



REPUBLIC OF KENYA



**KENYA LAW**  
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**Jozef & another v Kizondo & another (Environment & Land Case 3 & E055 of 2024  
(Consolidated)) [2025] KEELC 524 (KLR) (13 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 524 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE 3 & E055 OF 2024 (CONSOLIDATED)**

**AE DENA, J**

**FEBRUARY 13, 2025**

**BETWEEN**

**VAN DEN BRANDE JOZEF ..... 1<sup>ST</sup> PLAINTIFF**

**J & S INVESTMENTS LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**SAID ALI KIZONDO ..... 1<sup>ST</sup> DEFENDANT**

**CAKANGA MATENDE & COMPANY ADVOCATES ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling is the subject of two applications dated 5<sup>th</sup> August 2024 and 30<sup>th</sup> August 2024. The Plaintiffs have filed two suits. ELCLC/3/2024 filed on 22/3/24 (herein 1<sup>st</sup> Suit). The other is suit No. Kwale ELCLC E055 of 2024 filed on 30/8/24 (herein subsequent suit). The suits revolve around the same properties and I found it efficient to hear and determine the applications concurrently. However, the suits have not yet been consolidated.

**Application Dated 5/8/24**

2. The application dated 5/8/24 is filed under the 1<sup>st</sup> suit by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The application seeks the following verbatim orders;
  - a. Spent
  - b. That this Honourable court be pleased to issue and order compelling the 1<sup>st</sup> Plaintiff/ Respondent to release to the 1<sup>st</sup> Defendant/Applicant the Original title to Kwale/Tiwi Beach block/393
  - c. That this Honourable court be pleased to issue any other orders that it deems fit in the circumstances.



3. The application is premised on the grounds on its face and supported by the affidavit of Saidi Ali Kizondo, the 1<sup>st</sup> Defendant. It is averred that Kwale/Tiwi Beach block/393 is jointly owned by the 1<sup>st</sup> Defendant and one Willie Mahugu Ndabi.
4. Rehashing the events that led to the refund of the sum of Kshs 16,500,000/- referred in the prayers above, it is deponed that a sale agreement dated 16/8/23 was entered between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Plaintiff in respect of Mombasa/Block/Tiwi Beach/50 for a consideration of Kshs.20,000,000/-. It was duly executed by the 1<sup>st</sup> Plaintiff as a director of the 2<sup>nd</sup> Plaintiff. That clause 3.6 thereof required the 1<sup>st</sup> Defendant to surrender the title to Kwale/Tiwi Beach BLOCK/393 as security for completion which he did. The same was to be returned to the 1<sup>st</sup> Defendant upon the said completion. Referring to paragraph 24 of the 1<sup>st</sup> Plaintiff supporting affidavit deponed on 22/3/24 it is averred that the 1<sup>st</sup> plaintiff confirms being in possession of the original Certificate of Lease for Kwale/Tiwi Beach BLOCK/393. That the deposit of the purchase price was deposited with the 2<sup>nd</sup> Defendant on the understanding that were anything to go wrong with the sale transaction then the deposit would be promptly returned to the 1<sup>st</sup> Plaintiff in compliance to the 2<sup>nd</sup> Defendants professional undertaking. The professional undertaking was attached.
5. That due to unforeseen circumstances explained to all the parties the sale could not be completed whereupon it was mutually agreed that the deposit be refunded to the 1<sup>st</sup> Plaintiff. That the 1<sup>st</sup> Plaintiff communicated to the 2<sup>nd</sup> Defendant for the refund as confirmed under paragraph 29 of the 1<sup>st</sup> Plaintiff affidavit above. That as per the said paragraph the sole reason the 1<sup>st</sup> Defendant has been sued in these proceedings was lack of refund of the purchase price. That the 2<sup>nd</sup> Defendant on 17/4/24 effected the refund of the deposit of the purchase price to the 1<sup>st</sup> Plaintiff and also paid the legal fees of the Plaintiffs counsels. The RTGs slip was attached.
6. That once the refund was made as per the agreement and professional undertaking, the Plaintiffs had no claim against the 1<sup>st</sup> Defendant. The deponent reiterates That the title is being illegally held as it was not directly in issue to the dispute but was merely a security for completion of the sale transaction subject of the refund herein. That the 1<sup>st</sup> Defendant and Mr. Ndabi have been denied the full enjoyment of their right to property as envisaged under Article 40 of *the Constitution*. That there exists special circumstances warranting the grant of the orders sought. That the Plaintiffs actions amount to unjust enrichment. Further those efforts to have the 1<sup>st</sup> Plaintiff return the said certificate of lease have been fruitless. The bundle of correspondences is attached.
7. The deponent states that the joint owners have entered into a sale agreement with a potential buyer to enable settlement of hospital bills incurred by the 1<sup>st</sup> Defendant and the original title is required as part of the completion documents. A copy of the sale agreement and medical bills are attached. It is stated that the orders sought will not occasion any prejudice to the 1<sup>st</sup> Plaintiff and will in essence prevent further suffering on the part of the applicants who have effected the refund pending the hearing of this suit. That it is in the interest of fairness and justice that the orders sought are granted.

