



REPUBLIC OF KENYA



**Wainania v Nyangi (Environment & Land Case E043 of 2022)
[2023] KEELC 300 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 300 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E043 OF 2022**

**JO MBOYA, J
JANUARY 26, 2023**

BETWEEN

PETER WANYOIKE WAINANIA PLAINTIFF

AND

SIMON CHACHA NYANGI RESPONDENT

RULING

1. Vide Notice of Motion Application dated the 19th October 2022, the Defendant/Applicant herein has approached the Honorable Court seeking the following Reliefs;
 - i. This Application be certified as urgent, service of the same be dispersed with in the first instance and prayer 2 herein allowed ex - parte on the ground that the Plaintiff/Respondent and/or his employees, servants, agents or otherwise, have threatened and intend, unless restrained by this Honourable Court, to unlawfully break into or gain access to the Defendants'/ Applicants' property known as L. R.No.1160/774 as threatened and/or otherwise interfere with the Applicants' interest in the said property, pending the hearing and determination of this application.
 - ii. Thatthe Court does issue an order of Injunction restraining the Plaintiff/Respondent by himself, his employees, Servants, agents or any other person claiming through or under him from trespassing, breaking into, unlawfully gaining access or interfering with the Defendants'/ Applicants' property or premises known as L. R. No. 1160/774 as threatened pending the hearing and determination of this application.
 - iii. Thatthe Court does issue an order of Injunction restraining the Plaintiff/Respondent by himself, his employees, Servants, agents or any other person claiming through or under him from trespassing, breaking into, unlawfully gaining access or interfering with the Defendants'/



Applicants' property or premises known as L. R. No. 1160/774 as threatened pending the hearing and determination of this suit.

- iv. The Respondent/Plaintiff, furthermore, has no known assets within the 4. Jurisdiction of this court and the Applicants/Defendants are reasonably and genuinely apprehensive that they will be unable to recover any costs as may be awarded to them as against the Respondent/Plaintiff by this court.
 - v. The Honourable court be pleased to order that the Plaintiff does furnish, within 7 days hereof, security for the whole of the costs of the Defendant by making payment of the same to a bank or a reputable financial institution in the joint names of himself and the Defendant or in the names of their respective Advocates herein.
 - vi. In the event of the Plaintiff's default in compliance with the orders above, the Plaintiff's suit stands dismissed.
 - vii. The costs of this Application be awarded to the Defendant/Applicant.
2. The instant application is anchored and premised on various, albeit numerous grounds which have been enumerated at the foot thereof. Besides, the application has been supported by the affidavit of the Defendant/Applicant sworn on the 19th October 2022 and to which the Defendant/Applicant has annexed a total of four documents inter-alia a copy of the extract of the OB lodged with the National Police Service, Karen police Station.
 3. Upon being served with the application herein, the Plaintiff/Respondent responded thereto vide Replying affidavit sworn on the 2nd November 2022.
 4. On the other hand, the subject application came up for hearing on the 2nd November 2022 and on which date, the honourable court issued directions pertaining to and concerning the disposal of the subject application. For clarity, the court directed that the subject application be canvassed and disposed of by way of written submissions.
 5. Suffice it to point out that the Defendant/Applicant thereafter proceeded to and filed written submissions dated the 4th November 2022 and rejoinder submissions dated the 5th December 2022.
 6. On the other hand, the Plaintiff/Respondent filed written submissions dated the 22nd November 2022. For completeness, the three sets of written submissions formed part and parcel of the record of the court.

Submissions By The Parties

- i. Applicant's Submissions
7. The Applicant herein has raised, canvassed and amplified three pertinent and salient issues for consideration by the court.
8. Firstly, counsel for the Defendant/Applicant has submitted that the Defendant/Applicant is the registered proprietor and owner of the suit property. In this regard, counsel has referred the court to the certificate of title attached/annexed to the supporting affidavit sworn by the Applicant on the 19th October 2022.
9. Furthermore, learned counsel for the Applicant has contended that by virtue of being the lawful and registered proprietor of the suit property, the Applicant is vested and bestowed with exclusive and absolute interests over and in respect of the suit property.



