REPUBLIC OF KENYA

IN THE ENVIRONMENT OF LAND COURT

AT MOMBASA

ELC NO. 242 OF 2021

SAGALLA LODGE LIMITED.....PLAINTIFF

VERSUS -

SAMWUEL MAZERA MWAMUNGA &

JOSIAH CHOLA MWAMUNGA

(Suing as the Executors of ELIUD

TIMOTHY MWAMUNGA – Deceased).....DEFENDANTS

RULING

I. Preliminaries

1. Before this Honorable court for its determination are three (3) Notice of Motion applications dated 18th October, 2021 by the Appellant/Applicant under ELC Appeal No. 69 of 2022 which is brought under the provision of Order 42 Rule 6 (1) and (2) Order 43 (21) and Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, Cap 21.

While the second Notice of Motion application is one dated 21st December, 2021 by the Defendants under ELC No. 242/2021. It is brought under the Provisions of Sections 7, 1A, 1 and 3A of the Civil Procedure Act, Cap 21, Order 40 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules 2010.

The third application is Notice of Motion application dated 7th December, 2021 under ELC No. 242 of 2021 by the Plaintiffs/Applicants. It is brought under the dint of the Provisions of Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Cap. 21, Order 40 Rules 2 and Order 51 Rule 1 of the Civil Procedure Rules, 2010.

For good order, it was agreed that all these applications which involve the same subject matter and almost the same parties to be dealt with concurrently. Nonetheless, for clarity sake, the Honorable Court has undertaken to treat each of these Notice of Motion applications separately as possible while framing out issues as distinctly as possible.

II. The Appellant/Applicant's Case

2. The Appellant/Applicant filed the notice of Motion application dated 18th October, 2021. It seeks for the following orders:-

(a) Spend.

(b) That the pending the hearing and determination of this Application there be a stay of execution of the Ruling Honorable Court of Hon. F.N. Nyakundi issued on 29th September, 2021 in Voi ELC. No. 15 of 2020 herein and of any other consequential orders arising therefrom pending further orders of this Honorable Court and pending the hearing and determination of this application.

(c) That pending the hearing and determination of this Appeal there be a stay of execution of the Ruling of Honorable Court of Hon. F.N. Nyakundi issued on 29th September, 2021 in Voi ELC. No. 15 of 2020 herein and of any other consequential orders arising therefrom pending further orders of this Honorable Court pending the hearing and determination of this appeal.

(d) That costs of this application to be provided for.

3. The aforesaid Notice of Motion application is based on the premise facts grounds and/or averments of the fifty (50) Paragraphed Supporting Affidavit of ELIZABETH MWAMUNGA and the nine (9) annexetures marked as "EM -1 to 9" annexed thereto. She deposed that she was conversant with the facts of this case. She held the property forming the subject matter of the appeal in Sagalla Lodge located within all that property known as Land Reference No. 36092 – Ndara Ranch measuring 1,905 Ha. (Approximately 4,707.30 acres or thereabout) located within Voi in the County of Taita Taveta.

She held that she was sued by the Respondent vide a Plaint in suit No. Voi ELC No. E015/2020 wherein he sort for inter alia an order of injunction barring her or any other beneficiary of the estate of the late Eliud Mwamunga (hereafter referred to as "The Deceased") from accessing and/or interfering with their quiet possession of the suit property.

4. She informed court that in May, 2015, the Respondent approached the deceased with as intention to enter into a lease agreement over the Sagalla Lodge – a hotel located within the suit property. On 21st July, 2015 the deceased and the Defendant entered into the lease agreement – the hotel occupies approximately five (5) acres or thereabout of the suit property – but the Respondent filed the above stated suit which was heard and temporary injunction order granted on 10th November 2015 barring her from access to the leased property upon service her Advocates sought for the orders to be discharged and the same were granted and the suit fixed for inter parte hearing on 8th December, 2020.

They averred that there were disconnection of Certain service as electricity and water and that they held they had to close down the hotel due to Government directive in response to the Covid-19 Pandemic. The Respondent also sought to be issued with a force Majeure notice as contained in Clause 17 (a) of the Lease Agreement whereby he suspended his rental obligations under the lease, and according to this clause the Respondent is only permitted to access the lodge take steps in securing his properties and not allowed to resume operations up until they issue a written notice to the executor of the estate, but according to her the Respondent never issued any notice to this effect and he misled court as he never closed down the hotel which he continued with the normal operations throughout this period – as it was evident from a copy of the guest register yet he refused to pay rent to the estate. Indeed the electricity was disconnected by Kenya Power & Lighting Company (KPLC) due to the outstanding arrears by the hotel.

5. There was no evidence of her having interfered with water connection at the hotel – which was supplied by the Tavevo Water and Sewerage Company a public entity. On 29th September, 2021 the lower court delivered its ruling in favour of the Respondent and being aggrieved she filed this appeal as per the terms of the filed memorandum of Appeal dated 18th October, 2021 and filed on 19th October, 2021 she urged this court to grant the orders as prayed.

On 1st November, 2021 the stay of execution orders were granted by this court.

I have noticed that the Respondent is yet to file any replies to this notice of motion application.

III. <u>The Defendant's Notice of Motion Application dated 21st December, 2022 ELCC No. 242 of 2021.</u>

6. On 21st December, 2021 the Defendant's duly appointed legal executor – SAMUEL MAZERA MWAMUNGA AND JOSIAH CHOLA MWAMUNGA to the estate of the deceased filed a Notice of Motion application dated 21st December, 2021 in the ELC

No. 242/2021. They sought for the following orders:-

(a) Spend;

(b) That pending the hearing and determination of this Application this Honorable Court be pleased to set aside and/or discharge the interim orders of injunction issued in favour of the Plaintiff/Respondent on 9th December, 2021.

(c) That the Honorable Court do strike out the suit herein with costs to the Defendant as it is an abuse of the court process.

(d) That costs of this application be provide for.