#### **Response to the Application dated 5/8/24**

8. The application dated 5/8/24 is opposed by the replying affidavit of Van Den Brande Jozef the 1<sup>st</sup> Plaintiff and director of the 2<sup>nd</sup> Plaintiff sworn on 30/8/2024. The deponent avers the 2<sup>nd</sup> Plaintiff and the 1<sup>st</sup> Defendant agreed and entered into an agreement for the sale of the Kwale/South Tiwi Beach/50 for Kshs.20,000,000/-. That at the time of signing of the agreement the 1<sup>st</sup> Defendant was not the registered owner thereof but became owner of the said parcel from 3/10/23. That the Plaintiffs fulfilled their part of the bargain and paid the Kshs. 16,500,000/- herein as per the professional undertaking



herein. The 1<sup>st</sup> defendant breached the terms of the agreement by failing to avail the completion documents and effect transfer of the property.

9. That there was a second agreement which provided at clause 3.6 that the 1<sup>st</sup> Defendant parcel No. Kwale/Tiwi Beach BLOCK/393 was to be given as security/collateral upon failure on the part of the vendor to complete the sale of Kwale/Tiwi Beach BLOCK/50. The transfer was unsuccessful and the said clause takes effect. That the 1<sup>st</sup> Defendant does not deny signing the agreement and until the validity of the sale agreement is answered the title should not be released. That parties are bound by the terms of their contract.
10. It is further deponed that despite the 1<sup>st</sup> Plaintiff being shortchanged in the transaction a meeting was held on 6/4/24 between the 1<sup>st</sup> Plaintiff, 1<sup>st</sup> Defendant, Saidi Ali Majani, Makoroma Juma Abdalla and Saidi Mshenga Ruga to salvage the situation. The 1<sup>st</sup> Defendant admitted to presenting a fake title for Mombasa/block/Tiwi Beach block/50. A video and audio transcript of the meeting was attached. That an agency agreement for sale and purchase of the said Mombasa/block/Tiwi Beach block/50 was executed by the 1<sup>st</sup> Defendant as the Principle and Saidi Ali Majani and Makoroma Juma Abdalla as exclusive agents thereof. The same was to facilitate renewal of lease within 60 days. The period lapsed in July 2024 and the 1<sup>st</sup> Defendant is in breach of the agency agreement.
11. Based on the above it is stated that the 1<sup>st</sup> Defendant has come to court with unclean hands having breached both the original sale agreement and issuing a fake title deed to the Plaintiffs and breaching the agency agreement and acknowledgement thereof. That the contracts are binding since the applicant willingly and knowingly executed them. That the court is enjoined to construe and interpret the contract within the confines of the law. That where the terms are explicit and unequivocal the court is obliged to give effect and meaning to the terms and cannot re-write the contract at the instance of either party. That he who comes to equity must come with clean hands. That the applicant cannot seek release of the title Kwale/Tiwi Beach BLOCK/393 when he has failed to honour several agreements.
12. The deponent states he is a stranger to the depositions in paragraphs 19 and 20 of the 1<sup>st</sup> Defendants supporting affidavit to the application herein. That the letter dated 22/4/2024 was on a without prejudice basis thus inadmissible before court.

