Case Number:	Civil Case 1 of 2020
Date Delivered:	07 Dec 2021
Case Class:	Civil
Court:	High Court at Kerugoya
Case Action:	Ruling
Judge:	Janet Nzilani Mulwa
Citation:	Kukena Co-operative Savings & Credit Society Limited & 31 others v Rural Shuttles Limited & 7 others [2021] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Kirinyaga
Docket Number:	-
History Docket Number:	-
Case Outcome:	Applicants Chamber Summons dismissed and costs awarded to the Respondents
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CIVIL CASE NO. 1 OF 2020

KUKENA CO-OPERATIVE SAVINGS & CREDIT SOCIETY LIMITED & 31 OTHERS.....PLAINTIFFS

-VERSUS-

RURAL SHUTTLES LIMITED.....1ST DEFENDANT

KUKENA TRAVELLERS SHUTTLE LTD.....2ND DEFENDANT

MICHAEL KINYUA KIMARU.....3RD DEFENDANT

MBUTHIA JACKSON MWANGI.....4TH DEFENDANT

ALEXANDER TITUS MUGWERU.....5TH DEFENDANT

WILSON MBOGO GATHUMBI.....6TH DEFENDANT

ROBINSON CHOMBA KAARA.....7TH DEFENDANT

CYRUS KABUI MUCHIRA.....8TH DEFENDANT

RULING

Background to the Application

1. This is a Ruling in respect to the **Plaintiffs/Applicants' Chamber Summons dated 8th September 2020** brought under **Section 5(1)** of the **Judicature Act, Sections 3** and **3A** of the **Civil Procedure Act**, provisions for the time being prevailing in England on punishment for contempt of court and all other enabling provisions of law. The Application seeks the following Orders:

1. Spent.

2. That the Applicants KUKENA CO-OPERATIVE SAVINGS & CREDIT SOCIETY LTD & 31 OTHERS be granted leave to apply for an order that the 3rd to 8th Respondents ROBINSON CHOMBA KAARA, CYRUS KABUI MUCHIRA AND WILSON GATHUMBI MBOGO be committed and detained in civil jail for a period not exceeding six (6) months for contempt of the Orders issued by HON. LADY JUSTICE LUCY GITARI on 17th February 2020 and her Ruling delivered

on 29th May 2020.

3. That pending the interparties hearing of this application, the Respondents' new proxy created under the name KIRINYAGA SHUTLLE LIMITED Trading under the same Company Number (PVT-5JUP6AE) as the 2nd Respondent be restrained by way of an order of injunction from trespassing onto or taking over or dealing in any manner with the 1st Applicant's Transport Company; including but not limited to use of Kerugoya Bus Park and Nairobi Bus Park.

4. That the Respondents' new proxy created under the name KIRINYAGA SHUTLLE LIMITED trading under the same Company Number (PVT-5JUP6AE) as the 2nd Respondent be restrained by way of an Order of injunction from trespassing onto or taking over or dealing in any manner with the 1st Applicant's Transport Company; including but not limited to use of Kerugoya Bus Park and Nairobi Bus Park pending the hearing and final determination of the subject suit.

5. That the Officer In-charge of Kerugoya Police Station do enforce this Honourable Courts Orders issued on 17th February 2020 and the Ruling delivered on 29th May 2020.

6. That the Respondents pay for the damages the Applicants have suffered as a result of the impugned invasion.

7. That all other necessary directions be given.

8. That the costs of this application abide the outcome of the contempt proceedings.

The Applicants' Case

2. The application is based on the grounds on the face of the motion and the supporting Affidavit sworn by **DAVID MURIITHI KABABI** the 2nd Applicant herein and the Chairman of 1st Applicant, on behalf of all the Applicants. He deposed that there is another suit pending in the High Court at Kerugoya namely ***Constitution Petition No. 1 of 2020*** relating to the parties herein, among other dispositions.

3. He averred that on 17th February 2020, the Hon. Lady Justice Lucy Gitari granted an interim order of injunction restraining the Respondents herein from trespassing onto or taking over or dealing in any manner with the 1st Applicant's Transport Company, including but not limited to its use of Kerugoya Bus Park, pending the hearing and determination of the Applicants' Application dated 17th February 2020. Further, it is deponed that the Respondents continuously and frequently defied the said orders to the extent that the Applicants' Counsel on record appeared in Court on 24th February 2020 and sought directions on the proper interpretation of the same. Thereafter, the Respondents feigned obedience to the said Order and temporarily ceased to interfere with the operations of the 1st Applicant at both Kerugoya Bus Park and Nairobi Bus Park.

