



REPUBLIC OF KENYA



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Affluent Limited v Ludco Limited & 3 others (Environment & Land Case E053 of 2022) [2023] KEELC 16726 (KLR) (27 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16726 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E053 OF 2022**

**LL NAIKUNI, J
MARCH 27, 2023**

BETWEEN

AFFLUENT LIMITED PLAINTIFF

AND

LUDCO LIMITED 1ST DEFENDANT

REGISTRAR OF TITLES, MOMBASA 2ND DEFENDANT

DIRECTOR OF SURVEY NAIROBI 3RD DEFENDANT

THE HON ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. Introduction

Application Dated 31st May 2022

1. The Plaintiff/Applicant – Affluent Limited⁹ herein moved this Honorable Court vide a Notice of Motion application dated 31st May, 2022 for its determination. The application was brought under the dint of under Sections 1A, 1B and 3A of the *Civil Procedure Act*, cap. 21 and Order 40 Rules 1, 2 and 3 of the *Civil Procedure Rules, 2010*.

II. The Plaintiff/Applicant’s case

2. The Plaintiff/Applicant sought for the following prayers:
 - a. Spent.
 - b. That this Honorable Court do grant an order directing the 3rd Defendant to cancel and expunge deed plans no 410222 to 410245 from the records issued from survey plan F/R 427/40 (Plots no MN/1/21863/2 to MN/1/21863/25) which were fraudulently obtained



from consolidation and sub-division of properties known as LR no 100070/I/MN,10071/MN and 10072/1/MN pending the hearing and determination of this Application inter-parties and the suit herein.

- c. That this Honorable Court to grant an order directing the 3rd Defendant to cancel and expunge the survey plans no F/R 427/40 (Plots no MN/1/21863/2 to MN/1/21863/25) which were fraudulently obtained from consolidation and sub-division of properties known as LR no 100070/1/MN, 10071/1/MN and 10072/1/MN pending the hearing and determination of this application and this suit.
 - d. That this Honorable Court do grant a temporary injunction barring the 2nd Defendant from registering Deed Plans no 410222 to 410245) issued from survey plan F/R 427/40 (Plots no MN/1/21863/2 to MN/1/21863/25) obtained from illegal and fraudulent consolidation and sub-division of properties known as LR no 100070/1/MN,10071/1/MN and 10072/1/MN pending the hearing and determination of this Application.
 - e. That this Honorable court do grant an injunction stopping the ongoing arbitration proceedings between the 1 Defendant and the Plaintiff pending determination of this suit.
 - f. That the costs of this application be provided for.
3. The application based on the grounds, testimonial facts and averments made out under the 10 Paragraphed Supporting Affidavit of Monicah Mueni Muthami, the designated General Manager of the Plaintiff/Applicant sworn and dated on 31st May, 2022 together with eight (8) annexures marked as “MMM – 1 to 8” annexed thereof. She deponed as follows:-
 4. The Plaintiff maintained to be the registered owner of all the parcels of land known as LR no 100070/1/MN,10071/1/MN and 10072/1/MN (Hereinafter referred to as the Suit Properties”). Marked as “MMM – 1” are copies of the Certificate of Title Deeds. On 17th August 2018 the Plaintiff and the 1st Defendant entered into a sale agreement for the purchase of the said suit properties for a consideration of a sum of Kenya Shillings One Hundred and Seventy Million (ksh 170,000,000/=) a copy of the sale agreement was attached and marked as “MMM – 2”. Upon the execution of the agreement, the 1st Defendant paid a deposit of a sum of Kenya Shillings Ten Million (ksh 10, 000,000/=) and which required them to settle the outstanding balance after the expiration of ninety (90) days from that date and the transaction would be complete.
 5. However, before the lapse of these days, the 1st Defendant performed various acts fraud as regards the property. The 1st Defendant is said to have made an application for consolidation and sub - division of the properties to the County Government of Mombasa purporting to be the Vendor. The County Government of Mombasa through the Director of Planning circulated the application for no objection comment from the Ministry of Lands, Director of Survey and the County Planning Department. Pursuant to this, an approval to consolidate and sub - divide the suit properties was granted by the County Government of Mombasa.
 6. The land Officer Mombasa granted the Purchasers approval for the purported consolidation and sub – division. The 1st Defendant then proceeded to instruct one Kiguru Licensed Land Surveyors to consolidate and subdivide the said plots. The said Survey Plans were presented and then approved by the Director of Survey, who proceeded to issue the Deed Plans on 25 sub - divided plots being Deed Plans nos. 410222 to 410245 and Plots nos.MN/1/21863/2 to MN/1/21863/25 to the 1st Defendant made out of the Plaintiff’s three properties. .



7. The plaintiff was apprehensive that the 1st Defendant was intending to register the twenty five (25) title deeds made out from the consolidation and the sub – divisions stated above.
8. As a result, the Plaintiff had since reported the matter to the Nyali Police station and obtained OB no 30/13/05/22 and the matter was under investigations by Division of the Criminal Investigation (DCI) office.
9. Despite the reporting and the on going investigations, the 1st Defendant had Arbitral proceedings against the Plaintiff, which the Plaintiff sought halt and any illegal transaction on the properties by this Honorable Court. The Plaintiff stood to suffers irreparable loss.