7. The said Notice of Motion application by the Defendant is based on the testimonies, facts grounds and averments of the thirty (30) Paragraphed Supporting Affidavit of SAMUEL MAZERA MWAMUNGA and the twelve (12) annexetures – "SMM 1 to 12" annexed hereto. He deposed that he was a duly appointed legal Executor of the estate of the late Eliud Timothy Mwamunga (the deceased). The deceased is the registered owner of all that property known as Land Reference No 36092 Ndara – Ranch measuring 1905 hectares or thereabout located within Voi in Taita Taveta County. On 21st July, 2015 the deceased entered into a lease agreement with the Plaintiff over the existing Sagalla Lodge located within the Ndara Ranch. He informed court that as the dully appointed executor of the estate of the deceased they were at all material times under a statutory duty to collect and settle all debts owed to and owed to the estate. He held that the Plaintiff/Respondent had obtained ex - parte injunction orders against the Defendants on the basis of misrepresentation as well as non-disclosure of material facts and the proceedings herein were an abuse of the court process. He alleged that the Plaintiff/Respondent falsely claimed that the Legal Administrator had frustrated them in their business with the sole aim of wrestling the lodge from him.

8. He deponed that on 3rd June, 2020 the Defendant herein issued a Notice under the Clause 17(a) of the Lease agreement whereby they invoked the force Majeure Clause and suspended the lease agreement binding the parties herein citing the Covid - 19 Pandemic and the Government directives on the closure of hotels and restaurants and such similar hospitality entities during this trying moment globally.

Accordingly, he held upon issuance of the notice under the force Majeure Clause the Plaintiff/Respondent under Clause 17 (a) of the terms of the lease the Plaintiff/Respondent was only permitted to access the lodge to take necessary steps to protect his assets during the period of suspension. Despite this they have never issued a notice on their intention to resume their performance of obligation but instead they had continued operating with impunity.

9. He held that on 10th November, 2020 the Plaintiff/Respondent filed ELC Suit No. 15/2020 Voi whereby he sued the beneficiaries of the estate of the deceased and stated in Paragraph 17 of the Plaint that he sort for similar orders of injunction in respect of the suit property they were granted injunction orders on 10th November, 2020 and on 29th September, 2021 a ruling was delivered which is subject of appeal before this court in ELC (Appeal) No. 69/2021 and where stay of execution were granted on 15th November, 2021.

10. He deposed that despite re-opening and continuing with business as usual the Plaintiff/Respondent had been in breach of the lease agreement by refusing to pay the reserved rent of the lease premises for the years 2015 to 2020 amounting to a sum of Kenya Shillings Five Million Four Sixty Five thousand and Forty (Kshs. 5,465,040/=) which he has refused to settle. He confirmed having levied of distress and proclaimed their goods pursuant to a court order and which the Plaintiff/Respondent challenged the process through a court process. He held that the Plaintiff/Respondent had failed to disclose the following material facts:-

(a) They were electricity arrears to the Kenya Power leading to the disconnection of the electricity.

(b) The Defendant/Applicants having filed a suit No. 48/2021 at Voi against the Plaintiff for recovery of rental arrears.

(c) Plaintiff/Respondent had filed to disclose having been issued with notice of termination of the lease due to continued breaches of the lease agreement.

He argued that a tenant cannot force himself into a landlord and that the injunction orders granted to Plaintiff/Respondent by this

court should be set aside as the same was based on misrepresentation, gross non-disclosure of material facts as well as abuse of the court process. Based on the advise by his Advocates on record, he contended that this suit offended the provisions of Section 7, the doctrine of was ***"Res – Judicata"*** as a similar suit had been heard and determined over same issues and subject matter before the Magistrate Court and hence it would be in the interest of Justice that this suit is struck out with costs to the Applicant for being an abuse of the court process.

VI. Replying Affidavit by the Plaintiff/Respondent

11. On 19th January, 2022, while opposing the Defendant/Applicant Notice of Motion applicant dated 21st December, 2021 filed a twenty two (22) Paragraphed Replying Affidavit by DAVID MAINA GAITHO sworn and dated 18th January, 2022 with two (2) annextures marked as "DMG – 1 & 2" annexed hereto. He deponed being the Director to the Plaintiff's Company and duly authorized to swear this affidavit. He admitted the contents of Paragraphs 1, 2, 3, 4, 7, 8, and 9 of the Supporting Affidavit by the Defendant/Applicant save to hold that the effect of the force Majeure clause contrary to the assertion of the Defendant did not in any way bar the Plaintiff's operations.

12. He held that he opposed the contents of Paragraph 5 and 6 of the Supporting Affidavit. He further added that the Government of Kenya directive due to Covid – 19 Pandemic 19 had such adverse effect on the hospitality industry though the same had been relaxed and the operations by the Plaintiff had resumed but with difficulties cause by the Defendants who had been frustrating the Plaintiff by chasing away visitors to the hotel. He held that in answer to the Paragraphs 10, 11, 12, 13, 14 and 15 of the Supporting Affidavit by stating the parties in Voi ELC. No. 15 of 2020 i.e. Sagalla Lodge Ltd. -Versus- Elizabeth Mwamunga are not the same parties as the case herein. He held that at the time of filing of ELC No. 015 of 2020 the Defendants had not taken out letters of Administration.

13. Besides, he held that the said ELC. No. 15 of 2020 was withdrawn on 22nd November, 2021 in the presence of the Advocate for the Defendant and that was done prior to filing a suit before this court on 8th December, 2021. According to him the ELC (Appeal No. 69 of 2020 – "***Elizabeth Mwamunga –Versus- Sagalla Lodge Ltd'*** and all other orders arising as a result of Voi No. 15 of 2020 had since collapsed.

14. He held that the rent arrears being demanded by the Defendant for a sum of Kenya Shillings Five Million Four Sixty Five and Fourty (Kshs. 5,465,040/=) under Paragraph 16 of the Supporting Affidavit was contested as the Plaintiff has been making payments of rent to the deceased and operations were never interrupted until his passing away when the Defendants took over management of the deceased.

15. He held that the averments under Paragraphs 17 and 18 of the Supporting Affidavit were contested as there had been no claim of rent arrears during the lifetime of the deceased. He indicated that the order permitting levying of distress was as a result of forum shopping where the Defendants left Voi Magistrate Court ELC. No. 48 of 2021 to secure orders before a Magistrate in Mombasa. Clearly knowing the Mombasa courts had no jurisdiction – the land being 1,905 Ha. As a result it was not true there was material on non-disclosure. Indeed it's a fact that the suit is Res - Judicata and which the Defendant has failed to disclose. He admitted that indeed in as much as a tenant could not force himself onto a landlord, but held that the tenant has rights which are protected by the law. There was nothing warranting the suit to be struck out. In the long run the Deponent urged this court to dismiss the application dated 21st December, 2021 by the Defendant/Applicant with costs.