4. Subsequently, on 29th May 2020, this Honourable Court delivered a Ruling in which it issued various orders *inter alia* an injunction restraining the Respondents from trading in the name KUKENA or any other name closely related to KUKENA in the public transport sector or bearing a close resemblance thereto pending the hearing and determination of this suit. However, in defiance of the said Orders, the Respondents quickly changed their name from KUKENA Travellers Shuttle Limited to KIRINYAGA Shuttle Limited. The Respondents also proceeded to contemptuously occupy the slots allocated to the 1st Applicant at both Kerugoya Bus Park and Nairobi Bus Park thus making a complete mockery of the Ruling and Orders of Hon. 29th May 2020.

5. In the deponent's view, the 6th, 7th and 8th Respondents are the perpetrators of these contemptuous actions since they are the directors of the 2nd Respondent now known as KIRINYAGA SHUTTLE LIMITED. He contended that the Respondents have no regard for the law and are hell-bent on frustrating any proceedings before any Court. It was also his contention that unless this Honourable Court issues orders cuffing all the mischiefs of the 2nd Respondent, its proceedings will be turned into a circus and its Orders will be granted in vain. He further argued that the Respondents have acted in contempt of court in the circumstances and should therefore be punished by being committed to jail so as to restore the dignity of this Honourable Court.

6. Finally, he averred that due to the Respondents' actions, the Applicants and more specifically the 1st Applicant has suffered irreparable loss and will continue to do so since the Respondents are pushing them out of business by charging unreasonable and ridiculous travel costs.

The Respondents' Case

7. In opposition, the Respondents filed Grounds of Opposition dated 15th September 2020 and a Replying Affidavit sworn on 30th September 2020 by CYRUS KABUI MUCHIRA, the 8th Respondent herein. He deposed that the Applicants' application is hollow, bad in law and full of falsehoods. He stated that the 2nd Respondent Company (KUKENA TRAVELLERS SHUTTLE LIMITED) was incorporated on 11th October 2015. That vide a letter dated 11th December 2019, the National Transport and Safety Authority gave the 2nd Respondent approval to operate along the KERUGOYA-SAGANA-NAIROBI route. Further, that vide a letter dated 25th October 2019, the County Government of Kirinyaga allocated the 2nd Respondent a picking/dropping bay and booking office at Kerugoya bus pack between Kukena Sacco and Mt. Kenya Shuttles booking offices.

8. He averred that following the Ruling delivered by Justice L.W. Gitari on 29th May 2020 in respect of the Applicants Notice of Motion dated 17th February 2020, the directors of the 2nd Respondent resolved to change the company's name to KIRINYAGA SHUTTLE LIMITED. Upon compliance with the statutory formalities, the Registrar of Companies issued a Certificate of Change of Name on 3rd June 2020 under the name KIRINYAGA SHUTTLE LIMITED whose directors are Robinson Chomba Kaara, Cyrus Kabui Muchira and Wilson Gathumbi Mbogo, the 6th, 7th and 8th Respondents.

9. Thereafter, they wrote to the Nairobi City County and the County Government of Kirinyaga requesting that the change of name be reflected in their letters of allotment of picking/dropping and booking offices within the two towns. Subsequently, on 10th June 2020, the County Government of Kirinyaga allowed them to continue operating under their former name and the Chief Officer - Transport, Roads and Public Works, maintained that their booking office would still be located between Kukena Sacco booking office and Mt. Kenya shuttles.

10. Further, he averred that vide a letter dated 11th August 2020, the County Government of Kirinyaga issued guidelines for allocation of parking bays in Kutus town which confirms that all matatu operators have separate picking bays even in the other local routes. In addition, he averred that the vehicles belonging to KIRINYAGA SHUTTLE LIMITED have never occupied slots allocated to the 1st Applicant at any given time. It was thus his contention that the change of name from KUKENA TRAVELLERS SHUTTLE LIMITED to KIRINYAGA SHUTTLE LIMITED has not paralyzed the operations of the Applicants. That in any case, it is the Applicants and their agents who have been trespassing on the parking slots belonging to KIRINYAGA SHUTTLE LIMITED as evidenced by the annexed charge sheet.