III. The Replying Affidavit by the 1st Defendant/Respondent

10. The 1st Defendant/Respondent responded to the application vide a Replying affidavit sworn by DAVID MUEMA and dated 22nd July 2022 together with 38 annexures marked as “DM – 1 to 38”. The Deponent stated as follows:
 - a. He was the Director to the 1st Defendant’s Company. That at all material times to the execution of the sale agreement, the Plaintiff/Applicant represented itself out as the registered owner of all the parcels of land identified as LR nos. 10070/1/MN,10071/1/MN and 10072/1/MN.
 - b. He confirmed that pursuant to this representation, the 1st Defendant entered into an agreement of sale on 17th August 2016 for the purchase of the said properties for a consideration of a sum of Kenya Shillings One Hundred and Seventy Million (ksh 170,000,000/=). They were required to pay a deposit of a sum of Kenya Shillings Ten Million (ksh 10,000,000/=) to be held for onward transmission to the Vendor on completion of the Sale which obligation was duly discharged.
 - c. Further, among the salient obligations imposed on the Plaintiff were warranties and conditions on the indefeasibility of the Title Deed over the said properties and the 1st Defendant/ Respondent on unconditional letter of clearance from the National Land Commission regarding ownership of the land.
 - d. Despite all this, the Plaintiff breached the terms as stated out under the following particulars of the breach:-
 - i. the Plaintiff breached the warrants under Clause 12 on ownership and indefeasibility of the titles in respect to the suit properties;
 - ii. the Plaintiff/Applicant failed to furnish the 1st Defendant with an unconditional letter of clearance from the National Land Commission confirming that the land had no pending investigations and/or a public utility land,
 - iii. Unlawfully appropriating the sum of ksh 10,000,000/= despite knowledge of existence of a dispute in respect to the root of the title.
 - iv. Withholding or concealing material facts in regard to complaints raised by the public and or government entities on ownership of the suit properties,
 - v. Failing to avail the completion documents under Clause 5.2 of the sale agreement and,
 - vi. Unreasonably terminating the sale agreement while in breach of the warrants and obligations expressly provided in the sale agreement.



- e. The deponent further maintained that the Plaintiff/Applicant's actions were fraudulent and amounted to negligent misrepresentation, unjust enrichment and their conduct is therefore unconscionable. In particular the Plaintiff/Applicant was said to have:
- i. Fraudulently misrepresenting the ownership details of LR nos. 10070/1/MN,10071/1/MN and 10072/1/MN.
 - ii. Fraudulently and negligently concealing material facts regarding ownership of the suit properties contrary to the express terms under Clause 12(ix) of the sale Agreement thereby causing the Claimant to act on the warranties and the assurances contemplated thereof.
 - iii. Colluding with their advocates in illegally rescinding the contract and misappropriating thereof a sum of Kenya Shillings Ten Million (ksh 10,000,000/=).
 - iv. Unjustly enriching themselves by withholding a sum of Kenya Shillings Ten Million (ksh 10,000,000/=) upon issuance of an unmerited Rescission Notice while in breach of the warranties and obligations imposed in the Sale Agreement thereby unconsciously crystallizing the forfeiture Clause.
- f. In view of the forgoing breaches at the behest of the Plaintiff/Applicant and in light of the agreed mechanisms to resolve dispute, the 1st Defendant/Respondents Applicant decided to file an arbitration proceedings in Nairobi being Arbitration Cause between "*Ludco limited v Affluent limited & 3 others*". Indeed, the Plaintiff/Applicant had since filed a response and never raised the issue of the alleged illegal consolidation nor sub - division in its Arbitration pleadings at all.
- g. The deponent categorically denied that it clandestinely sub - divided the suit properties without the knowledge and consent of the Plaintiff/Applicant. It clarified and contended that the 1st Defendant/Respondent received and equivocal authority from the Plaintiff/Applicant to begin the process of subdivision pending completion. The said authority was in form of the Plaintiff/Applicant's agent who executed all relevant documents preceding sub - division, and the 1st Defendant's directors were only tasked with only the role of fast tracking and lobbying in a bid to hastening the process of subdivision.
- h. From the documents annexed herein, it was seen that the process of the sub – division was always known to the Plaintiff/Applicant and since the year 2016 they had never raised any complaint of the illegal subdivision until now.
- i. The Plaintiff/Applicant was aware of the reluctance and refusal by the 1st Defendant/Respondent to proceed on with the Conveyancing and transaction of these properties due to the numerous acts of commission and omission of illegalities and non compliance by the Plaintiff/Applicant herein.
- j. As a result of all these that the 1st Defendant/Respondent herein decided to pull out of the Conveyance and demanded to be give a refund of the deposit of the purchase price especially after the 1st Defendant/Respondent realized the creation of new title CR no 19704 (MN/1/4928) over the suit properties in favor of Nyali Secondary School.
- k. It was the 1st Defendant/Applicant's case that the application by the Plaintiff/Applicant was not merited as it was merely done to frustrate the Arbitration proceedings and process. The deponent urged court to dismiss the application with costs.