V. The Plaintiff's Notice of Motion application dated 7th December, 2021.

16. on 8th December, 2021, the Plaintiff/Applicant the Sagalla Lodge Ltd. filed a Notice of Motion application dated 7th December, 2021 by the said application the Plaintiff/Applicant sought for the following orders:-

(a) Spend;

(b) Spend;

(c) That pending the hearing and determination of this suit, the Honorable Court be pleased to issue a temporary injunction restraining the Defendants/Respondent their servants, agents or any other

person acting under their directions from interfering with the Plaintiff's peaceful use and occupation and business on one of the properties known a lodge land comprising of approximately 25 hectares or thereabout of CR 36092 Plot No. 12176 and in particular from:-

(i) Harassing, turning away, locking out or in any way interfering with the Plaintiff's guests, officers and/or employees at the gate, within the leased premises or at all.

(ii) Disconnecting, further disconnecting water supply to the property known as CR 36092 Plot No. 12176.

(d) The Jurisdictional Officer Commanding Station (OSC) Voi Police Station to ensure compliance with the court orders.

(e) That costs of this application be awarded to the Plaintiff/Applicant.

17. The application by the Plaintiff/Applicant is premised on the grounds, facts, testimonials and averments of the fifteen (15) paragraphed Supporting Affidavit of DAVID MAINA GAITHO sworn and dated 7th December, 2021 and six (6) annextures marked as "DMG – 1 to 6" annexed thereof. He deposed that he is the Director of the Plaintiff's Company with full authority to swear this affidavit and represent the Plaintiff in this matter. He informed court that sometimes on 21st July 2015, the deceased and the Plaintiff duly entered into a lease agreement for a period of fifteen (15) years over part of the suit property known as the lodge land measuring approximately 25 hectares (Approximately 61.77 acres) on the parcel of land known as CR 36092 Plot No. 12176.

18. He deposed that from that time they had been in quiet possession of the leased area until the demise of the deceased when the Defendants began interfering with the operations by the Plaintiff with the sole aim of wrestling the lodge from them by employing underhand and illegal means.

He further stated that they had been making regular and prompt payment of rent and had met all then obligation under the lease agreement up and until the closure of the hotel business due to the outbreak of the global Covid – 19 Pandemic.

19. He deposed that the Defendant had with the aid of persons known to them caused interference and hindered the operations by the Plaintiff including unlawfully carrying away hotel furniture and equipment, Kitchenware, beddings, food stuff, drinks, among other things changing the lodge's padlocks without notifying the Plaintiff, turning away both guests and employees and locking out guests at the gate, and disconnecting water making the Plaintiff incur a loss estimated at Kenya Shillings Three Million Six Sixty Five Thousand Six Sixty Nine Hundred (Kshs. 3,665,696.00/=). As a result the Plaintiff has resorted on installation of independent water system from the County Water Service provider M/s. Tavevo Water and Sewerage Company at a cost of approximately Kenya Six Hundred Thousand (Kshs. 600,000/=). Further, the Plaintiff has had to cancel bookings and refund customers their deposits.

20. He averred that should the orders not be granted they stand to suffer great and irreparable loss – which includes its reputation as a holiday designation which took time to build. He urged the honorable court to allow its application with costs. I have taken cognizance that the Defendant instead of filing a Replying Affidavit to the Plaintiff's application dated 7th December, 2021, he inadvertently termed it as Supporting Affidavit.

VI. <u>Submissions</u>

21. On 20th January, 2022, while all the parties for the Plaintiff and the Defendant were present in court, they were directed to have the three (3) Notice of Motion applications dated 18th October, 2021, 21st December, 2021 and 7th December, 2021 be canvassed and being disposed off by way of written submissions. Pursuant to that, all parties fully complied.

Equally, on 22nd February, 2022 both counsels Mr. Kiwinga and Mr. Nyange Advocates were accorded an opportunity to highlight their written submissions. They were extremely articulate and concise from their well-researched written submissions. The Honorable Court was impressed. Thereafter the Honorable Court reserved a date for delivery of the ruling thereof.

A. <u>The Plaintiff's Written Submissions</u>

22. On 25th January, 2022 the Learned Counsels for the Plaintiff the Law Firm of Messrs. Nyange Shania and Company Advocates filed their written submissions dated 24th January, 2022. Mr. Nyange Advocate submitted that the Plaintiff filed a Notice of Motion application dated 7th December, 2021 which was served and was opposed by the Defendants via a Reply Affidavit wrongly filed Supporting Affidavit sworn on the 17th January, 2022. He noted that in addition the Defendants had now filed a Notice of Motion application dated 21st December, 2021 supported by an affidavit sworn on the 21st December, 2021. The said application was opposed by the Plaintiffs via a Replying Affidavit sworn on 18th January, 2022. The Learned Counsel stated that the Plaintiff/Applicant in its application had met all the standards to be granted the injunction orders as set out in the now famous case of "***Giella –Versus- Cassman Brown (1973) E.A. Page 369***. He stated that it was not contested that the Plaintiff entered into a lease agreement with the deceased for a period of fifteen (15) years. The lease agreement was executed and duly registered.

23. The Plaintiff then took possession of the lease land being part of parcel No. CR 36092 Plot Nol. 12176 measuring 25 acres. The Plaintiff has been in peaceful occupation until the demise of the deceased when the Defendants were appointed executors of the estate they started interfering with the operations of the business premises for the Plaintiff. Though they had been paying rent but the Defendants ignored this and caused disconnection of the water supply turning away quests, took furniture and obtained orders to levy distress from the Magistrate Court Mombasa and not Voi.

The Learned Counsel argued the Plaintiff has prima facie case by virtue of its physical and lawful occupation of the suit property and the terms of the lease agreement which is still to expire. They indicated they were protected by the said lease agreement and in particular Clauses 11(a) of the Lease agreement and Section 65 (1) (a) of the Land Act No. 3 of 2012.

