
2. a final Judgment on the merits and
3. the involvement of same parties, or parties in privity with the original parties...”

24. It is now old hat that the said doctrine applies to both suits and applications. This sound legal position has been held through a myriad of cases as I shall be spelling out herein. To begin with it was held in



“Abok James Odera – Versus - John Patrick Machira Civil Application No. Nai. 49 of 2001”. However, as was held in the said suit, to rely on the defence of Res Judicata there must be:-

- i. a previous suit in which the matter was in issue;
- ii. the parties were the same or litigating under the same title;
- iii. a competent court heard the matter in issue;
- iv. the issue had been raised once again in a fresh suit

25. Further, in the case of “Christopher Kenyariri – Versus - Salama Beach (2017) eKLR”, the court clearly stated the ingredients to be satisfied when determining “Res Judicata” thus:-

“.....the following elements must be satisfied...in conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit
- b. Former suit between same parties or parties under whom they or any of them claim
- c. Those parties are litigating under the same title
- d. The issue was heard and finally determined.
- e. The court was competent to try the subsequent suit in which the suit is raised.”

26. The rule or doctrine of “Res Judicata” serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of “Res Judicata” thus rest in the public interest for swift, sure and certain justice.

27. A party is at liberty to choose a forum which has the jurisdiction to adjudicate his claim, or choose to forego part of his claim and he cannot be heard to complain about that choice after the event and it would be otherwise oppressive and prejudicial to other parties and an abuse of the Court process to allow litigation by instalments.

28. However, it is trite that the mere addition of parties in a subsequent suit does not necessarily render the doctrine of “Res Judicata” inapplicable since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings. If the added parties peg their claim under the same title as the parties in the earlier suit, the doctrine will still be invoked since the addition of the party would in that case be for the sole purpose of decoration and dressing and nothing else. Under explanation 6 to the provision of Section 7 of the *Civil Procedure Act*, Cap. 21 where persons litigate bona fide in respect of a public right claimed in common by themselves and others, all persons interested in such right shall, for the purposes of the section, be deemed to claim under the persons so litigating.

29. From the foregoing, it is clear that for the Doctrine of “Res Judicata” to suffice, a Court should look at all the four corners set out above namely; the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suits; the former suit must have been between the same parties or parties under whom they claim; the parties must have



- litigated under the same title; the Court which decided the former suit must have been competent and the former suit must have been heard and finally decided by the Court in the former suit.
30. Therefore, it is clear that parties are not 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 to the former suit.
31. In this case, the Plaintiff in this matter was not the one in CMCC ELC No. E003 OF 2020 (OS), where the suit was for Land adverse possession. What is the common issue in both suits? The suit property in CMCC ELC No. E003 OF 2020 (OS) was title No. CR 8831 Sub - division No. 48 (Original No. 9/3 of Section V Mainland South while in the instant suit is Title No. Mombasa Mainland South/ Block V/ 48. According to the Plaintiff in paragraph 14 of the Plaint dated 20th February, 2024 the land which was the subject matter in the lower court is not the same land as the Plaintiff’s land. The only parties that are similar are the 4th and 5th Defendants in the instant suit who are the Plaintiffs in the former suit.
32. The issues raised herein require to be proved at higher standards that the ordinary balance of probabilities in civil litigation. For the above facts to be proved or disapproved, there is need for direct evidence to be adduced and tested through cross-examination of witnesses before the court can make conclusions. This position has been up held by our superior courts on numerous occasions. In the case of:- “Republic – Versus - National Transport & Safety Authority & 10 others Ex - Parte James Maina Mugo [2015] eKLR” where it was held:-
- “..... where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review. The rationale for this is that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits”
33. Notably this Court has held recently in some of these cases:- “Ware Transport Limited – Versus - Third Engineering Bureau of China City Construction Group Co Limited Tiba Freight Forwarders Limited (Third party) (Environment & Land Case 252 of 2021) [2024] KEELC 1550 (KLR) (7 March 2024) (Ruling)”, that land is sensitive and an emotive resource in Kenya. The complexity about the intertwining weavings and intersections between its ownership and the attachment many a person in Kenya give it so much so that it brings out the intensity of emotions attendant to it can only be discerned from the length of time some cases take and the energy and zeal they often take from both the litigant and Learned Counsel as well as judicial officers. Different scenarios present themselves to courts when they handle matters on land which draw long and protracted litigation. The said proceedings cannot be deemed to be res-judicata.
34. I reiterate that the gist of the provision of Section 7 of the *Civil Procedure Act*, Cap. 21 defines the principle of Res – Judicata to apply where the issues in the previous suit ought to have been “heard and finally decided.”
35. In the case of “Tee Gee Electrics and Plastics Company Limited – Versus - Kenya Industrial Estates Limited [2005] KLR 97” the Court stated:
- “Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by res judicata when it was heard and determined on the substantive