IV. Submissions

11. On 27th July, 2022 while all the parties were present in Court, directions were made to the effect that the Notice of Motion application dated 31st May, 2022 be disposed off by way of written submissions. Pursuant to that all parties complied. Resultantly, the Honorable Court reserved a date to deliver its ruling on notice accordingly.

A. The Written Submissions by the Plaintiff/Applicant

1. On 6th October, 2022 the Learned Counsel for the Plaintiff/Applicant, the Law firm of Messrs. Muthee Kihiko Soni & Associates Advocates LLP filed written submissions dated even date in support of the Plaintiff's application. Mr. Kihiko Advocate commenced the submissions by providing a brief background of the matter. The Learned Counsel then outlined and caused analysis of following issues as a basis for consideration and urged Court to make its determination. These were:-
 - a. Whether the Application met all the principles governing the issuance of Injunctions.
 - b. Whether this Honorable Court should grant an order directing the 3rd Defendant to cancel and expunge the Deed Plans no 410222 to 410245) from the records issued from survey plan F/R 427/40 (Plots no MN/1/21863/2 to MN/1/21863/25) which were fraudulently obtained from consolidation and sub-division of properties known as LR no 100070/1/MN, 10071/1/MN and 10072/1/MN.
 - c. Whether this Honorable Court should grant an order directing the 3rd Defendant to cancel and expunge the Survey Plans no F/R/427/40 (Plots no MN/1/21863/2 to MN/1/21863/25) which were fraudulently obtained from consolidation and sub - division of properties known as LR no 100070/1/MN, 10071/1/MN and 10072/1/MN.
 - d. Whether this Honorable Court should grant an injunction stopping the ongoing arbitration proceedings between the 1st Defendant and the Plaintiff pending the hearing and determination of this application and suit.
12. Firstly, the Learned Counsel submitted that the application had satisfied the principles for granting injunctions as laid down in were laid down in the case of "*Giella v Cassman Brown* (1973) EA 358 where the Court held at page 360 as follows:-

“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 adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”.
13. He argued submitted that the Plaintiff/Applicant had established a prima facie case with a probability of success as expounded in the Court of Appeal case of "*MRAO v First American Bank of Kenya Limited & 2 Others* [2003] eKLR. The Counsel submitted that the Plaintiff/applicant had demonstrated that it's the bonafide duly registered owner of the suit properties; and that the 1st Defendant/Respondent failed to honor the terms and conditions stipulated in the sale agreement particularly, the requirement to pay the full purchase price within the ninety (90) days period. The Counsel contended that instead, the 1st Defendant/Respondent proceeded to fraudulently obtain the twenty - five (25) Deed Plans from the Director of Survey, without authority or consent from the Plaintiff/Applicant herein, who was apprehensive that the 1st Defendant/Respondent had the



intention of registering the twenty - five titles out of the purported subdivision to defraud the Plaintiff/Applicant of the properties. The Learned Counsel denounced the acts of the 1st Defendant/Respondent as not only unconceivable, but equally illegal to begin the process of consolidation and sub-division of the suit property, when the sale and transfer of the properties was not complete, and without authority of the Plaintiff/Applicant herein.

14. The Learned Counsel submitted that the acts of the 1st Defendant/Respondent of engaging in the illegality of fraudulently consolidating and sub - dividing its property, without consent or authority from the Plaintiff/Applicant will cause the Plaintiff/Applicant to suffer irreparable loss which cannot be compensated by an award of damages. The Learned Counsel relied on the case of “[Said Almed v Mannasseh Benga & Another](#) [2019] eKLR where the court held that:

“Where it is clear that the Defendant's act complained of is or may very well be unlawful, the issue of whether or not damages can be an adequate remedy for the Plaintiff does not fall for consideration. A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it. Support for this view is to be found in the Court of Appeal decision in the case of *Aikman v Muchoki* (1984) KLR 353.’ See the case of *Joseph Mbugua Gichanga v Co-operative of Kenya Ltd* (2005)eKLR.”

15. The Learned Counsel argued that the balance of convenience tilted in favour of the Plaintiff/Applicant. To buttress on this point, he relied in the case of “[Paul Gitonga Wanjau v Gathuthis Tea Factor Company Ltd & 2 others](#) (2016)eKLR, where the court dealt with the issue on balance of convenience. The Court 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 injury 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 on convenience lies”.

16. On the issue of whether this Honorable Court should grant an order directing the 3rd Defendant to cancel and expunge Deed Plans no 410222 to 410245) and survey plan F/R 427/40(Plots no MN/1/21863/2 to MN/1/21863/25) which were fraudulently obtained from consolidation and sub-division of properties known as LR no 100070/1/MN, 10071/1/MN and 10072/1/MN, the Counsel urged court to be guided by the case of: “[Margaret Wambui Kamau & 2 others v Eutychus Mwangi KARANJA & 3 Others](#) (2022) eKLR where the Court found that subdivision of the suit property without the beneficiaries/Plaintiffs' consent was illegal and it was only fair that the same be cancelled. Similarly, in the case of “[Mwau Mutie Mumo v Jason Mutie](#) (2019) eKLR the Court declared the consolidation of certain properties illegal for want of consent from the registered owner.