10. Consequently and in the premise, counsel for the Applicant has therefore added that by virtue of being the registered proprietor, the Applicant herein has demonstrated and established a prima facie case with probabilities of success.
11. In any event, counsel has added that by virtue of ownership of the suit property, the Applicant has constitutional rights to exclusive occupation and possession, which ought to be protected and vindicated by the court.
12. In support of the submissions touching on and concerning proof of a prima facie case counsel for the Applicant has cited and relied on various cases inter-alia, *Giella versus Cassman Brown & Co Ltd* (1073)EA 358, *American Cyanamid Company versus Ethicon Ltd* (1973)ALL ER 504 and *Joseph Siro Mosyoma versus Housing Finance Company of Kenya Ltd & 3 Others* (2008)eKLR.
13. Secondly, counsel for the Applicant has submitted that the Applicant herein shall be disposed to suffer irreparable loss, not adequately compensable in monetary terms, unless the orders of temporary injunction are granted in the manner sought.
14. To demonstrate that same is exposed to suffer irreparable loss, counsel for the Applicant has contended that the impugned activities by the Plaintiff/Respondent are calculated to injure, alter and affect the character of the suit property, albeit to the prejudice of the Defendant/Applicant.
15. Additionally, counsel for the Applicant has added that the Plaintiff/Respondent does not reside and has never been in occupation of the suit property, either as claimed or at all.
16. Thirdly, counsel for the Applicant has submitted that the claim lodged and mounted before the court is informed and colored by deception, misrepresentation and fraud on the part of the Plaintiff/Respondent.
17. Furthermore, counsel for the Applicant has contended that the claim before the court is not genuine and is merely calculated to defraud the Applicant of his rights and interests over the suit property.
18. Additionally, counsel has submitted that other than the allegations captured at the foot of the originating summons, the supporting affidavit thereof, the Plaintiff/Respondent has no demonstrable assets within the jurisdiction of the court capable of meeting or satisfying any costs, that may ultimately be awarded by the Honourable court.
19. In view of the foregoing submissions, counsel for the Applicant has therefore implored the Honourable court to order and decree that the Plaintiff/Respondent be directed to provide security for costs in the sum of Kes.800, 000/= Only.
20. To vindicate the submissions pertaining to provisions of security for costs, counsel for the Applicant has cited and relied on various cases inter-alia *Jayesh Hasmukh Shah versus Narin Haira & Another* (2015)eKLR, *Nyanza Spinning & Wiving Mills Ltd v Credit Bank & 2 Others* (2013)eKLR, *Messina & Another versus Stalion Insurance Company Ltd* (2005)1EA 264 and *Marco Trolls & Explosive Ltd versus Mamunje Brothers Ltd* (1988)KLR 730.
21. Premised on the foregoing submissions, counsel for the Applicant has therefore implored the court to find and hold that the Applicant has established and demonstrated sufficient basis to warrant the grant of the orders sought at the foot of the instant application.
 - b. Plaintiff's/respondent's Submissions
22. Vide written submission dated the 22nd November 2022, learned counsel for the Plaintiff/Respondent has raised, highlighted and canvassed three issues for consideration by the court.