merits of the case as opposed to suits that are dismissed on preliminary technical points. Res Judicata bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of res judicata. The last issue (dismissal for want of prosecution) was the issue in *The Tee Gee Electrics and Plastics Company Limited – Versus - Kenya Industrial Estates Limited* [2005] KLR 97; LLR CAK 6880. Here the Court of Appeal was explicit that res judicata does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merits”.

36. In the circumstances of this case, I am guided by the provision of Articles 25 (c) and 50 (1) & (2) of *the Constitution* which provide for fair hearing as well as Article 159 (2)(d) of *the Constitution* which directs this Court to tend to the substance of the case’ and its attendant justice. I strongly hold that this suit herein is not res-judicata to the CMCC ELC No. E003 of 2020 (0S) and ELC MISC APPLICATION No. E037 of 2022 and pertinent issues have been raised that require each party to be granted an opportunity to present their case for hearing and determination on merit.
37. To my mind, the issues and the details of the properties which were being addressed and/or deliberated upon in the previous suit are separate and distinct from the issues that underpin the current suit by the Plaintiff/Respondent. Clearly, the Plaintiff herein, whose stakes a claim to ownership of the suit properties, which I have pointed out are different from the suit property in the previous suit, was not a Party to the said suit.
38. To my mind, there is a serious dichotomy between striking out of a suit and dismissing a suit. The former arises where the impugned suit suffers from a legal defect or infraction and hence same is not heard on merits.
39. Contrarily, a suit is only dismissed after same has been heard on its merits and the Rights of the Parties thereto effectively and effectually determined by the court. Premised on the foregoing dichotomy, where a suit is struck out for whatever reason, the victim of the striking out order, is at liberty to revert to court, subject to the *Limitation of Actions Act*, Chapter 22, Laws of Kenya.
40. Premised on the foregoing observation, I am of the considered view that the invocation and ventilation of the Doctrine of Res-judicata by the 5th Defendant herein was anchored on misapprehension of the underlying ingredients, which ought to have been proven. In a nutshell, my answer to issue number One, is that “the Doctrine of Res-judicata” was improperly invoked and is in any event, is inapplicable to and in respect of the suit. Once more, it is my strong view that this objection on this ground is therefore overruled and not sustainable.

Issue No. d). Whether in filing a fresh claim, the Plaintiff seeks this Honourable Court to sit on an appeal from the decision made in CMCC ELC No. E003 of 2020 (O.S) without following the set up mechanism for a grievant to seek redress through an appeal

41. Under this sub title, Contextualizing the foregoing are Articles 165(3) and (6) and 162 of *the Constitution* and Section 13 of the *Environment and Land Court Act* respectively. Article 165(3) and (6) elaborately sets out the jurisdiction of the High Court as follows:

- (3) Subject to clause (5), the High Court shall have —
 - (a) unlimited original jurisdiction in criminal and civil matters;



- (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
- (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
- (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and
- (e) any other jurisdiction, original or appellate, conferred on it by legislation.
- (6) The High Court has supervisory jurisdiction over the subordinate Courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior Court.

