REPUBLIC OF KENYA

IN THE HIGH COURT KENYA

AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 39 OF 2016

IN THE MATTER OF THE ESTATE OF THE LATE REUBEN MUTUKU KIVA (DECEASED)

ELEANOR MUTUKU DURHAM…….....…….....APPLICANT

-VERSUS-

BEATRICE NGINA……..……..……..1ST RESPONDENT

JOYCE MWIKALI KIOKO……..……2ND RESPONDENT

JUSTUS KAVITA MUTUKU…...……..……3RD RESPONDENT

AND

MAKERRYL COMPANY LIMITED

EVEREDY CONSTRUCTION LIMITED

MAPEMA HOLDINGS LIMITED……..…INTERESTED PARTIES

RULING

1. By Summons dated 30th October, 2020 expressed to be brought under Section 47 of the Law of Succession Act and all other enabling provisions of the law, the applicant herein, **Eleanor Mutuku Durham**, seeks the following reliefs:

> **1) Spent**
>
> **2) That an order be issued by this honourable court restraining the directors of Markerryl Company Limited their agents, employees, servants or anyone working under their instructions from entering on, working on, mining or interfering with land parcels no. Machakos/Nguluni/3882 & 3881pending the hearing and determination of the application dated 16th October, 2020.**
>
> **3) That an order be issued for the OCPD Matungulu Sub-county to ensure compliance of the order herein.**
>
> **4) An order do issue restraining the Machakos County Land Registrar from transferring and/or subdividing land parcels no. Machakos/Nguluni/3882 & 3881 and to furnish this honourable court with a certified copy of the green card for land parcels no. Machakos/Nguluni/3882 & 3881 and the mother title thereto.**
>
> **5) Costs be provided for.**

2. According to the Applicant, her father passed away on 15th May, 2013 Markerryl Company Limited (hereinafter referred to as "the Company") purchased the same and the transfer was conducted thereafter.

3. It was the Applicant's case that Machakos/Nguluni/3881 and 3882 form part of the estate of the deceased and that they resulted from the

subdivision of Machakos/Nguluni/811 which was the mother title. According to her, when a person dies intestate the property is deemed as the property of the deceased and only the court that has power over it and if a transfer occurs thereafter it is deemed as fraud and illegal and the court has unequivocal powers to reverse any transaction thereof which are conducted after the death of the deceased. Her position was therefore that this court has powers to reverse all transfers and subdivision thereof which resulted from a criminal process.

4. It was averred that the said company has been carrying destructive activities on the said property by digging holes on the deceased's property and mining ballast and raw materials thereon.

5. According to the Applicant the process of obtaining the title deeds was shrouded in secrecy, full of misleading statements and camouflaged to deny the applicant and the occupants therein their rightful parties (sic) of the land and unless the court restrains the company from carrying on the said activities, the deceased's estate will suffer irreparable loss and damages.

6. According to the Applicant, the 1st and 2nd Respondents testified under oath in criminal case no 997 of 2015 that the land was fraudulently transferred and that their late father did not transfer the same to the 3rd respondent and that no evidence was adduced that she consented to the sale of the property of the deceased. She stated that she was never involved in any of the sales. To her, the withdrawal of Kangundo Criminal Case No. 997 of 2015 by the complainants was a scheme to give way to the subsequent sale. She further alluded to the fact that her sister, **Rose Mueni Kasina** had applied for the revocation of the grant and to that application was attached bundles of documents which were alleged to have been forged.

7. It was averred that the letters from the chief used to institute the succession cause were fraudulently issued since she was not present when she was alleged to have signed the same since she was in the United States of America.

8. According to the Applicant, she never instructed the firm of **M/s Muema & Associates Advocates** to represent her in this matter or any other matter. According to her they were not her advocates in the sale transaction and are no longer her advocates**.**

9. It was her view that since no leave was granted to **Viktar Ngunjiri** to participate in the application dated 16th October 2020, his response ought to be expunged from the record on the ground that it was unprocedurally filed and the court process should not be abused. She however accused the said person of having fraudulently purchased a property of a deceased person when he was aware of an existing criminal offence at Kangundo and where he recorded a statement and the 3rd respondent was charged with fraud and obtaining money from him by false pretence.