23. First and foremost, counsel for the Applicant for the Respondent has submitted that the Defendant/Applicant has neither shown nor establish any prima facie with probability of success. In this regard, counsel has added that the Applicant's rights and interests over and in respect of the suit property are the subject of litigation and in particular, the subject of claim premised on adverse possession.
24. To the extent that the Applicants rights and interests over the suit property are subject of determination by the court, counsel for the Respondent has therefore contended that until and unless the suit is determined, the Applicant herein cannot be heard to contend that same has a prima facie case.
25. Secondly, counsel for the Respondent has contended that the Applicant has neither demonstrated nor established that same is bound to suffer any irreparable loss. In the absence of evidence of irreparable loss, counsel for the Respondent has contended that no basis has therefore been laid to warrant the grant of the orders sought.
26. Thirdly, counsel for the Respondent has submitted that the claim for provision of security for cost is neither merited nor warranted in respect of the subject matter.
27. In any event, counsel has added that an order for provision of security for costs, either in the manner sought by the Defendant/Applicant or otherwise, would curtail the Respondent right of access to justice as enshrined vide Article 48 of *the Constitution* 2010.
28. Additionally, counsel has submitted that before a court of law can order and decree provisions of security for costs, the court is called upon to undertake a balancing act and to ensure that the rights of either party are duly safeguarded and protected.
29. Furthermore, learned counsel has continued and contended that an order for provision of security for costs is also at the discretion of the court and hence the court is called upon to act justly, reasonably and in the interest of justice, taking into account the obtaining circumstances in respect of the matter in question.
30. To vindicate the foregoing submissions, counsel for the Plaintiff/Respondent has cited and relied on the decision in the cases including Jayesh Hashmuch Shah versus Narin Haira & Another (2015)eKLR, Macro Trolls & Explosive Ltd v Mamunje Brothers Ltd (1988)eKLR, Aggrey Shivona versus Standard Group PLC (2020)eKLR and Keystone Bank Ltd & 4 Others versus I & M Holdings Ltd & Another (2017)eKLR.
31. In a nutshell, counsel for the Respondent has implored the court to find and hold that the Defendant/Applicant has neither established nor proved a basis to warrant the grant of the Application beforehand.

Issues For Determination:

32. Having evaluated and reviewed the Application dated the 19th October 2022, together with the supporting affidavit thereto and having taken into account the contents of the Replying affidavit sworn on the 2nd November 2022; and upon consideration of the written submissions filed by and on behalf of the Parties, the following issues do arise and are thus germane for determination;
 - i. Whether a Defendant who has not filed a Counter-claim or cross suit can seek for and procure an order of Temporary Injunction.
 - ii. Whether or not the Applicant has established a Prima facie case with probability of success.
 - iii. Whether the Applicant has established a basis to warrant the grant of an order for Provision of Security for Costs.



Analysis And Determination

Issue Number 1

Whether a Defendant who has not filed a Counter-claim or cross suit can seek for and procure an order of Temporary Injunction.

33. It is common ground that the suit before the court, namely, the originating summons herein, has been filed and mounted by and on behalf of the Plaintiff/Respondent and not otherwise.
34. Furthermore, it is the Plaintiff/Respondent herein who has raised various claims and sought varied reliefs pertaining to and concerning the suit property, which is admittedly owned by and registered in the name of the Defendant/Applicant.
35. Conversely, the Defendant/Applicant herein merely responded to the originating summons filed by the Plaintiff/Respondent and has sought for the dismissal of the originating summons.
36. Nevertheless, there is no gainsaying that the Defendant/Applicant herein has neither mounted nor filed his own suit or cross suit, either by way of a counterclaim or such other mode prescribed under the law.
37. Given that the Defendant/Applicant has neither filed nor mounted own suit, the question that does arise and which is the subject of this discourse, is whether the Defendant/Applicant can therefore file/mount an application for orders of temporary injunction, either in the manner sought or otherwise.
38. Before venturing to answer the itemized question, it becomes imperative to take cognizance of the relevant provisions that anchors and grounds an applications for temporary injunctions.
39. In this regard, the provisions of Order 40 Rule 1 of the Civil Procedure Rules, 2010 are therefore paramount and important. In any event same provides the touchstone upon which orders for temporary injunction are premised.
40. For coherence the provisions of Order 40 Rule 1 provides as hereunder;

Order 40 - Temporary Injunctions And Interlocutory Orders

1. Cases in which temporary injunction may be granted [Order 40, rule 1.] Where in any suit it is proved by affidavit or otherwise—
 - (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
 - (b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, 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. My understanding of the foregoing provisions drives me to the conclusion that prior to and before a particular Party can originate an application for temporary injunction, same must have a suit premised on precipitate pleadings.