11. It was also his contention that the name "KUKENA" and "KIRINYAGA" are not closely related and/or not in any way similar but are two distinct names bearing different meanings. He argued that as such, they cannot cause any confusion in the transport and/or matatu business or to their customers. Further, he stated that the fact that the name "KUKENA" is a collection of the names KUTUS, KERUGOYA and NAIROBI as admitted by the Applicants, is a clear demonstration that it does not bear a close resemblance to "KIRINYAGA SHUTTLE".

12. Additionally, he averred that the 1st Respondent has never been involved in the transport and/or matatu business and that on 23rd June 2020, the 3rd, 4th, 5th and 6th Respondents surrendered the trademark "KUKENA SACCO" through the Kenya Industrial Property Institute in compliance with the court order of 29th May 2020. In his view therefore, it is clear that the Respondents are not in contempt of the court orders of 29th May 2020.

13. Moreover, he contended that the Applicants have not satisfied the conditions necessary for the granting of injunctions. He stated that the 2nd Respondent Company has over thirty (30) vehicles whose owners and families depend on the transport and/or matatu business and thus would be adversely affected if an injunction is granted. He therefore urged that the Chamber Summons dated 8th September 2020 be dismissed with costs.

SUBMISSIONS

14. The application was canvassed by way of written submissions. The Applicants' written submissions were filed on 19th November 2020 whilst the Respondents' submissions were filed on 8th December 2020.

The Applicants' submissions

15. The Applicants submitted in addition to defying and disregarding the interim injunctive order issued on 17th February 2020, the Respondents instructed their Counsel on record, Mr. Ngigi Gichoya, to file an application dated 20th February 2020 challenging the same. They noted that the said application was however thrown out in the first instance and the Honourable Justice Lucy Gitari affirmed the interim injunctive relief earlier granted to the Applicants.

16. It was the Applicants submission that ***Constitutional Petition No. 1 of 2020*** challenged the procedure used by the County Government of Kirinyaga in allocating picking and dropping bays which have indisputably been owned by the Applicants for the past 23 years but were irregularly and illegally allocated to the Respondents. They stated that in both the Constitution Petition and the present suit, they have disclosed the flagrant falsehoods and perjury that the Respondents used to acquire the Applicants' slots at Kerugoya Bus Park.

17. Further, they submitted that the Respondents misrepresented themselves and presented themselves as the office holders of KUKENA Co-operative Society Limited (the 1st Applicant) in order to acquire the said slots. They argued that this fact has been admitted twice by the County Government of Kirinyaga in its Replying Affidavit dated 3rd March 2020 filed in response to the Constitution Petition wherein it was averred that the 2nd and 3rd Respondents in the Petition were led to believe that the 1st Applicant herein and the 1st Respondent herein were one and the same company. In the Applicants' view, this was a clear indication of the fraudulent misrepresentation employed by the Respondents in acquiring a slot irregularly and illegally at Kerugoya Bus Park.

18. Further, the Applicants faulted the Respondents for material nondisclosure of material facts to the court. They submitted that during the hearing of their application dated 17th February 2020, the Respondents failed to disclose to this Honourable Court that they had held office at KUKENA Co-operative Society Limited from May 2013 to August 2018 and unlawfully registered the trademark name "KUKENA" under a different Company during that period with the sole aim of completely defrauding, impoverishing and financially incapacitating the 1st Applicant.

19. It was the Applicants' further contention that this court's processes had been blatantly violated and abused with impunity. They argued that the court has been misled to sympathize and empathize with the Respondents yet they are literally undeserving litigants who only seek to achieve a legal cover up for their fraudulent operations against the Applicants. The Applicants submitted that the Respondents removal from office at KUKENA Co-operative Society Limited was occasioned by these common illegalities, fraudulent dealings, abuse of office as well as misrepresentation to SACCO Members who saw through the mischief and by a majority vote removed them from office.

20. In addition, the Applicants contended that the Respondents ought to disclose that having been part of the leadership of the 1st Applicant for 5 years, they had learnt all the business strategies, met with all the operation team leaders and thus it was easy for them to recreate a similar business and unfairly compete with the 1st Applicant, to the detriment of its members whose only source of livelihood is generated from the daily operations at Kerugoya Bus Park.