17. The Learned Counsel urged court to grant an injunction stopping the ongoing arbitration proceedings between the 1st Defendant/Respondent and the Plaintiff/Applicant pending the hearing and determination of this suit. On the ground that the questions concerning the fraudulent acts of the 1st Defendant/Respondent ought to be first heard and determined by this court, since in the arbitration



case the Plaintiff/Applicant had conveniently failed to disclose its own acts of fraud. The Counsel argued that the Plaintiff/Applicant anticipated that there was a likelihood that substantial injustice will occur if the 1st Defendant/Respondent should proceed to obtain twenty-five titles out of the fraudulent consolidation and subdivision of the Plaintiff/Applicant's property; hence the need of court to stay of the arbitral proceedings. The Learned Counsel relied on the case of "[Zadock Furniture Systems Limited & another v Central Bank of Kenya](#) (2014) eKLR, where the court cautioned against staying and/or setting aside arbitral proceedings. It added that where there are any compelling reasons to warrant stay of the arbitral proceedings, the Court may order such stay. The Learned Counsel urged court to find that the investigations into the 1st Defendant/Respondent's fraudulent activities was one such compelling reasons.

18. Additionally, he referred Court to the case of "[Chania Gardens Limited v Gilbi Construction Company Limited & another](#) (2015) eKLR where the Court stated: -

“Whereas Section 14 (8) of the [Arbitration Act](#) does not deny this Court jurisdiction to order stay of proceedings, the spirit of the [Constitution](#) in Article 159 and the entire corpus of the [Arbitration Act](#) is that arbitration as an alternative mechanism of dispute resolution should not be impeded by the Courts. Section 10 of the [Arbitration Act](#) is clear on that. I would, therefore, advocate that Courts should be very wary to issue a stay of arbitral proceedings unless there are compelling reasons to do so”.

19. In conclusion, Learned Counsel urged court to find that it had demonstrated and met the threshold for grant of injunctive orders pending the hearing and determination of this suit. Further, that it had demonstrated the illegal acts orchestrated by the 1st Defendant/Respondent of consolidating and subdividing the suit properties which warranted the cancellation of the Deed Plans and the Survey Plan arising from such illegality. The Court was urged to allow the application dated 31st May 2022 with costs to the Plaintiff/Applicant herein.

B. The Written Submission by the 1st Defendant/Respondent

20. On 19th October, 2022 the Learned Counsels, the Law firm of Messrs. Muturi Gakuo & Kibara Advocates for the 1st Defendant/Respondent filed their written Submissions dated even date to oppose the application by the Plaintiff/Applicant. Mr. Kibara Advocate provided Court with a detailed background of the matter and the particulars of the breaches of the sale agreement meted by the Plaintiff/Applicant herein which necessitated to the institution of the Arbitration proceedings. He reiterated in summary form the contents of the 1st Defendant/Respondent's Replying Affidavit and submitted that the Plaintiff/Applicant had concealed from the Court that the title to the suit properties had since been cancelled and a new title being CR 79592 which was issued on 19th May 2022 over the said properties and registered in favour of Nyali Primary school. Furthermore, the Learned Counsel submitted that the Plaintiff/Applicant in filed a response in the arbitral proceedings in Nairobi, but failed to mention anything to do with the alleged fraudulent sub - divisions. Instead the Plaintiff/Applicant claimed to be the legitimate and registered owner of a clean title to the properties.
21. The Learned Counsel submitted that the issue of fraud as raised by the Defendant/Respondent herein was an afterthought to try and scuttle, confuse and confound this Court as well as the arbitral tribunal. The Learned Counsel urged Court not to issue orders in vain since the said sub - divisions could not take place as the titles held by the Plaintiff/Applicant had since been cancelled and new title issued to a third party. The Learned Counsel maintained that by its own admission, it took the Plaintiff/Applicant four (4) years to lodge this claim for fraud and report the same to Nyali Police station, which



was another indication that the suit was only meant to derail the arbitration proceedings, by seeking stay orders from this Court.

22. To buttress on his points and in support of their defence against the application, the Learned Counsel relied on several authorities. He provided brief facts and the legal ratio to each of the cited cases. These cases were:- *Easy properties limited v Express Connections Limited* [2019] eKLR; *UAP Provincial Insurance Company Ltd v Joseph Muriuki Kenyatti & Another* [1998] eKLR. *Provincial Insurance Company Ltd v Joseph Muriuki Kenyatti & Another* 1998 eKLR. *EpcO Builders Limited v Adams Marjan -Arbitrator & Another*, Civil Appeal no 248 of 2005.