10. It was submitted by the Applicant that pursuant to Article 162(2) of the Constitution this court sitting as a succession court has concurrent jurisdiction with the Environment and Land Court in accordance with sections 45, 47, 49, 73, 76 and 82(b) (11) of the ***Law of Succession Act*** to determine issues relating to land, she being a survivor and beneficiary of the estate of the deceased.

11. As regards the issue of representation, she submitted that she did not instruct any advocate to represent her in the succession proceedings and the consents signed herein are all null and void. Accordingly, the court was urged to exercise its inherent powers and make the necessary orders notwithstanding the fact of representation.

12. In opposing the application, the 1st Respondent deposed that Machakos/Nguluni/3881 and 3882 do not form part of the estate of the deceased, a fact well known to the Applicant hence this court lacks the jurisdiction to deal with the matters herein. According to her, at the time of the transfer of the said property, it was registered in the name of her brother, **Justus Kavita**, who had been gifted the same by the deceased. According to her, it was agreed in consideration of settling criminal case no. 997 of 2015 and as step towards reconciliation and resolution of a myriad other issues, that Machakos/Nguluni/3882 be offered for sale and the proceeds thereof offset the costs and the balance be paid to the beneficiaries.

13. According to the 1st Respondent, she was the complainant in the said criminal case and she withdrew the matter in the spirit of reconciliation as the issues involved family members and cannot be revived under the guise of succession proceedings.

14. It was her view that this application does not meet the threshold for grant of injunction as the properties in question are not part of the estate of the deceased.

15. In opposing the application, the 3rd Respondent averred that Machakos/Nguluni/3881 and 3882 are currently registered in the name of Markerryl Company though the same were previously registered in his name having been created from Machakos/Nguluni/881 which was similarly registered in his name. According to him Machakos/Nguluni/881 was given to him by his deceased father during his lifetime a position known to all his siblings.

16. It was his deposition that the said company first bought Parcel No. 3881 measuring 70 acres or thereabouts for Kshs 45,500,000.00 which sum was paid directly to him. Later, the said company also bought parcel 3882 and though he was the registered owner, he agreed with his siblings including the applicant that all of them would benefit from the purchase price thereof. This, according to him, was meant to settle all complaints in and out of court regarding the two parcels. He therefore stated that the applicant now wants to renege on the same to the detriment of the said company.

17. He averred that in the second sale the applicant was represented by Muema and Associates Advocates who were until recently on record for six of the sisters including the applicant herein and who represented the applicant in the said sale where the purchase price was divided equally amongst the eight daughters of the deceased each receiving Kshs 1,300,000/= and it was not until one and half years later that the applicant filed the present application.

18. He disclosed that in the sale agreement all the sisters confirmed that the whole family had agreed to sell the said land and the said

company is only an innocent buyer for value. According to him the applicant is driven by malice since even before the company bought the first parcel, the applicant had given the 1st Respondent a consent to sell the entire original land Machakos/Nguluni/881. It was his case that the company paid the full purchase price for both parcels which were transferred and registered in its name in accordance with the law.

19. It was submitted on behalf of the 1st and 2nd Respondents that the applicant unprocedurally filed the application dated 30/10/2020 and the supplementary affidavit sworn on 30/11/2020 (without leave of the court) and all other subsequent pleadings in person on 30/10/2020 including submissions whilst she had the firm of Nzuki Nzioka & Co. Advocates on record as from 28/10/2020. It was therefore sought that those pleadings be expunged from the record.

20. It was further submitted that as it stands, parcels of land numbers Machakos/Nguluni/3881 and Machakos/Nguluni/3882 do not form part of the estate of the deceased since they are already in the names of 3rd parties who bought them with the applicant's knowledge and consent and have been utilizing the same for years. It was submitted that though the applicant is claiming the transfers of land were irregular, she has not presented any alleged irregular transfer document for any prior or latter implemented transfer to prove the same. Moreover, at the time of transfer to the Company, the suit land was clearly registered in the name of the 3rd respondent, **Justus Kavita**, unencumbered.