21. The Applicants maintained that the 2nd Respondent changed its name in order to defeat justice and frustrate the operations of the 1st Applicant at Kerugoya Bus Park. They contended that the Respondent cannot continue to occupy the slots on the basis of the fraudulent misrepresentation under which they acquired the same. They submitted that the doctrine of ***Ex-Turpi Causa non oritur actio*** cannot permit this Honourable Court to rubberstamp the acts of the Respondents hence the reason why the Court must be withdrawn from the acts of the Respondents at the earliest to safeguard the sanctity and integrity of its own processes. Reliance was placed on the case of **Standard Chartered Bank Limited v Intercom Services Limited & 4 Others (Civil Appeal No. 37 of 2003), unreported** where the Court of Appeal cited the English case of **Holman v Johnson (1775-1802) ALL ER 98** where Lord Mansfield C.J. said: –

"The principle of public policy is this, Ex dolo malo, non oritur actio. No court will lend its aid to a man who found his cause of action on immoral or on illegal act. If from the Plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says that he has no right to be assisted. It is on that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such Plaintiff."

22. They also relied on the case of **Scott v Brown, Denning & Mcnab Company (3) [1892] 2QB 724** at page 728 where Lindley LJ said: –

"Ex turpi causa non oritur actio. This old and well known legal maxim is founded in good sense, and expresses a clear and

well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has paraded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the court ought not to assist him."

23. It was also the Applicants' view that the Respondents' Replying Affidavit filed in response to the instant application is a complete admission by them of all the illegalities that they have involved themselves in and thus this Honourable Court should withdraw itself from assisting the Respondents in view of the same.

24. Further, the Applicants submitted that when the instant application was filed under a Certificate of Urgency on 8th September 2020, it attracted fresh Orders from Lady Justice A. Mshila who directed that status quo as at the date of the Ruling of 29th May 2020 be maintained. The status quo as at that date, according to the Applicants, was vacant occupation and the Applicants use of Kerugoya Bus Park and their slot operating the Kerugoya to Thika Picking and Collecting Bay which was in high demand and use. However, the status quo to date has not been maintained despite due service of all the Court Orders to the Respondents in person.

25. In support of the contempt of court proceedings, the Applicants cited the case of **Nairobi City County Assembly v Speaker, Nairobi City County Assembly & another; Orange Democratic Party & 4 others (Interested Parties) [2019] eKLR** where the court stated that:-

"I agree with Mr Kinyanjui that after the nullification of our Contempt of Court Act, we reverted to Section 5 of the Judicature Act as the law under which to punish for contempt of court. The said section provides as follows:

"(1). The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of justice in England, and that power shall extend to upholding the authority and dignity of the subordinate courts."

26. Further, the Applicants contended that the contempt advanced by the Respondents is currently and regrettably permitted by the County Government of Kirinyaga who issued them with an irregular permit to continue using Kerugoya Bus Park which must be forthwith vacated in the interest of justice. Finally, the Applicants submitted that in view of the well settled principle that costs follow the cause, the Respondents must be condemned to meet the costs of the instant Application.

The Respondents' Submissions

27. In their submissions, the Respondents reiterated the averments in the Replying Affidavit. They maintained that they resolved to change the 2nd Respondent Company's name to KIRINYAGA SHUTTLE LIMITED as part of their compliance with the court orders issued by Justice L.W. Gitari on 29th May 2020 and were emphatic that the names "KUKENA" and "KIRINYAGA" are not closely related or similar or identical in any manner whatsoever.

28. As regards the law on contempt of court, the Respondents cited the case of **Kenya Human Commission v Attorney General & Another [2018] eKLR** where Mwita J nullified the entire Contempt of Court Act No. 46 of 2016 for lack of public participation as required by Articles 10 and 118(b) of the Constitution and for encroaching on the independence of the judiciary. The Respondents also relied on the case of **Samuel M.N. Mweru & Others v National Land Commission & 2 Others [2020] eKLR** where Mativo J quoted with approval the case of **Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others [2014] eKLR** where the court found that the English law on committal for contempt of court under Rule 81.4 of the English Civil Procedure Rules, which deals with breach of judgment, order or undertakings is applicable by virtue of Section 5(1) of the Judicature Act.

29. The Respondents thus submitted that they are not in breach of the court orders issued by Justice L.W. Gitari on 29th May, 2020 since the orders did not restrain them from conducting matatu business in Kirinyaga and Nairobi.