V. Analysis and Determination

23. I have keenly considered the filed Notice of Motion application dated 31st May, 2022 by the Plaintiff/Applicant herein, the response to it, the affidavit evidence adduced, comprehensive written submissions, myriad of authorities cited by the Learned Counsels, the appropriate and relevant provisions of the *Constitution of Kenya, 2010* and statutes.
24. For the Honorable Court to reach an informed, reasonable, Just, equitable and fair decision, the Court has condensed the subject matter into the following four (4) salient issues for its determination. These are:
- a. Whether the Notice of Motion application dated 31st May, 2022 by the Plaintiff/Applicant herein meets the threshold for granting Mandatory injunction orders at the interlocutory stage.
 - b. Whether the honorable Court should grant a temporary injunction to restrain the 2nd Defendant/Respondent from registering the Deed Plans.
 - c. Whether court ought to halt the arbitration proceedings already taking place between the Plaintiff/Applicant and 1st Defendant/Respondent pending the determination of the suit.
 - d. Who will bear the costs of the application.

ISSUE no a). Whether the Notice of Motion Application Dated 31st May, 2022 by the Plaintiff/Applicant herein meets the Threshold for Granting Mandatory Injunction Orders at the Interlocutory Stage.

25. Under this sub – heading, clearly the issues for consideration is whether to grant mandatory injunctive orders at the interlocutory stage or not. From the perusal of the Plaint dated 16th May 2022 and filed on 17th May 2022 against the application dated 31st May 2022, in particular the pleadings makes reference to Prayer (ii) and (iii) of the Plaint, which are similar to Prayers (2) and (3) of the application. Undoubtedly, the Court deduces that, the Plaintiff/Applicant either knowingly or otherwise, is seeking final and conclusive orders at the interlocutory stage. Essentially, the Plaintiff/Applicant is urging Court to grant a major relief – cancellation and expunging of the Deed Plans and Surveying Plans of the suit properties, at the interlocutory stage. From the onset, and legally speaking, I discern that it is improper for the Plaintiff/Applicant to ask Court to preempt the final orders it seeks in the main suit without hearing parties on merits. Based on the principles of natural justice, equity and Conscience and fair hearing founded under the provisions of Articles 25 (c), 47, 48, 50 (1) and (2) and 159 of the *Constitution of Kenya, 2010*, the Court cannot make definitive and final conclusion without having the advantage of hearing and seeing empirical documentary evidence to be adduced and the witnesses who are subjected to full trial.



26. But for clarity sake, the Court wishes to extrapolate on whether the Plaintiff/Applicant is entitled to be granted the said orders calling for the cancellation and expunging of the Deed Plans and the Survey Plans at the interlocutory stage. 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. They are perpetual in nature and ordinarily issued after a Suit has been heard and finally determined. 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 Defendant in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under the provisions of Sections 1A, 3 & 3 A of the [Civil Procedure Rules, 2010](#) 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. In the cases of: [Joseph Kaloki t/a Royal Family Assembly v Nancy Atieno Ouma](#) [2020] eKLR and “[Malier Unissa Karim v Edward Oluoch Odumbe](#) (2015) eKLR Court held as follows:-

“The test for granting a Mandatory Injunction is different from that enunciated in the “*Giella v 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 Limited v 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”.

27. Further, it will be noted that the same Court of appeal in the case of:- “*Jay Super Power Cash and Carry Limited v 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”.

The Court also reaffirmed its decision in the case of:- [Shariff Abdi Hassan v Nabhif Jama Adan](#) [2006] eKLR where it stated that:

“The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.”



28. Additionally, the law on Mandatory Injunctive Orders was laid down in the case of “Civil Appeal 19 of 1998, *Andrew Kamau Mucuba v Ripples Limited*. The Court of Appeal in the latter held as follows:

“A Mandatory Injunction ought not be granted on an Interlocutory Application in the absence or special circumstances and then only in clear cases either where the court that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the Defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a Mandatory Interlocutory Injunction, they 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.”

29. Similarly,, in the case of:- *Nation Media Group & 2 others v John Harun Mwau* (2014) eKLR, the Court of Appeal said:-

“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 Injunction can only be granted in exceptional and in the clearest of cases.”

30. From these elaborate and plethora precedents, and the detailed facts of this case touching on both the Plaintiff/Applicant and the 1st Defendant/Respondent herein, the Court is fully convinced that graphically the Plaintiff/Applicant herein has not proved there was:

- i) Existence of special circumstance.
 - ii) Exceptional and clearest of cases.
 - iii) Whether the 1st Defendant/Respondent is trying to steal a march against the Plaintiff/Applicant.
- to warrant the issuing of Mandatory Injunction is in form of the facts of the case herein.

31. The Court has sought guidance from several decisions on this point. They include the case of Court of Appeal in “*Olive Mwihaki Mugenda & another v Okiya Omtata Okiiti & 4 others* [2016] eKLR while holding that the trial judge erred in law in granting final orders at the interlocutory stage when the main Petition had not been heard, stated that:

“Analysis of the persuasive decisions from India shows that if a trial court is inclined to grant final orders at the interlocutory stage, this can only be done in exceptional circumstances and the reasons for granting such final orders must be stated. In the Indian case of *Deoraj v State of Maharashtra & others*, Civil Appeal no 2084 of 2004, it was held that balance of convenience and irreparable injury need to be demonstrated before interlocutory final orders can be granted. In the Indian case, it was stated that a court could grant such final interlocutory orders if failure to do so would prick the conscience of the court resulting in injustice being perpetrated throughout the hearing and at the end, the court would not be able to vindicate the cause of justice. In the case of *Ashok Kumar Bajpai v Dr. (Smt)*



Ranjama Baipai, AIR 2004, All 107, 2004 (1) AWC 88, at paragraph 17 of the decision the Indian Court expressed as follows:

“...It is evident that the Court should not grant interim relief which amounts to final relief and in exceptional circumstances where the Court is satisfied that ultimately the petitioner is bound to succeed and fact-situation warrants granting such a relief, the Court may grant the relief but it must record reasons for passing such an order and make it clear as what are the special circumstances for which such a relief is being granted to a party.”