42. The legislation contemplated under the provision of Article 162 (3) is the *Environment and Land Court Act*, No. 19 of 2011. Under the provision of Section 13 of the said Act thereof outlines the Environment and Land Court’s jurisdiction as follows: -

- (1) The Court shall have original and appellate jurisdiction to hear and determine all dispute in accordance with Article 162(2) (b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162(2) (b) of *the Constitution*, the Court shall have power to hear and determine disputes—
 - (a) relating to environmental planning and protection, climate issues, land use, planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.
- (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom



relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*.
(emphasis added)

43. I strongly find that if there is any aggrieved party in the CMCC ELC No. E003 of 2020 (O.S), they can appeal to this court. Nonetheless, having decided before in this ruling that this matter is not res judicata, therefore, this ground of the objection fails and once more not sustainable.

Issue No. e). Whether the Plaintiff Applicant has met the threshold for granting of orders of interlocutory mandatory injunction and whether the same are in line with Order 40 Rule 1 of the Civil Procedure Rules, 2010

44. Under this sub – title the main substrata of the application here is rather straight forward. It is on whether to grant interim injunction orders or not. The application herein is premised under the provision of Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst the provisions of the law. Which provides as follows:-

Order 40, Rule 1

Where in any suit it is proved by affidavit or otherwise—

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

45. The principles applicable in an application for an injunction were laid out in the celebrated case of “Giella (Supra)”, where it was stated:-

“First an applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

46. The three conditions set out in “Giella (supra)”, need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of:- “Nguruman Limited (Supra)”,

“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. Limited - Versus - 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".

47. In dealing with the first condition of prima facie case, the Honorable Court guided by the definition melted down in *MRAO Limited – Versus - First American Bank of Kenya Ltd & 2 others* (2003) KLR 125,

“So what is a prima facie case, I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself would 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”

48. As the Court previously observed in this ruling, the Applicant averred that he was the lawful and absolute registered legal proprietor of all that land Title No. Mombasa/ Mainland South/ Block V / 48 measuring approximately 1.44 acres since 11th June, 1997. Annexed hereto and marked as “EMM - 1” is a copy of the Title. He had been in use and exclusive quite possession and occupation of the aforesaid land since 11th June 1997 without any interruption.

49. On 12th February, 2024 and on diverse dates in the month of February 2024 his aforesaid land was attacked and invaded by the 2nd and 3rd Respondents accompanied by goons and unknown other persons and forcefully and violently evicted him and his servants and/or employees from his land. The raid and forceful invasion of his property by the 2nd and 3rd Respondents accompanied by goons and other persons unknown to him was unlawful, illegal and flagrant violation of his Constitutional right of secure protection of his property. Using violence and force with the assistance and protection from the 2nd Respondent who was a DCIO at Likoni Police Station Mombasa, the 3rd Respondent was installed in his parcel of land Title No. Mombasa/mainland South/ Block V/ 48 and have forcefully taken occupation of the said parcel of land and to date the 3rd Respondent remains in forceful, violent, illegal and unlawful occupation of his property. The land was currently barricaded by hired guards to prevent him to access it. The 3rd Respondent produced and paraded a copy of Title No. MOMBASA / MS / BLOCK V / 48 issued and registered in favour of 3rd Respondent on 15th January 2024 by the 1st Respondent. Annexed in the affidavit and marked as “EMM- 2” a copy of the said Title.

50. The title No. MOMBASA/ MS/ BLOCK V/ 48 was fraudulent and does not relate to his land being Title No. MOMBASA/ MAINLAND SOUTH/ BLOCK V/ 48. He came to learn that the 4th and 5th Respondents claimed and obtained ex parte orders for title described as Title No. CR. 8831, SUBDIVISION NO. 48 (ORG. NO. 9/3 OF SECTION V MAINLAND SOUTH through a suit filed in the Chief Magistrate Court Mombasa as CMCC ELC NO E3 (O.S) OF 2020 and later through Mombasa High Court ELC MISC. APPLICATION NO. [E037 OF 2022](#) which was filed by 4th and 5th Respondents against the 1st Respondent and others seeking a committal Order to civil jail against the 1st Respondent and others for disobedience to comply with the Orders issued by the Chief Magistrate on 18th March 2021 in CMCC ELC NO. E3 (O.S) of 2020. Annexed in the affidavit and marked together as “EMM - 3 (a) and (b)” and “EMM - 4” are copies of the said Orders issued by the Chief Magistrate and the Ruling of High Court, respectively.