#### **Application dated 30<sup>th</sup> August 2024**

13. The application dated 30/8/24 was filed under suit No. Kwale ELCLC E055 of 2024 and in addition to the 1<sup>st</sup> defendant in the 1<sup>st</sup> suit incorporates the agents pursuant to the agency agreement dated 6/4/24 referred to hereinbefore. The Application dated 30/8/24 seeks the following orders.
  1. That pending the hearing and determination of this Application, this Honourable Court be pleased to issue an inhibition order over all that parcel of land known as Kwale/Tiwi Beach/933.
  2. That this Honourable Court be pleased to direct the Kwale Land Registrar to register the inhibition granted herein over all that plot of land known as Kwale/Tiwi Beach/933.
  3. That pending the hearing and determination of this Application, this Honourable Court be pleased to order the placement of the inhibition physically on that parcel of land known as Kwale/Tiwi Beach/933.
  4. That this Honourable Court be pleased to grant a vesting order, transferring all that plot of land known as Kwale/Tiwi Beach/933, into the name of the 2<sup>nd</sup> applicant.



5. That this Honourable Court do grant any other further order as may be just and expedient and for the interest of justice.
6. That cost of this application be provided for
14. The application is based on among other grounds already highlighted that the 1<sup>st</sup> Defendant issued the applicants with a fake title deed to the property in a ruse meant to deceive the Plaintiffs that he had fulfilled his transfer obligations. That since the transfer was unsuccessful, Clause 3.6 takes effect, leading to the forfeiture of the security/collateral to the 2<sup>nd</sup> applicant. It is contended that the property surrendered as security now lawfully belongs to the 2<sup>nd</sup> Plaintiff pending the official transfer of the property. That the Plaintiffs rightfully hold lien over the security/collateral because of the failed completion of the sale agreement on the part of the 1<sup>st</sup> Defendant.
15. It is deponed that the Plaintiffs seek a vesting order under the provisions of section 2,49,50 of the Trustee Act, transferring the property into the name of the 2<sup>nd</sup> applicant. That this court is clothed with jurisdiction by dint of Section 2 of the said Act, Article 162(2) of the Constitution being a court of equal status with the High Court as well as Section 4 of the Environment and Land Court Act.
16. With regard to the agency agreement it was additionally deponed that the meeting was to attempt to salvage the botched sale transaction and complete the transfer of Mombasa/block/Tiwi Beach/50 into the name of the 2<sup>nd</sup> applicant. The two agents role was to aid in the renewal of the lease over Mombasa/block/Tiwi Beach/50 to facilitate the completion of the sale. That the 1<sup>st</sup> Defendant signed an acknowledgement to renew the lease , the 2<sup>nd</sup> Plaintiff then deposited Ksh. 2,000,000/- and which was received by the 4<sup>th</sup> Defendant to facilitate the renewal process into the name of the 2<sup>nd</sup> Plaintiff within 60 days of execution of the acknowledgement. A further amount of Ksh. 2,500,000/- was to be paid upon completion of the transaction.

#### **1<sup>st</sup> - 4<sup>th</sup> Defendants Response to the application dated 30/8/2024**

17. In response to the application dated 30/8/24 the Defendants filed a replying affidavit sworn by the 1<sup>st</sup> Defendant on 31/10/24. It is deponed that the application is fatally defective for want of an affidavit in support and should be struck out in liminie. That the application also ought to have been commenced by way of Notice of Motion and not Chamber Summons. That the same is premature and an abuse of the court process. There is no threat to Kwale/Tiwi Beach/933 in terms of disposal and wastage as the Plaintiffs were in possession of the original title. That the orders sought are of a final nature and can only be issued after hearing of all the parties on merit based on evidence.
18. The deponent restated the history of the agreement culminating into the refund of the purchase price to the Plaintiff, the failed renewal of lease and the title pledged as security. It is avered that the Plaintiffs had an opportunity to wait for completion of the lease renewal to enter into the agreement. That the fact that they proceeded with the transaction on the basis of the title they deem fake, they too participated in an illegality and cannot benefit from an illegality. They cannot benefit from equity because they have come to court with unclean hands. Courts of law are not created to sanction illegalities. That the Plaintiffs actions amount to unjust enrichment.
19. The Defendants contend that the Plaintiffs have no proprietary interest over the property the same having been extinguished upon refund of the purchase price. That having failed to demonstrate an interest in Kwale/Tiwi Beach/933 the Plaintiffs were not entitled to vesting orders. That the orders for inhibition were unwarranted as no evidence has been led to prove the property was in danger of being wasted and disposed by the Defendants.



20. The Defendants also deny a meeting was held on 6/4/24 and the existence of the agency agreement for sale and purchase of MOMBASA/BLOCK/Tiwi Beach/50.