From the instant case, I reiterate that there are no special circumstances that have been explained by the Plaintiff/Applicant to warrant the granting of final orders at the interlocutory state. Therefore, the prayer numbers 2 and 3 of the application must fail.

ISSUE no Whether the court can grant a temporary injunction to restrain the 2nd Defendant from Registering the Deed Plans.

32. Under this sub title, the issue is whether to grant temporary injunctive orders. The role of the court at this interlocutory stage is to merely consider whether the principles for a grant of an injunction at this stage have been met. As set out in “*Giella v Cassman Brown* [1973] EA 358 (*supra*) as has already been elaborately cited and refereed to by the Learned Counsel for the Plaintiff/Applicant herein. The court will consider whether the material presented by way of affidavit evidence is persuasive enough to find that the Plaintiff/Applicant has demonstrated “a prima facie case’ with a probability of success at the hearing stage. The evidence ought to further demonstrate that in view of the circumstances of the dispute, the Plaintiff/Applicant will suffer irreparable damage whereby an award of damages would not be sufficient compensation to them and that the balance of convenience is in favour of granting the orders to the Plaintiff/Applicant herein.
33. To begin with, the Court notes that the Plaintiff avers that it is the registered owner of all the suit properties and indeed produced copies of the Certificates of Title marked as “MMM – 1” dated 25th May 2009, 4th December 2014 and 4th December 2014 respectively. It is not disputed that the on 17th August 2016 the Plaintiff/Applicant and the 1st Defendant/Respondent entered into a Sale agreement for the suit properties terms and conditions stipulated thereof. The Plaintiff/Applicant contends that in the process, the 1st Defendant/Respondent proceeded to instruct one Kiguru Licensed Land Surveyors who had since consolidated and subdivided the said parcels of land into 25 plots and deed plans issued and marked as “MMM – 6”. The Plaintiff/Applicant is apprehensive that that the 1st Defendant/Respondent will proceed and procure title deeds for the 25 plots and devour its interest in the suit property.
34. The 1st Defendant/Respondent disputes the Plaintiff/Applicant’s title to the suit property. It contends that the basic obligations on the terms and conditions of the sale agreement dated 17th August 2016 were breached by the Plaintiff/Applicant herein whereby they had wanted to know the actual status of the suit properties. It is the 1st Defendant/Respondent’s case that the Plaintiff/Applicant falsely presented itself as the registered owner of the suit property. The Plaintiff/Applicant is said to have failed to warrant the validity of its title to the suit property, by providing the 1st Defendant/Respondent with an unconditional letter of clearance from the National Land Commission that the suit property was not public land as provided by Clauses 5.2.10 and 12 of the sale agreement.



35. Indeed, the 1st Defendant has produced a letter dated 27th August 2018 from the National Land Commission, informing the Law firm of Malwa Nduya & Co Advocates that the preliminary investigations indicated that the suit properties are public land to wit:

“This is to inform you that the Letters Ref no 189222/10 dated 14th February, 2017 and ref no, NLC/CHAIRMAN/VOL XIX/153 dated 6th April, 2017 are NOT clearance letters and neither do they confirm that the land is not Public Land.

The preliminary findings by the Commission indicate that the referenced pieces of land are Public Land and therefore NOT available for allocation whatsoever.....”

(See the contents on page 52 of the 1st Defendant/Respondent’s Replying Affidavit). Pursuant to this, the said letter was followed by a letter dated 20th May 2020 from the National Land Commission instructing the Land Registrar Mombasa to register a restriction against the suit properties pending the conclusion of investigations (See the contents of page 109 of the 1st Defendant/Respondent’s Replying Affidavit). The 1st Defendant/Respondent maintains that the said titles were cancelled, the parcels consolidated and issued with Plot no 22457/1/MN on 14th May 2022 to the Cabinet Secretary to the Treasury of Kenya as Trustee for the Nyali Secondary School (see the contents of page 120 of the 1st Defendant/Respondent’s Replying Affidavit).

36. The first requirement the Plaintiff has to satisfy, is “a prima facie case”. The Court of Appeal in “the *MRAO Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR fashioned a definition for prima facie case in civil cases in the following words:

“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 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...

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.

37. The Plaintiff/Applicant has the burden of proving a prima facie case, the Court of Appeal in “*Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR explained the way that an applicant can prove it, by stating that:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means



no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.”