42. Furthermore an application for temporary injunction must be anchored and predicated upon some pleadings, whether same be plaint, counterclaim or otherwise. For clarity, an application for temporary injunction cannot be anchored in vacuum.
43. To underscore the observation that prior to and before an application for temporary injunction can be mounted, there must be an existing suit, I beg to adopt and reiterate the holding in the case of *Mukoma Wa Njiri versus Natinal Land Commission & another; Jimna Njuguna Kimunya & another* (Interested party) [2021] eKLR, where this court held and observed as hereunder;
35. On the other hand, it is also apparent that the proposed interested parties herein have also sought for an order of temporary injunction in the subject same have invoked the provisions of Order 40 Rule 1 & 2 of the Civil Procedure Rules.
36. In my humble view, the provisions of Order 40 Rule 1 of the Civil Procedure Rules, 2010, can only be invoked or relied upon by a party who has filed a suit, whether vide a *Plaint*, *Originating Summons* and/or *Petition*, subject to the relevant and applicable law.
37. Alternatively, the remedies under Order 40 Rule 1 of the Civil Procedure Rules, 2010 can also be adverted to by a *Defendant* or *Respondent*, who has filed a counter claim or a cross *Petition*, and not otherwise.
38. Suffice it to say, that the condition upon which an order of temporary injunction can and often do issue espouses *inter – alia*, the existence of a *Prima facie* case, which in my humble view, connotes that the person seeking the orders of temporary injunction indeed has a suit, which raises *prima facie* issues.
44. Other than the foregoing decision, which underscore the necessity that an application for temporary injunction can only be anchored on a subsisting suit/case, with precipitate pleadings to premise such an application, it is also worthy to state that a similar scenario was also canvass and deliberated upon in the case of *Ngorika Farmers Cooperative Society Ltd versus John Kiarie & 2 Others* (2006)eKLR.
45. For coherence, Hon Justice Musinga, J (as he then was), stated and observed as hereunder;
- “Mr. Karanja for the defendants submitted that the application had no merits and was misconceived. He added that an interlocutory injunction could not be granted unless there was a prayer for injunction in the plaint. He sought to rely on *Southern Credit Banking Corporation Ltd Vs Charles Wachira NgundoMilimani Commercial Court Civil Case No. 1780 of 2000* (unreported).
- In the plaint there are only two main prayers:-
- (a) A declaration that L.R. No. Nyandarua/ngorika/1441 belongs to the plaintiff.
- (b) An order to the Land Registrar Nyandarua to cancel Title number Nyandarua/ngorika/1441 and issue a new one in the plaintiff’s name.
- There is no prayer for any injunction whatsoever and I am in agreement with Mr. Karanja that the orders as sought by the plaintiff cannot issue in the circumstances”.
46. Whereas the learned Judge was dealing with a situation where no prayer for Permanent injunction had been impleaded in the *Plaint*, the situation beforehand relates to where an application has been mounted, albeit in the absence of a precipitate suit/case by the Claimant.



47. Additionally, there is also another perspective that does arise and which merits due consideration. For clarity, this perspective relates to the Doctrine of departure as captured vide Order 2 Rule 6 of the Civil Procedure Rules, 2010.
48. In respect of the subject suit/proceedings, the Defendant/Applicant has only filed the Replying affidavit, which subject to directions under the provisions of Order 37 of the Civil Procedure Rules, (would constitute the Defendants pleadings).
49. However, no where in the said replying affidavit has the Defendant/Applicant alluded to and contended that same would be seeking for an order for injunction, whether Temporary or Permanent or otherwise.
50. In the absence of a prayer or claim for parament or perpetual injunction, it is my finding and holding that a plea for temporary injunction will not be well grounded and hence, if any such application is mounted, then it would be in vain.
51. In any event, there is also the issue of Parties being bound by their pleadings and therefore not being allowed to travel far and beyond the borders circumscribed by the pleadings filed before the Honourable court.
52. Without belaboring the significance and centrality of Parties being bound by pleadings, it suffices to recall, restate and reiterate the holding of the Court of Appeal in the case of Dakianga Distributors Ltd versus Kenya Seed Company Ltd (2015)eKLR, where the Court of Appeal stated and observed as hereunder;

“A useful discussion on the importance of pleadings is to be found in Bullen and Leake and Jacob's Precedents of Pleadings, 12th Edition, London, Sweet & Maxwell (The Common Law Library No. 5) where the learned authors declare:-

“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.”