### **Preliminary Objection**

21. The Defendants filed a Notice of Preliminary Objection dated 31/10/24. The application dated 30/10/24 is being impugned for want of a supporting affidavit and being brought by way of Chamber Summons instead of Notice of Motion contrary to the provisions of Order 51 of the Civil Procedure Rules 2010. I have perused the record of this file and there is on record a Supporting Affidavit sworn on 30/8/24 by the 1<sup>st</sup> Plaintiff. The only point of departure is that it does state it is sworn in support of the said application. However in my view this does not affect the substance of the application. As to the mode under which the application is filed, the overriding objective of this court is to do substantive justice in cases presented before it. The court is also guided by Article 159(2) of *the Constitution* of Kenya 2010 and 51 Rule 10(1) and (2) of the Civil Procedure Rules to administer justice without undue regard to technicalities. Consequently, I see no merit in the preliminary objection.

### **Hearing Of The Applications**

22. The applications were canvassed by way of written submissions.

### **1<sup>st</sup> and 2<sup>nd</sup> Defendants Submissions**

23. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submissions are dated 12<sup>th</sup> November 2024. It is submitted that the orders sought in the application dated 5/8/24 were in the nature of an interlocutory injunction to conserve the subject property when in danger of being wasted pending determination of the main suit. Counsel relied on the case of Peter Gitaru Gitu Vs. KCB Bank Kenya Ltd (2021) on the law governing the granting of interlocutory injunctions that is order 40 of the Civil Procedure Rules. Citing the conditions set out in the case of Giella Vs Cassman Brown & Company Ltd (1973)EA 358 on the principles for granting interlocutory injunction and Mrao Ltd Vs. First American Bank of Kenya & 2 Others (2003)eKLR 125 on what constitutes a prima facie case with a probability of success, it is submitted that the 1<sup>st</sup> Defendant has demonstrated his proprietary interest in Kwale/Tiwi Beach/933. That the circumstances leading to the original title thereto being in the possession of the Plaintiff were explained and the provisions of clause 3.6 of the sale agreement. That it was clear the Respondents received the full refund and yet still hold onto the title when he no longer had any claim against the Defendants.
24. It is asserted that the Plaintiffs are estopped from relying on the said clause 3.6 since they chose to rely on the provisions of the Professional undertaking herein on reimbursement. It is contended holding onto the title and having received the refund amounts to unjust enrichment. Reliance is placed on the cases of Madhupaper International Ltd & Another Vs. Kenya Commercial Bank Ltd & 2 Others (2003)eKLR. and Chase International Investment Corporation & Another Vs. Laxman Keshra and Others (1978)KLR 143. That there was no loss the Plaintiffs stood to make if they returned the title having been reimbursed.
25. It is urged that the sale agreement dated 16/8/23 and relied upon to retain the title is an illegal sale agreement since the 1<sup>st</sup> Defendant was not the registered owner of Mombasa/block/Tiwi Beach/50 and had no legal capacity to enter into the agreement. That the Plaintiff was well aware that the lease had expired and the 1<sup>st</sup> Defendant was in the process of renewal as evidenced in paragraph 4 and 8 of the Plaintiffs replying affidavit deponed on 30/8/24. That this was the basis for the introduction of the security to safeguard the purchase price. That the contract is void and cannot be enforced by this court.



26. Admitting the legal position that the court cannot rewrite a contract between the parties, it is submitted the court can intervene where fraud is proved. In the present case the Plaintiffs entered into an agreement knowing that the lease had expired and the 1<sup>st</sup> defendant was no longer registered owner which was fraudulent as the title was fake. The court is referred to the case of Kenya Airways Limited Vs. Satwant Singh Flora, Mohamed Vs. Attorney General (1990)KLR 146 and Nyeri Civil Appeal No. 40 of 2001 Nyeri County Council Vs. Monica M. Mwangi where it was held no court can enforce an illegal contract.
27. The law is urged to arise to the occasion and avoid enforcing an illegality. The court is invited to allow the application dated 5/8/24 and dismiss the application dated 30/8/24.