38. Thus, from the surrounding facts and inferences herein and material placed before court, the Honorable Court is of the view that the Plaintiff/Applicant herein has not establish a prima facie case with a probability of success at trial. It is instructive to note that there exists complex competing issues here on the ownership of the suit properties. The status of the title deeds are seriously being challenged. While the Plaintiff/Applicant claims title to the suit properties and having entered into a sale agreement between itself and the 1st Defendant/Respondent they have turned around and are accusing the 1st Defendant/Respondent of having committed fraudulent means to attain the sub divisions and the consolidation of the Deed and Survey Plans title deeds. However, from the face of it, there is no evidence to support the fraudulent claims associating the 1st Defendant/Respondents to be part of. If anything the 1st Defendant/Respondent has demonstrated through its replying affidavit, that the Plaintiff/Applicant's title to the suit properties was highly compromised by allegations of the same being public land. Which led to the said titles being cancelled, consolidated and issued new title in favour of Nyali Secondary School. Without holding a mini trial and without examining the merits of the case closely, it is my humble view that the Plaintiff/Applicant herein has failed to establish an arguable case, at this interlocutory stage.
39. It follows that when an applicant fails to prove a prima facie case, does the court still consider the other two requirements? Certainty not, the Court of Appeal in the case of “[Nguruman Limited v Jan Bonde Nielsen](#) (*supra*) it held that:
- “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. Ltd v Afraba 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.” (emphasis mine)
40. As discussed in [Nguruman](#), where an applicant has failed to establish a prima facie case, then court does not need to consider whether there is irreparable injury or there is a balance of convenience. An applicant cannot leap-frog to a grant of temporary injunction, all the three pillars of an order of injunction must be established before an injunction is granted. For these reasons, therefore, the prayers sought by the Plaintiff/Applicant for grant of temporary injunctive orders are also unsuccessful.



ISSUE no c). Whether court ought to halt the Arbitration Proceedings between the Plaintiff/Applicant and 1st Defendant/Respondent Pending the determination of the Suit.

41. It is well established principle of law that the Court at all costs should never be seen to re writing contractual agreements for parties. The parties are bound by the terms and conditions of their own contractual agreements. The provision of Clause 21 of the sale agreement provides as follows:-

“ARBITRATION: - “Should any dispute arise between the parties with regard to the interpretation, rights, obligations and/or implementation of any one or more of the provisions of this agreement, the parties shall in the first instance attempt to resolve such dispute by amicable negotiation. Should such negotiations fail to achieve a resolution within fifteen (15) days, either party may declare a dispute by a written notification to the other whereupon such disputes shall be referred award of the arbitration tribunal shall be final and binding upon the parties to the extent permitted by law.....”

42. From the facts adduced so far, the 1st Defendant/Applicant has indeed since lodged its claim before the Chartered Institute of Arbitration. Ideally, the Plaintiff/Applicant has subjected itself to that process by filing a response to the claim made by the 1st Defendant/Respondent herein. Juxtapose, the Plaintiff/Applicant now seeks to stay the arbitration proceedings until this matter is heard and determined. It strongly holds on this position due to the allegation of criminality issues allegedly meted by the 1st Defendant in the matter. The Plaintiff/Applicant maintains that it has made a report to Nyali Police station the 1st Defendant’s fraudulent activities and obtained OB no 30/13/05/2022 (see annexure marked as “MMM – 7”). The Plaintiff/Applicant contends that despite the ongoing investigations of the 1st Defendant’s activities, the 1st defendant has filed the arbitration proceedings. In its defence, the 1st Defendant argues that the Plaintiff/Applicant is out to frustrate the arbitration proceedings, which are pursuant to Clause 21 of the agreement of sale.

43. From the sale agreement, it is clear that the intentions of the parties were that if any dispute arose they oust the jurisdiction of the court and have preference to have the dispute settled through negotiation and where the same fails to refer it to arbitration. Based on the new policy by the Executive arm of Government of Kenya and the Judiciary transformation policy known as “Alternative Judicial System initiative (popularly referred to as “The AJS”) now being spear headed by the AJS Committee headed by Justice Ngugi, JA is anchored under the provision of Article 159 (2) (c) of the [Constitution of Kenya, 2010](#), it burdens this court to promote and advance alternative forms of dispute resolution including reconciliation, mediation and arbitration in resolving disputes. This Honorable Court is a firm believer and supporter of alternative justice systems especially where parties agree to subject themselves to alternative mode of dispute resolution other than the court. It should never loss such an opportunity.