24. Regarding the argument advanced by the Defendants that the Plaintiff had been in rent arrears, the Learned Counsel averred that the Plaintiff had annexed receipts as evidence of payment of rent. Further they also argued which to them was now public knowledge around that period that, all hotels and lodges could not operate due to government restrictions arising from the global Covid - 19 pandemic and hence the Defendants could not reasonably expect the Plaintiff to continue paying rent while not in operation due to the global Covid - 19 Pandemic. To buttress their case they relied on the cases of '***Mrao Limited – Versus - First American Bank Kenya Limited; the American Cynamid – Versus - Ethicon Ltd. and Mbuthia – Versus - Jimba Credit Finance Corporation.***

25. The Learned Counsel further contended on the issue of irreparable harm the court should determine whether the Defendants have a right to interfere with the operations of the Plaintiff on the suit property. He argued that Defendants had no court order barring the Plaintiff from being in occupation of the property and operating the lodge as per the lease agreement and the claim for the nonpayment of rent had not been determined and should not be a justification for interfering with the operations of the Plaintiff's business on the suit land. The court had yet to declared that the Plaintiff was in breach of the lease agreement.

He submitted that this being a hospitality industry reputation was paramount and a critical component of the business and therefore to destroy it would be more than financial loss which harm was irreparable once tarnished and guests would stop visiting the facility going forward.

Besides the in the spirit founds from the case of **"Nguruman Limited –Versus- Ian Bonde Nielson & 2 Others.**

26. It's his submissions that the Defendants stood to suffer no prejudice in the event the court granted the orders sought herein. He submitted that the balance of convenience held in favour of the Plaintiff and urged court to grant the orders as prayed.

On whether the Notice of Motion application dated 21st December, 2021 was meritorious the Learned Counsel submitted that it is Defendants who were guilty of material non-disclosure of facts at the time of filing their application they deliberately failed to disclose that "***Voi ELC No. 15 of 2020 Sagalla Lodge –Versus- Elizabeth Mwamunga"*** had been withdrawn whose effect was meant that the ELC Civil Appeal No. 69 of 2021 would automatically collapse. Despite this, the Defendants failed to disclose this fact yet they were present when this withdrawal took place. Nonetheless, the parties in the ELC No. 15 of 2020 and those in the present suit were different.

27. Further, the court in Voi has no jurisdiction to deal with this matter. He dither argued that the orders for levying distress and proclamation of the goods for the Plaintiff emanated from a court in Mombasa and not Voi – a clear case of forum shopping as the court in Mombasa had no jurisdiction to entertain the matter, the reason the orders were never challenged is because they were never served. He further argued the Defendants could not levy distress for rent and still claim that the Plaintiff was in rent arrears since the

year 2015 for this they relied on the case of "***Bahadirali Ibrahim Shamji – Versus - Al Noor Jamal and 2 Others Civil Appeal No. 210 of 1997 and GOTV Kenya Limited – Versus Royal Media Services Limited & 2 Others (2015) eKLR*** .

28. On whether the suit Voi ELC No. 15 of 2020, ELC Appeal No. 69 of 2021 and ELC No. 48 of 2021 were Res judicata to the present suit ELC No. 242 of 2021. He argued through a letter dated 19th November, 2021 by the Plaintiff to the Court Administrators indicating the withdrawing the suit marked "DMG – 1 (c)". He stated that on 25th November, 2021 vide a court order, marked as "DMG – 1 (c)" the suit at the lower court was withdrawn in the presence of the Defendants Advocate in effect, of the said suit at Voi meant the ELC Appeal No. 69 of 2021 automatically collapsed leaving the suit ELC. No. 48 of 2021 which the parties are difference from those of the instant case. They referred to the Provisions of Section 7 of the Civil procedure Act Cap. 21 and the decision of '***Independent Electoral and Boundaries Commission –Versus - Maina Kiai & 5 Others (217) eKLR*** on the test for determining the application of the doctrine of Re- judicata on any given case.

They argued the Defendants applications failed to satisfy these elements Besides the Voi ELC No. 48 of 2018 lacked pecuniary jurisdiction to entertain this case.

These suits have not been heard and determined yet for a suit to be deemed Res-judicata must meet these requirements.

29. Finally the Learned Counsel strongly and elaborately refuted the Plaintiff's suit was an abuse of court process and hence to be struck out. To support the point he relied on the case of ***"Nancy Musili – Versus - Joyce Mbele Karisi and Muchanga Investments Ltd. –Versus Safaris Unlimited (Africa) Limited and 2 Others Civil Appeal No. 25 of 2002 (2009) KLR 229 Court of Appeal.*** He opined that the Defendant's applicant was fatally defective contrary to the provisions of section 5 of the Oaths and Statutory Declaration Act Cap 15 as the Affidavit showed as having been sworn at Voi while the stamp read Nairobi concluding that the place the affidavit was sworn and where it was commissioned were different places – hence the need to strike out the supporting affidavit altogether. Thus the Defendant's Notice of Motion application ought to be dismissed with costs.

B. <u>The Defendant's written Submissions.</u>

30. On 2nd February, 2022, the Learned Counsel for the Defendants the Law firm of Messrs. S.M. Righa & Company Advocates filed their written submissions. Mr. Kinyua Advocate submitted vehemently opposing the Notice of Motion application by the Plaintiff dated 7th December, 2021, through a Replying Affidavit dated 17th January, 2021 thought erroneously filed as Supporting Affidavit, they also filed a Notice of Motion application dated 21st December, 2022 which they sought to set aside the Interim injunction orders as well as striking out of the entire suit instituted by the Plaintiff claiming it was an abuse of the due process of the court.

31. The Notice of Motion application was strongly opposed by the Plaintiff through a Replying Affidavit dated 18th January, 2022. The Learned Counsel as a way of setting up the pace of his detailed and thoroughly prepared submissions provided a detail of the surrounding interferences and the background facts as adduced by both the Plaintiff and the Defendants that led to the germane of this heated dispute all pertaining to the suit property and the lease agreement duly executed between the Plaintiff and the deceased terms and conditions stipulated thereto.