### **1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs Submissions**

28. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs submissions are dated 30/10/24 and identified three issues for determination namely whether the 1<sup>st</sup> Defendant is in breach of the sale agreement dated 16/8/2024, Whether the Defendant has come to court with unclean hands and Whether the court should place a caution over the title Kwale/Tiwi Beach/933 pending hearing and determination of the main suit. Revisiting the failure by the 1<sup>st</sup> Defendant to complete the transaction, the import of section 3.6 and the title issued as collateral guaranteeing successful transfer of MOMBASA/BLOCK/Tiwi Beach/50 to the Plaintiff it is submitted that clause 3.6 takes effect. That parties to a contract are bound by the conditions therein and a court cannot rewrite contracts for parties neither can they imply terms that were not part of the contract. Reliance was placed on Centurion Engineers & Builders Limited Vs Kenya Bureau of Standards (2023)KECA 1289 (KLR).
29. That the 1<sup>st</sup> Defendant was in breach of the sale agreement and the acknowledgement agreement since they without lawful excuse failed and or refused to perform their part of the agreement. The court was referred to the case of Jackline Njeri Kariuki Vs. Moses Njunge Njau (2021) eKLR.
30. On whether the Defendants have come to court with clean hands reliance is placed on the cases of Arun C. Sharma Vs Ashana Raikundalia t/a Raikundalia & Co. Advocates, Nishit Raikundalia & Sapphire Trading & Marketing Ltd ( Misc. Civil Appl 802 of 2020) (2014)KEHC 2430 KLR (commercial & Tax ) where the court held that equity will not show any love to a person who has acted malafides in seeking its hand.
31. On the caution it is submitted that it has been established that the 1<sup>st</sup> Defendant is bound by the terms of the sale and having come to court with unclean hands the parcel Kwale/Tiwi Beach/933 should be protected by the court. That the property was used as collateral and this establishes a prima facie case. Referring to the provisions of section 71 of the Land Registration which outlines the process of registration of a caution, it is contended that the Plaintiffs have demonstrated they have followed the said procedure to no avail to warrant the courts intervention. That the Plaintiff seeks to protect its interest in the subject property as held in Milka Muthoni Wagoco Vs. County Council of Kirinyaga & 2 Others (2017)eKLR
32. Alternatively the court is invited to hold the title to Kwale/Tiwi Beach/933 into its custody pending hearing and determination of the suit.

### **Analysis And Determination**

33. I have considered the prayers sought in both the applications the subject of this ruling , the depositions in support and against the applications, the submissions and authorities cited by the parties in support and against. The main issue for determination is what orders should issue in the circumstances.



34. I have noted the 1<sup>st</sup> Defendants submission that the orders sought in the application dated 5/8/24 are in the nature of an interlocutory injunction. In my view the orders sought above are in the nature of a mandatory injunction being sought at interlocutory stage. A definition of what constitutes a mandatory injunction is pertinent at this juncture as well as the principles that should guide the granting of the same at interlocutory stage.
35. In the case of *Mwangi v Erdermann Property Limited (Civil Appeal E064 of 2021)* [2023] KEHC 17271 (KLR) (Commercial and Tax) (12 May 2023) (Judgment) the court cited the following authorities highlighting the principles for grant of mandatory injunction; -

In the case of *Kenya Breweries Ltd & Another vs Washington O. Okeya* [2002] eKLR, the Court of Appeal stated as follows:“ A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the appellant had attempted to steal a march on the appellant. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

Similarly, in the case of *Nation Media Group & 2 others vs John Harun Mwau* [2014] eKLR, the Court of Appeal again reiterated that:“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary (sic) injunction can only be granted in exceptional and in the clearest of cases.”

In *Malier Unissa Karim –versus - Edward Oluoch Odumbe* (2015) eKLR again the Court held 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 4<sup>th</sup> 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, it 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 appellant attempts to steal a match on the respondent, a mandatory injunction will be granted on an Interlocutory application”.

36. The learned judge proceeded to aptly summarise the above thus;-
19. From a reading of these and other authorities that have been submitted by the parties, before granting the mandatory injunction the Court must satisfy itself that there are special circumstances pertaining to an application for mandatory injunction. This would include the fact that the facts relate to a simple, clear case that can be determined summarily. In particular, the Court should be disinclined to grant a mandatory injunction if the effect of such an order is to grant the relief or a substantial part of it at the interlocutory stage without giving an opportunity for the suit to be examined on its merits and evidence.’