Sir Jack Jacob in an article entitled “The Present Importance of Pleadings” published in (1960) Current Legal Problems and which article was quoted with approval by the Supreme Court of Malawi in Malawi Railways Limited v Nyasulu [1998] MWSC 3 states of the importance of pleadings:

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings.



Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

In *Libyan Arab Uganda Bank for Foreign Trade and Development & Anor v Adam Vassiliadis* [1986] UGCA 6 the Court of Appeal of Uganda cited with approval the dictum of Lord Denning in *Jones v National Coal Board* [1957] 2 QB 55 that:

“In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries.”

This Court in *Independent Electoral and Boundaries Commission & Anor v Stephen Mutinda Mule & 3 others* (supra) cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) Limited v Nigeria Breweries PLC SC 91/2002* where Pius Adereji, JSC expressed himself thus on the importance and place of pleadings:

“... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

The judges in that case also stated:

“In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

Mr. Kimamo Kuria, for the respondent, faulted the learned judge for giving credit of sums alleged in evidence as having been paid by the appellant to the respondent Mr. Bosire Gichana, for the appellant, while supporting that part of the judgment believed that the learned judge was entitled to give such credit and that it was not necessary to amend the defence.

We are of the respectful opinion that the learned judge, after holding correctly that parties were bound by their pleadings erred in holding that the appellant was entitled to credit on sums which were not pleaded in the defence at all. The appellant was bound by its pleading in the defence where it claimed that it had issued three cheques in replacement of dishonoured cheques which its witness admitted, and the trial court so found, that they were cheques issued in respect of other independent transactions.

53. Premised on the various perspectives that I have discussed in the preceding paragraphs, I am constrained to find and hold that the prayers for temporary injunction which has been mounted, albeit in the absence of the requisite pleadings, have been mounted in vacuum and hence same are not legally tenable.



Issue Number 2

Whether or not the Applicant has established a Prima facie case with probability of success.

54. Notwithstanding the foregoing, it is established and trite that prior to and before a court of law can grant a temporary injunction, it behooves the Applicant to prove and establish the existence of a prima facie case with probability of success.
55. In any event, the meaning, tenor and scope of what constitutes a prima facie case has been the subject of various court decisions.
56. In this regard, the holding of the Court of Appeal in the case of Mrao Ltd versus first American Bank Ltd (2003)eKLR, is succinct and apt.
57. For coherence, the court of appeal stated and observed as hereunder;

“In civil cases, a prima facie case is a case in 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

58. Elsewhere in the said decision, the court stated as hereunder;

But as I earlier endeavored to show, and I cited ample authority for it, a Prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.

59. From the foregoing excerpt, what becomes clear is that there must be a case with probability of success upon trial.
60. In respect of the subject matter, there is only one case which is subject to proof upon trial. For clarity, it is the case mounted by the Plaintiff/Respondent, who shall bear the obligation and burden of proving his allegations.
61. Suffice it to point out that if the Plaintiff/Respondent fails to discharge the burden/obligation to prove his case at the trial, subject to the provisions of Section 107, 108 and 109 of the [evidence Act](#), Chapter 80 Laws of Kenya, then the suit shall be amenable to dismissal.
62. Notwithstanding the foregoing, I beg to state and reiterate that the Defendant/Applicant herein does not have a suit/case (filed by self) upon which this court can judge or adjudge the chances of success or otherwise.
63. In a nutshell, I am afraid that the Defendant/Applicant has not established a prima facie case with probability of success, which is essential in the consideration of whether to grant an order of temporary Injunction, or otherwise.

Issue Number 3

Whether the Applicant has established a basis to warrant the grant of an order for Provision of security for costs.