32. The Learned Counsel averred that the application by the Plaintiff failed to meet the requirements and the standards set out in *the Classious locus* case of "***Giella – Versus - Cassman Brown (1973) E.A. Page 358 and East African Development Bank –Versus- Hyundai Motors Kenya Limited (2006) eKLR*** and instead indicated that the Defendants had shown byway of cogent evidence that the Plaintiff was not deserving of the Interim injunction order sort and their orders ought not be allowed. To begin with the argued that the Plaintiff had not established a "*Prima Facie*" case with a high probability of success as the Plaintiff came to court and sought the orders on the basis of malice, misrepresentation of facts and gross non-disclosure of material facts. On this point he relied on the case of '***Moses Koech – Versus - Rael Langat (2012 eKLR*** to the effect that:-

"An injunction being an equity remedy, the applicant might have to come before this court in good faith. He came to this court seeking equity hence should have acted with clean hands. Granting such a person inunction orders against a person who is not able to act due to some hindrance by the person seeking the orders will be unjust. In the premises I decline to grant the orders

sought"

33. His argument was that the Plaintiff failed to disclose that he had previously filed a suit before the Chief Magistrate Court (Voi) ELC. No. 15 of 2020 whereby he obtained word for word similar orders of injunction vide a ruling of the trial court delivered on 29th September, 2021 and which formed the subject matter of ELC. Civil Appeal No. 69 of 2021 that was currently before this Honorable Court whereby this court on 15th November, 2021 granted stay of execution of the lower court ruling and which remain in force as they have not been set aside todate.

He argued that since the lower court had dealt with the matter of injunction, this court should not be dealing on the same matter again as the same is barred by the provisions of Section 7 of the Civil Procedure Act Cap. 21 and on the breach of the doctrine of Res judicata, and Section 7 of the Civil Procedure Act, the Counsel relied on the cases of "***Uhuru Highway Development Limited – Versus - Central bank of Kenya & 2 Others (1996) eKLR and Ram Kirpel – Versus - Rup Kuari I.L.R. Vol. VI 1883 Achehabad Series Centre for rights Education And Awareness and 2 Others –Versus- Speaker of National Assembly & 6 Others (2017) eKLR, Stephen Mugao –Versus- Julia Wanja Muchege (2021) eKLR*** . He held that although the Plaintiff claimed to have withdrawn the suit before the lower court the application seeking for injunction orders had been argued and determined by court on 29th September, 2021. Satisfying the ingredients of Res-judicata founded on Section 7 of the Civil Procedure Act and thus on this ground alone he held the Plaintiff had no prima facie case.

34. With regard to the allegations raised by the Plaintiff to effect the interference of its quiet possession of the suit premises and all the particulars under Paragraph 6 of its Supporting affidavit and the Photographs marked as "DMG – "4a" to c" which showed goods being removed from the suit premises the Counsel referred court to the provisions of Section 107 (1) and 109 of the Evidence Act Cap 80 so as the Plaintiff had failed to discharge the burden of proof and established by way of documentary evidence that the Defendants had in any way interfered with the leased premises. He held that all these allegations had been controverted through documentary evidence by the Defendants. Indeed, he held that the Plaintiff had failed to disclose that the Defendants had made several demands for rental arrears that predated the death of the deceased. The counsel averred that the Plaintiff had misled court by interfering that the Defendants had illegally carted away his goods. When he was well aware that same was subject to a lawful process of levying of distress.

35. As regard the levying of distress to the Plaintiff's goods by the Defendants. The counsel refuted the Defendants obtained the court orders through forum shopping as alleged by the Plaintiff who he held had failed to proof it, and as the same was validly obtained and had been undischarged nor set aside. The proclamation notice was duly served upon the Plaintiff on 2nd July 2021 and the Plaintiff was given fourteen days to settle the outstanding arrears. The said goods which were proclaimed were equally not sufficient to settle the rental arrears which prompted the filing of the Civil Case ELC. No. E48 of 2021 at Voi Magistrate Court for recovery of the same. On the disconnection of electricity it was only the Kenya Power and Lighting Limited that had the power and mandate to connect electricity of its customers and not the Defendants. The Plaintiff had not shown any documentary evidence of them connecting water from TAVAVO.

36. The Learned Counsel's connection in reference to the argument by the Plaintiffs on the notice of force Majeure caused by the global Covid-19 Pandemic that parties were bound by the terms of the lease agreement and that a court of law could not re-write a contract between the parties as they are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.

He referred court to the provisions of Clause 17 of the Lease Agreement where the Plaintiff ought to issue- a Notice of Force Majeure he is only allowed to access the suit property to secure his assets during the period of suspension. It precludes the Plaintiff from resuming operations once the lease has been suspended, but in the instant case the Plaintiff continued its operations despite the issuance of the Notice. Furthermore, the Counsel averred that the Defendants had never made any demand for period beyond the period of suspension of the lease.

37. On the second limb as to whether the Plaintiff would suffer any irreparable loss if the injunction was not granted – the counsel's contention is that they would not suffer any at all as the Plaintiff failed to substantiate through cogent financial statements how they would lose business and suffer huge financial loss as the bank statements attached only showed a cheque that was drawn in favour of KWS and later reversed. He stated that the removal of goods was subject to a lawful process of distress. He argued that the Plaintiff would be compensated by way of damage. It was actually the Defendants who continued to suffer irreparable loss and harm as no rent was being remitted to them and it would be worse if the injunction orders were granted. The balance of convenience tilted in favour of the Defendants as the duly appointed executor to the estate of the deceased.

38. The Learned Counsel equally submitted and argued that the Plaintiff's suit should be struck out for being an abuse of the court process and law as the Plaintiff had become a vexatious and habitual litigant. He referred court to all the suits which had been filed by the Plaintiff at the various court over the same subject matter and being contrary to the provisions of Sections 6 and 7 of the Civil Procedure Act, cap. 21 and Order 4 Rule 1 of the Civil Procedures Rules 2010. On this point he relied on the case of *"**Kiama Wanjoi – Versus - John N. Mugambi and Another (2012) eKLR.***

39. In conclusion, he held that the suit being litigated before the Voi Magistrate Court should be allowed to continue and issues raised by the Plaintiff herein be as well litigated before the said court, as the property in dispute were within the pecuniary jurisdiction of the Magistrate Court. He urged court to find the Plaintiffs application and suit unmeritorious and be dismissed with costs while that of the Defendants being meritorious be allowed with costs.

VII. Analysis and Determination

38. I have fully considered all the filed pleadings, the written and oral submissions the several cited authorities and the relevant provisions of the law in reference to the Notice of Motion application dated 7th December, 2021 by the Plaintiff the replies thereof and another Notice of Motion application dated 21st December, 2021 by the Defendants and the replies thereof.