37. I'm in agreement with the above summary of the decisions of the Court of Appeal cited hereinbefore by the learned judge and which are binding upon this court. Guided accordingly I will review the orders sought vis a vis the facts and materials placed before the court.
38. The 1<sup>st</sup> Defendant is seeking an order compelling release of the original title to Kwale/Tiwi Beach BLOCK/393 by the Plaintiff to the 1<sup>st</sup> Defendant. The prayer is premised on the ground that the original title is illegally being held following refund of the purchase price to the Plaintiff which option was taken pursuant to a professional undertaking issued. That the said title was a mere security and or collateral for the completion of the sale transaction and the purchase price having been refunded the relevant clause being 3.6 no longer applies. It is also stated that holding both the refund monies and the original title amounts to unjust enrichment.
39. Let me state that what is being sought are orders that are capable of finally determining the fate of title to Kwale/Tiwi Beach BLOCK/393. This is further compounded by the disclosure made by the 1<sup>st</sup> Defendant that it is intended to dispose of the same to a buyer who has already been identified and agreement entered to enable settlement of medical bills incurred by the 1<sup>st</sup> Defendant. Granting orders for release of the said original title to the 1<sup>st</sup> Defendant at this point of the proceedings would mean the court will have agreed with the above averments which have been contested by the Plaintiffs without hearing the parties. The Plaintiffs state that they are properly holding the title as lien and have set out the reasons for taking this position. Issues of fraud and capacity of the 1<sup>st</sup> Defendant to enter into the sale agreement have emerged. The validity and or legality of the sale agreement is being questioned. Both parties are questioning the bonafides of the other. These are matters that can only be determined upon hearing the parties and weighing their cases on the scales of justice.
40. Are there any special circumstances that have been demonstrated by the 1<sup>st</sup> Defendant to warrant the grant of orders sought? At first I thought the need to settle the medical bills would suffice for this requirement. I have already noted that the disposal for purposes of raising the funds does not resonate with the guidance set by the Court of Appeal herein quoted. The subject would be lost and no longer in the control of the court. Infact it is a perfect ground to reject the application for going against the provisions of order 40 Rule 1(a) and (b) of the Civil Procedure Rules which state as follows;-

40(1) (a) and (b) of the Civil Procedure Rules 2010 which provides that:-

“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.”

41. On the other hand the Plaintiffs commenced proceedings in E055 of 2024 (the subsequent suit ) where they seek the following verbatim prayers;-



- a. A Declaration that the Defendants are in breach of the Agency agreement dated 16<sup>th</sup> April 2024.
  - b. An order that property number Kwale/Tiwi Beach BLOCK/933 be transferred to the Plaintiff and issuance of the title deed in the Plaintiff's name.
  - c. An order for permanent injunction restraining the 1<sup>st</sup> Defendants by himself, their agents, servants or employees from entering, remaining, developing, being upon, selling, alienating, sub-dividing, transferring, charging, or any other way interfering, utilizing or dealing with the land parcel number Kwale/Tiwi Beach BLOCK/933.
  - d. A vesting order transferring all that plot of land known as Kwale/Tiwi Beach BLOCK/933 into the name of the Plaintiff.
  - e. General Damages for breach of the Agency agreement dated 16<sup>th</sup> April 2024.
  - f. Costs of this suit be borne by the Defendants
42. In the application dated 30/8/24 the Plaintiffs have moved this court to inter alia grant a vesting order, transferring all that plot of land known as Kwale/Tiwi Beach/933, into the name of the 2<sup>nd</sup> applicant. I will not belabour this point. I will reiterate the discussions on the principles of grant of a mandatory injunction at interlocutory stage which I have already enumerated. Clearly this prayer is a replica of prayers (b) and (d) of the Plaint filed with the application. It will be tantamount to deciding the dispute summarily in favor of one party amidst the contestations raised by both the parties. There are no special circumstances to warrant the rendering of the two orders sought at interlocutory stages. The court reiterates that at this point the divergent statements by the parties remain allegations until each party can prove their case. To grant a mandatory injunction at this point would amount to granting a substantive prayer contained in the plaint.
43. I have noted the prayer for orders of inhibition to issue over the parcel of land known as Kwale/Tiwi Beach/933 and the Land Registrar to register the same against the title. This is objected to by the Defendants.
44. Firstly what is an order of inhibition?  
Section 68(1) of the [Land Registration Act](#) provides that:-
- “The Court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, generally until a further order, the registration of any land lease or charge.”
45. What I glean from the law above an "order of inhibition" is a court order that acts like a prohibitory injunction, preventing any dealings with a piece of land until further court orders are issued, essentially preserving the status quo of the property while a legal dispute is ongoing.
46. A look at the definition and rationale of an order of status quo entails is necessary. The court in the case of Thugi River Estate Limited & another Vs National Bank of Kenya Limited & 3 others [2015] e K.L.R. explained the circumstances under which orders for status quo may be issued as follows; -
- “Firstly, an order of status quo will issue through a judicial process. Where the court in exercise of its general or statutory jurisdiction grants orders for maintenance in situ of a particular state or set of facts... the second or alternative order for status quo is the one issued by the court as a case management strategy. It is issued to provide assistance to the case. It also