64. The Plaintiff/Respondent herein filed and lodged the originating summons claiming that same has been in occupation of the suit property for more than 12 years.
65. Premised on the contention that same has been in occupation of the suit property for more than 12 years, the Plaintiff/Respondent has therefore sought to be declared as the owner of the suit property on the basis of adverse possession.
66. On the other hand, upon being served with the originating summons (or otherwise upon coming across the originating summons herein) the Defendant/Applicant filed his Replying affidavit and same has made various albeit numerous averments.
67. In particular, the Defendant/Applicant has contended that the Plaintiff/Respondent has never been in occupation and possession of the suit property. In this regard, the Defendant/Applicant has averred that the claim based on adverse possession is colored by deception, misrepresentation, mala fides and fraud.
68. What becomes evident and apparent is that there two sets of facts, or better still, versions of facts, which are at variance and shall therefore require to be tested during a plenary hearing.
69. Suffice it to point out that whilst dealing with an interlocutory application, this court is neither mandated nor authorized to deal with precipitate issue of facts and the law. For clarity, the court is barred from making final and substantive pronouncement on issues of facts and law.
70. In respect of the foregoing observation, it suffices to cite and quote the holding of the Court of Appeal in the case of Thomas Mumo Maingey (Suing on his own behalf and on behalf of the Franciscans of Our Lady of Good Counsel Sisters Registered Trustees) versus Sarah Nyiva Hillman & 3 others [2018] eKLR, where the court stated and observed as hereunder:

23. It was not the role of the court when considering the interim applications to make a final determination on the conflicting affidavit evidence. As Lord Diplock warned in *American Cyanamid Co (No 1) vs Ethicon Ltd* [1975] UKHL 1 “it is no part of the court’s function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.” This Court expressed a similar view in *Mbutia vs Jimba Credit Finance Corporation & another* [1988] KLR 1 where it was held that “the correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side’s propositions.”

71. Despite the fact that this court cannot deal with precipitate facts at an interlocutory stage, the Defendant/Applicant has made very weighty allegations/averments inter-alia fraud whose particulars have been variously enumerated at the foot of the supporting affidavit.
72. Having made the weighty allegations/averments, the Defendant/Applicant has therefore sought to impress upon the Honourable court that the Plaintiff’s/Respondent’s suit is baseless, frivolous, fictitious and a fraud.
73. Additionally, the Defendant/Applicant relying on the contention that the Plaintiff/Respondent suit is fictitious, fraudulent and frivolous has therefore impleaded an order for provision of security for costs.
74. It is important to state and underscore that either party is at liberty to make and mount an application for provision of security for costs. For clarity, such applications are informed vide the provisions of Order 26 of the Civil Procedure Rules, 2010.



75. Nevertheless, it is not lost on this court that the grant of an order for provision of security for cost is an exercise of discretion. In this regard, the court is called upon to exercise its discretion, judiciously and reasonably, albeit upon taking into account the obtaining circumstances and facts of each case.
76. Furthermore, it is also important to recall that unless due caution and circumspection is exercised, the grant of an order for provision of security for costs is likely to cause a hinderance, limitation or restriction to the Constitutional rights to access to justice. See Article 48 of *the Constitution* 2010.
77. Consequently and in the premises, it is my humble view that prior to and before decreeing an order for provision for security for costs, the court is called upon to undertake delicate balancing of the competing rights and interests of the diverse Parties, but same must not lose sight of the Values, objects and Principles of *the Constitution*, 2010. See Article 10 of *the Constitution*, 2010.
78. Be that as it may, the court must at all times ensure that same fosters, promotes and fulfills the values, objective and principles of *the Constitution* 2010. In this regard, the provisions of Article 259 of *the Constitution* 2010 are paramount.
79. Having made the foregoing observation, I must now return to the subject matter and ascertain whether the obtaining facts and circumstances would warrant an order for provision of security for costs.
80. Nevertheless, before returning a verdict on the foregoing question, it is important to take cognizance of the principles that have been established in various courts while granting or not granting an order for provision for costs.
81. To this end, the holding in the case of *Keystone Bank Limited & 4 others versus I & M Holdings Limited & another* [2017] eKLR, where the court stated and observed as hereunder;

“The same principles were espoused in the case of *Jayesh Hasmukh Shah Vs. Narin Haira & Another* (2015) eKLR in which the court held;

“It is now settled law that the order for security for costs is a discretionary one as long as that discretion is exercised reasonably, and having regard to the circumstances of each case.