To enable this Honorable Court arrive at an informed, just and fair decision the Honorable Court has condensed and framed the following four (4) salient issues for determination as follows:-

a. Whether the Plaintiff herein vides its Notice of Motion application dated 7th December, 2011 meets the standards and requirements for being granted temporary injunction orders meted under the provisions of Order 40 Rules (1) (2) and (3) of the Civil Procedure Rules 2010.

b. Whether the Notice of Motion application and suit filed by the Plaintiff offends the doctrine Res judicata and Sub - Judice under the Provisions of Sections 6 and 7 of the Civil Procedure Act Cap 21 and Orders 4 Rule 1 and Order 40 Rule 7 of the Civil Procedure Rules 2010 hence should be struck out for being an abuse of the due process of law and non - disclosure of material facts as brought out under the Notice of Motion application dated 21st December, 2011 by the Defendants.

(c) What are the equitable remedies that the parties herein are entitled to in law in the given circumstances.

(d) Who will bear the costs of the said two (2) Notice of Motion applications dated 7th December, 2021 and 21st December, 2021"

ISSUE No. (a) Whether the Plaintiff herein vides its Notice of Motion application dated 7th December, 2011 meets the standards and requirements for being granted temporary injunction orders meted under the provisions of Order 40 Rules (1) (2) and (3) of the Civil procedure Rules 2010.

Brief Facts.

39. The facts of this case have been stated out by the parties on such an elaborate way so that this court finds unnecessary to expound on them. Nonetheless from the filed pleadings, it is evident that the deceased is the legal and absolute registered owner to suit land with all the indefeasible rights title and interest vested on him by law. The land measures 1, 905 Ha (approximately 4, 707.30 acres).

On 21st July, 2015, the deceased and the Plaintiff duly executed a lease agreement terms and conditions stipulated thereof for a period of fifteen (15) years. The Plaintiff took quite possession and operated a tourism and hospitality premises and according to them they would be remitted all the rents to the deceased. The Landlord – /Tenant relationship remained cordial until he passed on. The Defendants who were the duly appointed legal executors to the estate of the deceased started having frosty and poor relationship with the Plaintiff. They claimed the Plaintiff had been in an outstanding rental arrears, and further although during the global Covid-19 Pandemic, the Plaintiff issued a notice on the basis of the force Majeure founded under clause 17(a) of the Lease agreement in essence suspending operations but later on resumed operations without issuing another notice and continued business without remitting arrears. The rent accumulated to a sum of Kenya Shillings Five Million (Kshs. 5, 000.00).

40. According to the Defendants despite the several demand notices the Plaintiff refused, neglected and/or failed to pay rent. As a result the Defendants were compelled to institute a suit at Voi – ELC. No. 48 of 2021 and Mombasa to levy distress and issued proclamation notices where upon its expiry they levied distress by picking the goods for the Plaintiff on the other hand the Plaintiff filed a suit at Voi – ELC No. 015/2020 seeking injunction orders against the Defendants and which vide a ruling of 29th September, 2021 the orders were granted being aggrieved by the said orders the Defendants preferred an appeal ELC(A) No. 69/2021 before this court and on 25th November, 2021 they sought and were granted stay of execution.

Subsequently, on though a Court Order of 2th November, 2021 the Plaintiff withdrew the Civil Case No. 015/2021 before Voi Chief Magistrate's Court and on 7th December, 2021 filed a suit before this court seeking the same injunction orders alleging interference of its operations by the Defendants.

41. On 21st December, 2021, the Defendants also filed a Notice of Motion applications seeking for the Plaintiff's suit to be struck out for being an abuse of court and law as it offends the doctrine of "Res Judicata" and Sub - Judice under the Provisions of Sections 6 and 7 of the Civil Procedure Act, Cap. 21 and to have the injunction orders granted to the Plaintiff set aside. That is enough of the brief facts of the case hereof.

42. Now turning to the issue raised under the sub-heading. I must determine whether the Plaintiff/Applicant is entitled to a temporary injunction orders prayed for. In deciding whether to grant the orders or not it is trite law that I should be guided by the well - established principles enunciated in the *locus classicus* now famous precedent of ***GIELLA –VERSUS- CASSMAN BROWN (1973) E.A. Page. 358*** whose holding is as follows:-

"The condition for the grant of an interlocutory injunction are now, I think well settled in East Africa.

First, an applicant must show a prima facie case with a probability of success.

Secondly an interlocutory injunction will be ne normally 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".

22. The fundamental issue to ponder is whether the Plaintiff/Applicant has made a ***"Prima facie"*** case in his case with a probability of success. In the case of ***MRAO –VERSUS - FIRST AMERICAN BANK OF KENYA LTD. & 2 OTHERS (2003)eKLR 125*** cases which have also been extensively referred to by the Learned Counsel for the Proposed Defendant, "a Prima facie" case was well described as follows:-

"A prima facie case in a civil application includes but not confined to "a genuine and arguable case", it is a case which, on material presented to the court a tribunal property 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"

23. Outrightly, as shall be demonstrated herein below, the Honorable Court concludes that the Plaintiff/Applicant has succeeded in establishing ***"Prima facie"*** case to be considered for the temporary injunction sought. On arriving at that conclusion, the Honourable Court has relied on the decisions of ***Kenya Horticultural Exporters Pg. 1977 Limited –Versus - Pape 1986 KLR 705, Nguruman Limited –Versus- Jan Bonde Neilson & 2 Others 2014 eKLR.***

It's not in dispute that on 21st July, 2015 the Deceased, the registered legal owner to the suit land, and the Plaintiff duly executed a Lease Agreement for a tenancy relationship of the suit premises for a period of fifteen (15) years meaning expiration would be in the year 2030. There are still eight (8) years to go all facts remaining constant in the fullness of time. From the facts, it is stated that the Plaintiff took quiet possession and started operating its tourism and hotel industry on the suit property. While regularly remitting rent. It was until the demise of the deceased that the landlord – tenant relationship started getting sour culminating to endless litigation in court. The situation was made worse by the erupting of the global Covid -19 Pandemic as all the business were affected and the Plaintiff based was compelled to issue a notice of force Majeure suspending its operations. The bone of contention was on the legal interpretation of Clause 17 (a) of the Lease agreement, while the Defendants perceived it to mean upon issuance of the Notice the Plaintiff would only have access to see its assets but to suspend the operation on the other hand the Plaintiff is alleged to

have continued operations though at a low scale and hence could not manage to sustain remitting rent.