44. Besides to this, the Court seeks solance from the case of “[Chania Gardens Limited v Gilbi Construction Company Limited & another](#) [2015] eKLR where it was held that:-

“ Accordingly, there are no grounds of staying the arbitration herein. It should be noted that the Court received a perpetual command from Article 159 of the [Constitution](#) to promote arbitration and other alternative forms of dispute resolutions, and it should be extremely wary to hamper those mechanisms or issue orders which will interfere with the process of arbitration. No wonder Section 10 of the [Arbitration Act](#) provides that the Court should only intervene as far as the law permits. The word used is “intervene”, which connotes justifiable intervention in law. I will not issue any stay of the arbitration. See eminent literary work of Dr. Kariuki Muigai FCI Arb, Phd and current Chairman of the Chartered Institute



of Arbitrators, Kenya Branch in his book, *Settling Dispute through Arbitration in Kenya* (2012) 2nd Ed. Glenwood at page 91 states:-

“The fundamental principle, embodied in the , 1995 (the Act), is that where there is a valid arbitration clause, all issues falling within the jurisdiction of the arbitrator should be decided by the tribunal, and the court should not intervene. This preposition was well captured in the case of *Shamji v Treasury Registrar Ministry of Finance* the court stated that it was a well settled proposition that where a dispute between the parties has been referred to the decision of a tribunal of their choice, the Court should direct that the parties go before the specified tribunal other than interfere with the party’s choice of that forum”.

Flowing from the above, what Ringera J (as he was then) in *Telcom (K) Ltd v Kamconsult Ltd* [2001] 2 EA 574 stated that it is not the role of the court to terminate the arbitral proceedings, remains the law. Contrary to the submissions by the Applicant, enactment of Article 159 of the Constitution, Sections 1A and 1B of the Civil Procedure Act cap. 21 reinforce the need to accord arbitral process due deference as mechanism of dispute resolution by intervening only as is necessary for the sake of justice. Not otherwise. The type of intervention sought here is not supported in law.”

45. Based on the above authoritative finds and legal ratio, the Honorable Court should not impede nor intervene the progression of arbitration proceedings. Instead, it should be keen in promoting alternative justice system and only allow a stay of arbitral proceedings where there exist compelling reasons. As indicated, the Court is clothed with a constitutional burden of promoting arbitration as one of the forms of alternative dispute resolution mechanisms. Unless a party to the arbitral proceedings can demonstrate a justifiable reason to stay the proceedings for example, the lack of impartiality and independence of the arbitrator, the court has no business staying the arbitral proceedings. Again, arising from the reason stated herein, the prayers to stay the proceedings of the arbitration which as the English saying goes, “the train has already left the station..” by the Plaintiff/Applicants herein fails.

ISSUE no d). Who will Bear the Costs of the Application

46. It is trite law that the issue of costs is at the discretion of the Court. Costs mean the award that is granted to a party upon the conclusion of a legal action, or process or proceedings in any litigation. The provision of Section 27 (1) of the Civil Procedure Act, cap. 21 holds that costs follow the events. (See the Supreme case of “*Jasbir Rai Singh Rai v Tarchalon Singh* (2014) eKLR, the Court of appeal case of *Mary Wambui Munene v Ibururu Dairy Co – Operative* and *Cecilia Karuru Ngayu v Barclays bank of Kenya & Another* (2016) eKLR.
47. In this case, the results of the matter is that the Plaintiff/Applicant has not succeeded in prosecuting their application on the parameters founded in Law. Nonetheless, taking that this matter is still proceeding on and in order to promote the AJS mechanisms, sustain the win – win, cordial and amicable atmosphere amongst the parties now that they are attempting to engage in an Arbitration process a form of Alternative Judicial System (AJS) founded under the provision of Article 159 (2) (c) of the Constitution of Kenya, it is in the interest of natural justice, Equity, Conscience, fair and reasonable that each party bears its own costs of the application.

VI. Conclusion & Disposition

48. Consequently, based on the analysis to the framed issues herein, the Honorable Court is not satisfied by the issues raised in the Notice of Motion application dated 31st May, 2022 taking that the reliefs sought are of such conclusive nature of the matter before adjudication. Besides, based on the doctrine of



exhaustion the Honorable Court strongly holds that the Arbitration mechanisms as the 1st Defendant seem to have already subjected themselves by lodgings a complaint before the Institute of Chartered Arbitration to try and resolve this matter.

49. In that case, therefore, I proceed to grant the following orders:-

- a. That an order of the Court is made that the Notice of Motion application dated 31st May, 2022 by the Plaintiff/Applicant is devoid of merit and hence be and is hereby dismissed without any orders to costs.
- b. That an order of the Court is made in the spirit founded in the provision of Article 159 (2) (c) of the *Constitution of Kenya, 2010*, and Section 6 of the *Arbitration Act, 1995* that the proceedings herein be and are stayed pending the Arbitration proceedings between the parties herein are heard and determined by the arbitrator selected by them pursuant to the agreement of sale dated 17th August 2016.
- c. That in order to keep track of the progress made by parties and the Arbitration proceedings hereof the matter to be mentioned on 9th October, 2023 thereof.
- d. That each party to bear their own costs.

50 It Is So Ordered Accordingly

RULING DELIEVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 27TH MARCH 2023

HON. JUSTICE (MR) L.L. NAIKUNI (JUDGE).

ENVIRONMENT & LAND COURT AT

MOMBASA

In the presence of:

- a. M/s. Yumnah, Court Assistant.
- b. Mr. Daniel Kihiko Advocate for the Plaintiff/Applicant.
- c. M/s. Mulongo Advocate holding brief for Mr. Kibara Advocate for the 1st Defendant/Respondent.
- d. Mr. Mwandeje Advocate for the 2nd, 3rd & 4th Defendant/Respondent