Such factors as absence of known assets in the country, absence of an office within the jurisdiction of the court, inability to pay costs; the general financial standing or wellness of the plaintiff; the bona fides of the plaintiff’s claim, or any other relevant circumstances or conduct of the plaintiff or defendant may be taken into account”.

In an application for security for costs, the applicant ought to establish that the respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a respondent will be unable to pay costs in the event that he is unsuccessful. The same must be proven. This was the holding in the case of *Kenya Education Trust Limited Vs. Katherine S. M. Whitton* Civil Appeal No. 301 of 2009.

It should, however, be noted that much will depend on the circumstances of each case though the final result must be reasonable and modest. In the case of *Marco Trols & Explosive Ltd Vs. Mamunje Brothers Ltd* (1988) klr 730 this point was enunciated by the court in the following terms: -

“The exercise of the courts’ power is discretionary. However, the onus is on the applicant to prove such inability or lack of good faith that would make the order for security reasonable.”



82. Taking into account the various aspects/ perspectives that ought to be taken into account and considered, I am not convinced that the obtaining circumstances herein would warrant an order for Provision of Security for costs.
83. To my mind, the factual issues/evidence that bely the subject dispute are heavily contested and hence, either Party ought to be afforded due opportunity to ventilate his/ her case before the Honourable Court, without undue hindrance. In any event, there are serious allegations and counter-allegations, inter-alia deception and fraud, which would require to be resolved.
84. Consequently and in the premises, I am not disposed to exercise my discretion to order or decree provision for security for costs, insofar as the bona fides, or otherwise of the claim before the Court must await the plenary Hearing.

Final Disposition

85. Having duly considered and analyzed the various issues that were highlighted and amplified in the body of the Ruling, it is evident that the subject application is not meritorious.
86. Nevertheless, it is imperative to point out that there is a property which is the subject of dispute. Consequently, there is need to ensure that the suit property is duly preserved and protected, free of alienation, wastage and or interference, in any manner whatsoever.
87. Premised on the foregoing and duly inspired by the decision in the case of Virginia Edith Wambui... Versus....Joash Ochieng Ougo, Civil Appeal No.3 of 1987 (1987) eKLR, where the Court of Appeal held that:-

“The general principle which has been applied by this court is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial.”
88. In a nutshell, the Application dated the 19th October be and is hereby dismissed and costs of the Application shall abide the outcome of the suit.
89. Further and in pursuance of the Provisions of Section 13(7) of the *Environment and Land Court Act*, 2011 and coupled with the need to ensure that the suit property is duly preserved, I am minded to issue and Do hereby grant the following orders;
 - i. There be and is hereby granted an order for Maintenance of the Status Quo over and in respect of L.R No. 1160/774 (hereinafter referred to as the suit property, pending the hearing and determination of the suit. For clarity, the status quo shall concern the status of the title, occupation, possession and use thereof as of the date of this order.
 - ii. Further and for the avoidance of doubt, the Order of Status Quo herein shall not be used by any person who is not in occupation of the suit property to gain entry upon and ingress onto the Suit Property.
 - iii. On the other hand, the orders of Status quo herein shall similarly, not be used and utilized for purposes of actualizing Eviction of or (sic) recovery of Vacant possession.
 - iv. Either way, the status of the suit property shall be maintained and preserved and in particular, the same shall not be alienated, sold and or otherwise disposed of pending determination of the suit.
90. It is so ordered.



DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY 2023.

OGUTTU MBOYA

JUDGE

In the Presence of;

Benson - Court Assistant.

Mr. Wendo h/b for A Lubullellah for the Defendant/Applicant.

Mr. J Angwenyi for the Plaintiff/Respondent.