maintains a particular state of affairs or set of facts. Unlike a conservatory order or injunctive order, it is not descriptive. It is originated either by the court or by the consent of the parties. Often the court would not have been moved by either party. The court then expects an existing state of affairs or facts be preserved until a particular occurrence or until the courts' further orders. It is intended to also freeze the state of affairs. State of affairs however do not always remain static, so it is always crucial for the court to be very specific and neat in its description of what state of affairs is to be preserved.”

47. In the present two cases, it has emerged that the original title is being held by the Plaintiffs. The Plaintiffs have basically sought that the status quo pertaining to the register of Kwale/Tiwi Beach/933 be preserved by placing an inhibition which in essence will prevent registration of any transactions. While the Defendant urges that there is no immediate threat to wastage because the Plaintiffs are holding the original title, it is my view that preservation of the register for the said parcel is necessary pending the hearing and disposal of the suit or until the occurrence of an event such as mutual consent between the parties to compromise the suit and which is adopted as an order of the court. I have already made a finding that the suits must proceed for determination on merit. The 1<sup>st</sup> Defendant wants to dispose and which I have noted is against the very rationale for preserving a status quo.
48. Additionally both the Plaintiffs and the 1<sup>st</sup> defendant have established a prima facie case by demonstrating their interest in the property one by registration and the other by an alleged lien arising from the sale agreement. This calls for both to be heard in rebuttal. As to what constitutes a prima facie case, the court is guided by the Court of Appeal dictum in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR that “a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
49. Considering the circumstances of this case I’m persuaded and satisfied that there are sufficient reasons to warrant the issuance of such a prohibitory order because, like an interlocutory injunction, such an order preserves the property in dispute pending the trial. For me this is the course that carries the lower risk of injustice in the circumstances of this case. Also see the case of *Dorcas Muthoni & 2 others v Michael Ireri Ngari* [206]eKLR where the court was guided by this principle.
50. The court has also noted the invitation that the title Kwale/Tiwi Beach/933 is held by the court. Based on the courts discussions in their entirety I see no prejudice in granting this order, it will reinforce the need to maintain the status quo and keep the peace of mind of both parties in the dispute pending determination of both cases.

### **Conclusion and disposition**

51. I think I have said enough to show why the orders sought in the application dated 5/8/24 cannot issue as well as some of the orders in the application dated 30/8/24. I have also shown the justification for maintaining the status quo with regard to the parcel file Kwale/Tiwi Beach/933 by granting the orders of inhibition sought herein.
52. The following orders consequently issue to dispose of the two applications.
  - i. The Application dated 5<sup>th</sup> August 2024 is hereby dismissed.
  - ii. Costs on the application dated 5<sup>th</sup> August 2024 shall be in the course.



iii. The Application dated 30<sup>th</sup> August 2024 partly succeeds and is hereby allowed in the following terms;-

1. That pending hearing and determination of the main suit an order of inhibition be and is hereby issued restricting registration of any transfer and or other form of disposition, transaction against parcel Kwale/Tiwi Beach/933.
2. That the Kwale Land Registrar shall register the inhibition granted hereinabove over parcel Kwale/Tiwi Beach/933.
3. That within 30 days of this order the Plaintiffs shall surrender the original title to Kwale/Tiwi Beach/933 to the Deputy Registrar Environment & Land Court Kwale for safe keeping pending the determination of this suit and or until further orders of the court.
4. That cost of the application dated 30/8/24 shall be in the course.

53. Leave to appeal the ruling of the court is hereby granted if required.

54. The suits shall be mentioned on 11/03/25 for further directions.

It is so ordered.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY VIA CTS THIS 13<sup>TH</sup> DAY OF FEBRUARY 2025.**

**HON. A.E DENA**

**JUDGE**

**13/2/2025**