30. As regards the injunction sought, the Respondents argued that the Applicants have not met the conditions set out in the case of **Giella v Cassman Brown & Company (1973) EA 358** for the grant of temporary injunctions. Firstly, it was the Respondents' contention that the Applicants have not made out a prima facie case with any chances of success since they have not demonstrated a

case for violation of their rights. They submitted that the Applicants have not exhibited any evidence to show that the Respondents have invaded and/or trespassed into their parking and/or picking bays at the Kerugoya Bus Park and Nairobi Bus Park. Secondly, the Respondents argued that the fact that the Applicants have sought for damages against them in prayer 6 of the instant applicant, is a clear admission on the part of the Applicants' that the alleged trespass/invasion can be compensated by an award of damages which in any case, can only be done after they have discharged the burden of proof upon hearing of the full suit.

31. Further, the Respondents submitted that the **Fourth Schedule, Part 2, paragraph 5 of the Constitution of Kenya 2010** empowers the County Government of Kirinyaga and Nairobi City Government to regulate traffic, parking and public road transport without any interference by the Applicants whilst paragraph 7 thereof empowers county governments to ensure fair trading practices. In the premises, the Respondents urged that the Chambers Summons dated 8th September 2020 be dismissed with costs.

ISSUES FOR DETERMINATION

32. In my considered view, the Applicants have addressed several issues in their submissions which are not necessary in the determination of this application. The court will therefore restrict itself to determining the following issues only:

i. Whether the Respondents are guilty of contempt of the court orders of 17th February 2020 and 29th May 2020"

ii. Whether the Applicants have made out a case for the grant of the injunctive order sought"

iii. Whether damages can issue at this stage"

iv. Who should pay the costs of the application"

ANALYSIS AND DISPOSITION

Whether the Respondents are guilty of contempt of the court orders of 17th February 2020 and 29th May 2020"

33. Contempt of court is basically conduct or action that defies or disrespects authority of court. ***Black's Law Dictionary, 9th Edition,*** defines contempt as:

"The act or state of despising; the conduct of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice."

34. In 2018, the High Court in the case of ***Kenya Human Rights Commission v Attorney General & 2 others*** **[supra**] declared the **Contempt of Court Act No. 46 of 2016** constitutionally invalid and nullified it. The substantive law that governs contempt of court currently is therefore **Section 5 of the Judicature Act**, Chapter 8 Laws of Kenya which confers the jurisdiction to punish for contempt on superior courts. The said section provides that:

"1. The High court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.

2. An order of the High court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court".

35. Further, **Order 40 Rule (3)** of the **Civil Procedure Rules 2010** provides that in cases of disobedience, or of breach of any terms of a temporary injunction, the court granting that injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.

36. Why is it necessary for courts to punish contemnors" In **Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui [2021] eKLR,** Mwita J stated as follows:

"The reason why courts punish for contempt is to uphold the dignity and authority of the court, ensure compliance with directions of the court, observance and respect of due process of law, preserve an effective and impartial system of justice, and maintain public confidence in the administration of justice by courts. Without sanctions for contempt, there would be a serious threat to the rule of law and administration of justice."

37. In ***Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another*** **[2005] eKLR, Ibrahim, J.** (as he then was), while dealing with a question of contempt underscored the importance of obeying court orders, stating:

"It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void. (Emphasis mine)

38. It also noteworthy that contempt of court proceedings are criminal in nature since they may call for imposition of criminal sanctions which may interfere with a person's liberty. As such, proof of contempt must be higher than that of balance of probability although not beyond reasonable doubt. (See ***Mutikika v Baharini Farm Limited*** **[1985] eKLR**) An applicant must therefore prove to the required standard that there has been willful and deliberate disobedience of a court order for the Respondent to be held in contempt. In this regard, Mwita J in **Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui [supra]** cited the case of ***Airports Employees Union v Ranjan Catterjee & Another*** **[AIR 1999 SC 880: 1999(2) SCC:537, where the S**upreme Court of India held that:

"In order to amount to "civil contempt" disobedience must be willful. If disobedience is based on the interpretation of court's order, notification and other relevant documents, it does not amount to willful disobedience."