45. This interpretation on the "Force Majeure" is arguable as far as this court is concerned. According to the Black Law Dictionary, the concept of **"Force Majeure"** ***means "Law French "Superior Force" an event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (e.g floods and hurricanes) and acts of people (e.g riots, strikes and wars)".***

In a contract such as the Lease Agreement in the instant case, its a common contractual provision in contracts which essentially allocates the risk of loss if performance becomes impossible or impracticable, especially as a result of an unforeseen or unenforceable circumstances or event or effect that parties could not have anticipated or controlled and that prevents someone from fulfilling a contract. They are irresistible computation or superior strength which frees both parties in a contract from liability or obligations when extraordinary events or circumstances beyond the control or the parties as state here do occur.

In the instant case, it is now common knowledge that in the year 2020 to some extent now the world was hit by the global Corona/Covid – 19 Pandemic which caused operations impossible. There were strict government directives on keeping social distance washing hands regularly and wearing of masks and even the closure of numerous business premises. Of these the tourism and hospitality industry such as tourism entities, hotels and restaurants were hard hit socially, and economically. The Plaintiff was not an exception. Therefore, this court recognizes that there is likely hood that business may not have been smooth or efficient around that time for the Plaintiff. However, upon resumption of operations it is incumbent that the Plaintiff must adhere with the terms and conditions stipulated in the lease Agreement which includes the payment of the monthly rent for the occupation of the suit premises.

46. On the second limb, indeed the Plaintiff is likely to suffer irreparable damage without any aspect of compensation by way of damages should they not be granted the orders of injunction sought. In order to show irreparable harm, the applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. To this effect, the Plaintiff has argued and it's a fact not disputed that all its upon they were proclaimed and distressed levied against them where all its goods, furniture, foodstuff, beddings, drinks and equipment were taken away by the Defendants. In the process of levying distress from an order obtained from the Mombasa Court. Even then, the Defendants has failed to provide a full account of how much the goods were and recovered from them. As a result, the reputation and the Plaintiff incurred business loss and financial conundrum likely to adversely affect its guests and tourism industry. This is a very sensitive industry and highly dependent on highly sustainable goodwill. A very slight disruptions is likely to bring the whole industry down. This state of affairs was worsened by the eruption of the global Covid-19 Pandemic and the Government of Kenya directive for all hospitality industries to close down. The Plaintiff were not spared and the more reason they invoked the provisions of the Clause 17(a) of the lease agreement by issuing a notice for force majeure to the Defendants. In that state of affairs, evidently, it had become very difficult for the Plaintiff to continue operating its premises and continue remitting rent at the same time. Its for this reason that this court is satisfied that the Plaintiff has established a prima facie case with a high chance of succeeding during the full trial.

Indeed the Plaintiffs have suffered irreparable loss, harm and damage not easily quantifiable before compensation at this state before the matter is fully heard and determined and which this court strongly direct should take place in the shortest time possible.

47. Likewise, the fact that the Plaintiff took quiet possession and were operating the business premises in a cordial way until the demise of the deceased where the Defendants claims to have issued several demand letters for the remittance of the outstanding rent, followed by a myriad of court orders leading to the levying of distress of the goods for the Plaintiff, and total disruptions of its business.

I fully concur with the Defendants while citing the case of "***National bank of Kenya Limited – Versus - Pipe Plastic Samkolit (K) Limited as was quoted in the case of "Danson Muriuki Kihara –Versus- Johnson Kabungo (2017) eKLR whereby the Court of Appeal*** held *inter alia:*

"A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion fraud, or undue influence are pleaded and proved"

Parties must be bound by the terms of the lease agreement duly executed herein as it's the same that determines the rights and obligations of the parties herein, for this reason the Plaintiff has to be granted the injunction orders sought.

49. Finally, on the third limb, the balance of convenience tilts in favour of the Plaintiff/Applicant and which has apparently been infringed by the Defendant and which is incapable of being compensated by way of damages. The Plaintiff should be granted the order so as to enable them pick up their bits and pieces from the operations of the business so long as they fully comply with the terms and conditions of the Lease agreement. For these reason the Honorable Court concludes that the application has no merit and therefore fails under this sub - heading.

ISSUE No. (b) Whether the Notice of Motion application and suit filed by the Plaintiff offends the doctrine Res judicata and sub - judice under the Provisions of Section 6 and 7 of the Civil Procedure Act Cap 21 and orders 4 Rule 1 and order 40 Rule 7 of the Civil Procedure Rules 2010 hence should be struck out for being an abuse of the due process of law and non-disclosure of material facts as brought out under the Notice of Motion application dated 21st December, 2011 by the Defendants.

50. The Honorable Court has been urged to strike out the suit by the Plaintiff as the same offends the doctrine of Sub - Judice and Res judicata contrary to the Provisions of Sections 6 and 7 of the Civil Procedure Act Cap 21 and hence it's an abuse of the due process of court and law. Ideally, this Principle has been provided for by the Provisions of Under Section 7 of the Civil Procedure Act Cap. 21. *Inter alia:-*

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

Explanation. —(1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

51. From the above legal provisions, the following are the ingredients that constitutes and the bar of the Doctrine of ***Res Judicata*** to be effectively raised and upheld an account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms:-

a) The suit or issue was directly and substantially in issue in the former suit.

b) That former suit was between the same parties or parties under whom they or any of them claim.

c) Those parties were litigating under the same title.

d) The issue was heard and finally determined in the former suit.

e) The court that formerly heard and determined the issue was competent to try the subsequent suit or this suit in which the issue is raised.

52. It is trite law that "**Res judicata"** is a point of law and a true preliminary objection, if proven to exist a court ought to allow its procession and dismiss the entire suit. The **Court of Appeal in IEBC – Versus - Maina Kiai & 5 others (2017)eKLR** observed that:-

'Res Judicata is a matter properly to be addressed in limine as it does possess jurisdictional consequence because it constitutes a statutory peremptory preclusion of a certain category of suits. …Thus for the bar of Res Judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

a) The suit or issue was directly and substantially in issue in the former suit.

b) That former suit was between the same parties or parties under whom they or any of them claim.

c) Those parties were litigating under the same title.

d) The issue was heard and finally determined in the former suit.

e) The court that formerly heard and determined the issue was competent to try the subsequent suit or this suit in which the issue is raised.