51. The 5th Defendant has contended that he and the 4th Defendant who was now deceased had been living on Plot Title Number CR 8831, Sub - division No.48 (Orig No 9/3 Section V Mainland South)



- uninterrupted for a period of over 12 years. After the lapse of the 12 years they filed Mombasa CMCC ELC No. E003 of 2020 (O.S): Ali Ramadhan Juma & Ano – vs - Forest Houdon Megson & Another seeking for orders that we be declared proprietors and their interests be registered adversely against the registered proprietors Forest Houdon Megson and Patricia Philomena Megson. (See Annexure as “EMM – 3” of the Plaintiffs Supporting Affidavit) that the 4th Defendant (now deceased) and the 5th Defendants were residing on Plot Title Number CR 8831, Sub - division No. 48 (Orig No 9/3 Section V Mainland South) for a period of over 12 years uninterrupted from the registered owners Forrest Houdon Megson and Mary Patricia Philomena Megson.
52. The case proceeded for hearing and judgment delivered on 12th March, 2021 in their favour. (See Annexure ASS7 on the 3rd Defendant’s Replying Affidavit). Pursuant to the judgment being delivered, they proceed to register the property under their names and obtain a title from the 1st Defendant’s offices. They engaged a surveyor Pimatech Land Surveyors who conducted a survey on the property and prepared a survey report and it was noted and found that the parcel of land known as Title Number CR 8831, Sub - division No. 48 (Orig No. 9/3 Section V Mainland South was one and the same parcel known as LR Number Mombasa/ Mainland South/Block V/48, (See Annexure ASS 8 on the 3rd Defendant’s Replying Affidavit). The surveyor further noted that the change of the title was due to the conversion that was done by the Ministry of Lands to convert titles registered under the old regime of the land from the RTA regime to the LRA regime.
53. A Court exercising is equitable jurisdiction would in the light of the pendency of this suit favour to preserve the status quo and afford parties opportunity to be heard and not to be turned away and denied access to justice. In the case of “Mbuthia – Versus - Jimba credit Corporation Ltd (Supra)”, the court held that;
- “In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the party’s cases.”
54. Similarly, in the case of “Edwin Kamau Muniu – Versus - Barclays Bank of Kenya Ltd” the court held that;
- “In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria.”
55. In the present case, the Defendants/Respondents by their action, have threatened the alienation of the suit property which will be prejudicial to the Plaintiffs/Applicants being the Legal proprietors of the suit land. Ownership of land and proof of title Regarding this first condition though, the Applicants have demonstrated a prima facie case with a probability of success at the trial as enunciated in the case of “Giella -Versus - Cassman Brown & Co. Ltd (Supra)”.
56. The court has further considered the evidence on record against the second principle for the grant of an injunction, that is, whether the Applicants might suffer irreparable injury which cannot be adequately compensated by an award of monetary damages. With regards to the second limb of the Court of Appeal in “Nguruman Limited (supra)”, held that,
- “On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate,



prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

57. On the issue whether the Applicants will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Applicants must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. It is not hidden that the Applicant’s property is at risk. The Applicant stated that the 3rd Respondent had no right or interest in his property and his unlawful forceful eviction of himself, servants and/or employees from his property and his subsequent occupation thereof was a flagrant violation and breach of his property rights guaranteed under the law and *the Constitution* in the Bill of Rights. The 1st Respondent had ignored and/or refused to issue a Search Certificate upon request and application in respect of his parcel of land being Title No. MOMBASA/ MAINLAND SOUTH/ BLOCK V/ 48. The 3rd Respondent violently trespassed to his parcel of land Title No. MOMBASA/ MAINLAND SOUTH/ BLOCK V/ 48 with the assistance of the 2nd Respondent is a flagrant oppressive act of impunity.
58. Accordingly, unless restrained and ordered to restore his possession and occupation of the land by way of a mandatory injunction Order of this Court, ordering the 3rd, 4th and 5th Respondents together with their servants and/or agents from trespassing, entering, evicting and occupying his parcel of land Title No MOMBASA/MAINLAND SOUTH / BLOCK V/ 48 his property rights guaranteed under the law and *the Constitution* are breached and violated and he had suffered severe in compensable loss and damage.
59. According to the 5th Defendant the Plaintiff had failed to established a prima facie case with a probability of success, had failed to establish that if the injunction was not granted, it will suffer irreparable injury that could not be compensated by an award or damages and the balance of convenience lies in favour of the Defendants.
60. A Court had to ensure justice is seen to be done and the Court processes are not abused. The judicial decision of “Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (Supra)” provides an explanation for what is meant by irreparable injury and it states;
- “Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”
61. Quite clearly, the Applicants would not be able to be compensated through damages as it has shown the court that their rights to the suit property as a legal proprietors and that the Respondents ought to be stopped infringing those right in any manner. The Applicants have therefore satisfied the second condition as laid down in “Giella’s case”.



62. Thirdly, the Applicants have to demonstrate that the balance of convenience tilts in their favour. In the case of “Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (Supra)” which defined the concept of balance of convenience as:

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

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

63. In the case of “Paul Gitonga Wanjau – Versus - Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR”, the court dealing with the issue of balance of convenience expressed itself thus:-

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

64. The balance of convenience tilts in the favour of the Plaintiff. The decision of “Amir Suleiman – Versus - Amboseli Resort Limited [2004] eKLR” where the learned judge offered further elaboration on what is meant by “balance of convenience” and stated:-

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

65. Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the claim of the Applicant.

66. In the case of:- “Robert Mugo wa Karanja – Versus - Ecobank (Kenya) Limited & Another [2019] eKLR” where the court in deciding on an injunction application stated;

“circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose



the property; the court is in such situation enjoined to grant a temporary injunction to restrain such acts...”

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

68. I have noted that the Plaintiff were seeking a interim mandatory injunction. Before proceeding further, its significant to appreciate the great distinction between the prohibitory injunction as envisaged in the “Locus Classicus” case of “Giella – Versus - Cassman Brown (Supra)” and a Mandatory Injunction. The first authority on making this distinction was “Shepard Homes – Versus – Sandham (1970) 3 WLR Pg. 356 Case” in which Megarry .J as he then was stated follows:-

“Whereas a Prohibitory Injunction merely requires abstention from acting, a Mandatory Injunction requires the taking of positive steps, and may require the dismantling or destruction of something already erected, or constructed. This will result in a consequent waste of time, money and materials. If it is ultimately established that the Defendant was entitled to retain the erection”.

69. Whether the Plaintiff is entitled to be granted mandatory vacating the Defendants from the suit property in the interim. Unlike Temporary Injunction which are granted only to be in force for a specified time or until the issuance of further orders from Court, Permanent Injunction are rather different, in that they are perpetual and issued after a Suit has been heard and finally determined.

70. Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Defendants in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under the provision of Sections 1A, 3 & 3 A of the *Civil Procedure Act*, Cap. 21 if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just seat, wait and watch under these given circumstances.

71. I have held before in this court in the case of “Bandari Investments & Co. Limited – Versus - Martin Chiponda & 139 others[2022] eKLR” that:-

39. It’s the effect of the order that matter as opposed to it mere positive working which makes it mandatory. The Honorable Court must be very cautious and vary that the matter before court is not only an application for mandatory injunction, but is one which, if granted would amount to the grant of a major part of the relief claimed in the action. Such applications should be approached with great circumspect and caution and the relief granted only in a clear case lest the suit is finalized at the interlocutory stage and there is nothing left to be heard and determined at the chagrin of the opposing party. Certainly, that would not be equity, fair and just at all to the other party.