39. In the instant application, it is my considered view that the Applicants have not demonstrated that the 3rd to 8th Respondents deliberately disobeyed the court orders of 17th February 2020 and 29th May 2020 or at all. As regards the Orders of 17th February 2020, the Applicants have admitted that when their counsel on record sought for the court's clarification on the same on 24th February 2020 after an alleged defiance by the Respondents, the Court affirmed the said order and for the first time in a long time, things went back to normalcy at Kerugoya Bus Park. This means that if there was any sort of contempt of the order of 17th February 2020 by the Respondents, it was purged and therefore there is nothing to punish the Respondents for as regards that order.

40. I am also of the view that taking into account the circumstances of this case and the material placed before court, the Respondents cannot be held in contempt of the order of 25th May 2020. The Order barred the Respondents from inter alia trading in the name KUKENA or any other name or designation closely related to or bearing a close resemblance to the same in the transport sector industry. The Respondents were also barred from interfering with the 1st Applicant's operations including **the use of Kerugoya Bus Park under the name KUKENA**. (Emphasis mine).

41. The Respondents have given a detailed account of the steps they took to enable them get back into business without defying the said orders. They changed their name formally to KIRINYAGA SHUTTLE LIMITED which does not bear any resemblance whatsoever to KUKENA and cannot cause any confusion to the consumers of their services. The Respondents also went ahead and informed the County Government of Kirinyaga to effect the name change in their letter of allotment of parking and picking bays at Kerugoya Bus Park. Surely, this cannot be regarded as defiance or disobedience of the Orders of 29th May 2020.

42. Further, the site visit at Kerugoya Bus Terminus by the court on 26th January 2021 confirmed that each party has indeed been allocated its own slots. The 1st Applicant occupies bay number 52 and 53; the 2nd Respondent occupies bay number 49 and 50; whilst, bay number 51 is not allocated to any party but either could use it when available. The court observed that the parties use the allotted bays peaceful without any interference by either of them and have no issues with each other. The upshot is that the Applicants have therefore not proved that the Respondents are guilty of contempt.

Whether the Applicants have made out a case for the grant of the injunctive order sought"

43. The principles governing the grant of temporary injunctions are well settled and were initially laid down in the case of **Giella v Cassman Brown & Company Limited [1973] E A 358,** where the court stated 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."

44. A prima facie case was defined by the Court of Appeal in the case of **Mrao v First American Bank of Kenya Limited & 2 others (2003) eKLR** as follows:-

"A prima facie case in a Civil Case includes but is not confined to a "genuine or arguable" case. It is a case which on the material presented to the court; a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

45. In the instant application, the question as to whether the Applicants have established a prima facie case with a probability of success turns on whether the names KUKENA and KIRINYAGA SHUTLLE LIMITED bears any resemblance or are closely related. As already noted hereinabove, the two names are very distinct and do not resemble at all. The Applicants have indeed not demonstrated that their rights have been infringed by the Respondents' use of the name KIRINYAGA SHUTLLE LIMITED in place of KUKENA. I therefore find that the Applicants have not established a prima facie case with probability of success.

46. Do the Applicants stand to suffer irreparable harm which cannot be adequately compensated by an award of damages" Irreparable harm occurs where there is no standard by which the amount of injury can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be an adequate remedy. (See **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR)**

47. In the instant application, one of the reliefs sought by the Applicants under prayer **6** is ***"That the Respondents pay for the damages the Applicants have suffered as a result of the impugned invasion."*** In my view, this is a clear acknowledgement by the Applicants that damages are indeed an adequate remedy in this case. In any event, the Applicants have not shown that the Respondents may not be in a position to pay the damages if they become due.

48. Lastly, there is no doubt as to whether or not the Applicants have established a prima facie case and/or whether or not damages would be an adequate remedy and thus it is unnecessary for the court to consider where the balance of convenience lies. The Applicants have therefore not met the conditions necessary for the grant of the injunctive order.

Whether damages can issue at this stage"

49. On this, I hold the view that prayer 6 of the instant application is not merited since it seeks a final order yet damages cannot be awarded at this interlocutory stage. I am in agreement with the Respondents' assertion that damages can only be awarded upon tendering proof of the injury occasioned by the Respondents' actions which can only be done after a full hearing of the suit.

Who should bear the costs of the Application"

50. It is well settled that costs follow the event. Since the Applicants Chamber Summons lacks merit, it is hereby dismissed and costs awarded to the Respondents.

Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS.....DAY OF.....2021.

J. N. MULWA

JUDGE

DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 7TH DAY OF DECEMBER, 2021

R.M. MWONGO

JUDGE