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

53. While applying these principles this court has established that although indeed the Plaintiff filed a suit E15/2021 at Voi and on 29th September 2021 a ruling was delivered in their favour the suit was never heard and finally determined. The orders were only granted at the interlocutory stage to preserve the property pending the hearing and final determination of the main suit for this alone, the doctrine of Sub - Judice and Res Judicata collapses. But before the suit could be listed for full trial on 25th November, 2021 the Plaintiff filed a Notice of withdrawal of the said suit and the court is informed it was done in the knowledge and presence of the Advocate of the Defendants hence the allegation of non-disclosure of material facts are baseless. Its on 7th December, 2021 that the Plaintiff filed a suit before this court seeking injunction orders and which were granted. The fact that the ELC E015/2020 has been withdrawn this court had no interest in knowing about it. Be that as it may the withdrawal of that suit may have direct effect to the filed appeal ELC Appeal No. 69/2022 but for the sake of argument I wish to leave matters as they stand and await for the crossing of the river when parties get to the bridge at the opportune moment thereof.

54. On whether the suit should be struck out for being an abuse of the due process – under Order 4 (1) of the Civil Procedure Act, Cap. 21 of the Laws of Kenya. I dare say striking out of suits are founded under the Provisions of Order 2 Rule 15 of the Civil procedure Rules which holds *inter alia:-* .

"At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court,

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

55. The powers of court to strike out pleadings as provided by Court by Order 2 Rule 15 are not mandatory but discretionally. These powers will be cautiously exercised by court only after the party seeking to have the suit struck, presents a plain and obvious case that the pleadings raise no cause of action and the only remedy available is to strike them out. It is well settled that a suit should not be struck out and the Plaintiff/Respondent driven from the judgement seat unless the case is unarguable. It is therefore necessary to consider whether or not the Plaintiff's suit herein has an arguable case. From the surrounding inferences and facts adduced herein, the Plaintiff filed this suit against the 1st and 2nd Defendants vide a Plaint seeking judgement against the 1st and 2nd Defendants and orders to restrain them from interfering with the terms of the lease agreement.

56. When considering whether a pleading discloses a reasonable cause of action, the court ought to be careful not to embark on a trial. In **D. T Dobie (supra)** the court held:-

"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that 'is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way". (Sellers, L.J. (supra)). As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right.

If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.

As stated, court should aim at preserving a suit, in this case the Honorable Court finds that there is a cause of action against the 1st and 2nd Defendants. The issues raised are triable and serious under the content of the Plaint herein. They ought to be heard and determined during a full trial hereof. Therefore clearly this request by Defendants has not merit and cannot be sustained.

ISSUE No. (c) ***What are the equitable remedies that the parties herein are entitled to in law in the given circumstances.***

57. Arising from the detailed analysis herein it is important that the Plaintiff is facilitated and enabled by this court to resume smooth operations of its business premises. This will be done on condition that the Plaintiff fully adheres to the terms and conditions stipulated in the lease agreement.

In order to provide an enabling environment and while awaiting the full trial, the parties Plaintiff and Defendants are compelled to prepare proper books of accounts to be tables in court for verification and that from whatever rental arrears accruing be a reasonable amount should be settled while awaiting the full trial of the case. The Defendants should provide a full books of accounts and an estimated account of what was recovered from the levied and proclaimed goods as to merely state that the amount recovered was not adequate to recover the rent arrears is not helpful at this juncture.

ISSUE No. (d) ***Who will bear the costs of the said two (2) Notice of Motion applications dated 7th December, 2021 and 21st December, 2021"***

58. The Black Law Dictionary defines "Cost" to means, ***"the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other***".

The provisions of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that Costs follow events. The issue of Costs is the discretion of Courts. From this provisions of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in this case is that the Notice of Motion application dated 7th December, 2021 by the Plaintiff has succeeded and hence they are entitled to costs of the application and that of the Defendants dated 21st December, 2021.

VIII. Conclusion and Disposition

59. In the long run, based on the detailed and thorough analysis of the salient issues raised hereof, I now do hereby proceed to make the following orders:-

(a) THAT the Notice of Motion application dated 7th December, 2021 by the Plaintiff herein be and is hereby allowed as the same has merit and all other orders sought granted thereof with costs but on condition that the Plaintiff stringently, strictly and diligently conform to the terms and conditions stipulated in the duly executed Lease Agreement on the 21st July, 2015 between them as the tenant and the Defendants as the Land Lords hereof.

(b) THAT the Notice of Motion application dated 21st December, 2021 by the Defendants be and is hereby dismissed for lack of merit with costs to the Plaintiff.

(c) THAT the Notice of Motion application dated 18th October, 2021 by the Appellant/Applicant be and is hereby allowed to wit that:-

i. there be stay of execution of the ruling of the Hon. F. N Nyakundi issued on 29th September, 2021 in Voi ELC No. 015 of 2010 pending the hearing and final determination of the application on 9th June, 2022;

ii. the Appellant granted 21 days to compile and prepare the records of appeal to be fixed for direction under the provisions of Section 79B and G of the Civil Procedure Act, Cap. 21 and Order 42 Rules 11 and 13 (1), (2), (3) & (4) (a) to (f) of the Civil Procedure Rules, 2010 on 9th June, 2022.

(d) THAT the Plaintiff and the Defendants to prepare and furnish this court with a full and detailed accounts on the actual rental remittance from the business premises within the next fourteen (14) days from the date of this ruling with a view of directing payment of a reasonable sum and on practical and fair basis until the outstanding and/or any outstanding rent arrears will have been fully settled.

(e) THAT for sake of expediency this matter to be fixed for hearing and final determination within the next ninety (90) days from this date hereof. There be a mention date on 13th May, 2022 for the purpose of:-

(i) The production and presentation of the books of accounts as stated under Clause (d) above of this ruling.

(ii) Making some reasonable advance payment for off setting any outstanding rental arrears.

(iii) Holding a pre-trial conference session on case management under Order 11 of the Civil Procedure Rules 2010 and fixing of an appropriate hearing date within the set out time frame stipulated hereof.

(f) THAT the costs of these two (2) Notice of Motion applications dated 7th December, 2021 and 21st December, 2021 to be borne by the Defendants in the cause.

RULING READ, SIGNED AND DELIVERED AT IN COURT THIS 27TH DAY OF APRIL 2022.

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT

MOMBASA

In the presence of:

M/s. Yumnah Hassan, Court Assistant.

Mr. Kiwinga Advocate for the Appellant/Applicant.

Mr. Nyange Advocate for the Plaintiff/Respondents.