The circumstances under which the Court would grant a Mandatory Injunction was well stated out by the Court of Appeal in the Case of “Malier Unissa Karim –Versus - Edward Oluoch Odumbe (2015) eKLR as follows:-

“The test for granting a Mandatory Injunction is different from that enunciated in the “Giella –Versus - Cassman Brown case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of “Kenya Breweries



Ltd-Vs- Washington Okeyo (2002) EA 109” had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 24 Halsbury Laws of England 4th Edition Paragraph 948 which states as follows:-

“A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a march on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application”.

40. Further the same Court of appeal in the case of “Jay Super Power Cash and Carry Ltd –Versus - Nairobi City Council and 20 others CA 111/2002” held that:-

“This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken balance he can pay for it”.

Additionally, based on a passage from 24 Halsbury Laws of England, Page 248, the case of Locabail International Finance Limited - Versus - Agro Export and others (1986) All ER 906, the court held thus:-

‘A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can easily be remedied, or if the Defendant attempted to steal a march on the Plaintiff...a Mandatory injunction will be granted on an interlocutory application.’

The reason for this rule on granting of Mandatory Injunction is plain. Megarry .J put it succinctly in a subsequent passage in the case of “Shepard Homes Case (Supra) as follows:-

“.....if mandatory injunction is granted on motion, there will be normally be no question of granting a further mandatory injunction at the trial; what is done and the Plaintiff has, on motion, obtained once and for all the demolition or destruction that he seeks. Where an injunction is prohibitory, however, there will often still be a question at the trial whether the injunction should be dissolved or contained”

41. From the facts herein, the 1st & 18th Defendants have been in occupation of the suit land from time memorial until they were forcefully evicted by the Plaintiff. It follows therefore that the 1st and 18th Defendants have a “prima facie” evidence and legal inclination to the Suit property.
72. What is disputed and the main contention herein is the suit property that the 4th Defendant is purported to be in occupation of. For these reasons therefore the Court finds that the suit is not ripe to grant mandatory orders and thus I decline to do so.



ISSUE No. f) Who bears the Costs of the Notice of Preliminary objection dated 22nd May, 2024 and the Notice of Motion application dated 20th February, 2024.

- 73. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
- 74. In the present case, and taking that the matter is still proceeding on, the Honourable Court elects to have the costs to be in the cause.

VII. Conclusion & Disposition

- 75. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Clearly, the 5th Defendant/ Respondent has failed in raising suitable objections to the suit and the Notice of Motion application both dated 20th February, 2024.
- 76. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-
 - a. That the Notice of Preliminary objection dated 22nd May, 2024 be and is hereby found to lack merit thus dismissed entirely.
 - b. That the Notice of Motion application dated 20th February, 2024 be and hereby allowed in the following terms:-
 - i. A temporary injunction order be and is hereby issued compelling parties and barring the parties from dealing with the suit property in any manner pending the hearing and determination of this suit.
 - ii. An order for Mandatory Injunction is declined as the same is Pre – mature in the given circumstances.
 - c. That for expedience sake, the matter be fixed for hearing on 5th December, 2024. There be a mention on 5th November, 2024 for Pre – Trial Conference in accordance with the provision of Order 11 of the Civil Procedure Rules 2010.
 - d. That the cost of these applications to be in the cause.

It is so ordered accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 18TH DAY OF SEPTEMBER 2024.

.....



HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT MOMBASA

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Mwawasa Advocate holding brief for Mr. Asige Advocate for the Plaintiff.
- c. Mr. Kimei Advocate for the 1st, 2nd and 6th Defendants.
- d. M/s. Amina holding brief for Mr. Khalid Salim Advocate for the 4th Defendant.
- e. M/s. Amina holding brief for Mr. Mohammed Advocate for the 5th Defendant.