21. It was contended that since Kangundo Principal Magistrates Criminal case number 997 of 2015, **R vs. Justus Kavita,** alluded to by the applicant was settled within the law through case settlement in the spirit of reconciliation at Kangundo law Courts hence resolving a myriad of imminent disputes, he proceedings cannot be used to prove his guilt as no such judgement was rendered. The resultant sales of land were conducted in agreement among the siblings and the proceeds thereof went to settling the costs of litigation and the balance was shared among them as agreed**.**

22. According to the said Respondents, the applicant is not keen on having the grant confirmed hence the reason she is filing application after application herein. It was averred that the applicant who is also known as **Elina Katumbi Mutuku** has all through been involved in these succession proceedings as clearly discernible from the court record showing her signature to consent. It is therefore a mere allegation without proof when the applicant alleges that she never signed the consent in respect of the petition for letters of administration.

23. It was therefore submitted that the applicant's applications do not meet the threshold for revocation of grant and issuance of an injunction as the properties in question have not been demonstrated to be part of the estate of the deceased but rather in the names of other parties. It is the Respondents' position that the issue of whether the same were fraudulently/irregularly transferred can only be done to the required evidential threshold through challenging the titles currently held in the environment and land court and they urged the court to dismiss the application in the interest of justice and fairness.

24. On behalf of the company, an affidavit was sworn by its director, **Viktar Maina Ngunjiri**, who confirmed that the company is the current registered and legal owner of Machakos/Nguluni/3881 and 3882 which were previously registered in the name of the 3rd Respondent and which were created after the subdivision of Machakos/Nguluni/881 which was also registered in the name of the 3rd Respondent. He reiterated what was deposed to by the 3rd Respondent as to how the company purchased the two parcels and added that from the sale agreement in respect of parcel no. 3882, I was revealed that the 3rd Respondent held the said land in trust for his sisters because the agreement provided that upon the sale, the said sisters including the applicant would be the sole beneficiaries of the total purchase price in equal shares. In the said agreement, the said sisters including the applicant were represented by the firm of Muema & Associates. Based on the information received from their advocates they believed that every daughter received Kshs 1,300,000/=. He stated that in the sale agreement all the sisters confirmed that the whole family had agreed to sell the said land and if the applicant suffered in any way her recourse should be to seek damages from her sisters and not the company which was an innocent buyer for value.

25. It was averred that in the two transactions the company paid the full purchase price and followed the law to the letter including the requisite due diligence and obtaining the relevant statutory consent. According to him, at no time were the properties registered in the name of the deceased but were in the name of the 3rd Respondent and the company later learnt that the 3rd Respondent got the said property from their father as a gift *inter vivos*. It was disclosed that during the sale of land no. 3882, all the vendor's siblings in the settlement agreement assured the company of the safety of the sale agreement and the investment generally.

26. It was deposed that the company has heavily invested on the said parcels including buying the surrounding and neighbouring parcels hence the size has grown to more than 150 acres from the 70 that it bought from the 3rd Respondent and the current values of its investment is way above half a billion. It was disclosed that the company runs a business of mining and milling construction material from the said land as a legalised user thereof. It further supplies construction material for both building premises and for road construction to a lot of companies and institutions hence suspending its operations even for a day would cause a lot of customers as well as the company untold loss. On the other hand, in the event that the applicant is successful in her application, her remedy lies with her siblings and besides the company has no intention of alienating the land.

27. It was further averred, based on legal advice, that the applicant ought to have commenced her case before the ELC and not in a succession court. The court was urged, in the event that it decided to cancel the said transactions, to order that the value of the company's investment as per the valuation report plus the costs of the infrastructural developments on the land be first paid by the applicant or any other party.

28. It was therefore sought that the application be dismissed with costs.

29. It was submitted on behalf of the three companies joined as interested parties that where a title to land requires investigation and third parties are involved like companies and the property are not admitted by all parties to be the estate of the deceased the best suited court to try the suit would be ELC court. It was however acknowledged that the succession court too has wide jurisdiction to establish and ascertain property that comprise the estate of deceased.

30. It was however submitted that the companies involved in this matter are innocent buyers for value and without notice. This is one issue that shall require investigation before the titles are cancelled. How transfers were effected from deceased's name to that of the third respondent shall also be investigated and determined. According to the interested parties, a prima facie case at this stage has not been established more so when the applicant was a party to the whole transaction and has been quiet since the year 2015 when the first sale took place and the two years after the second took place.

31. It was further submitted that the applicant's loss if any can be compensated by way of damages. The three companies herein besides meeting the purchase price have already put in more than 500 million shillings in this investment. They stand to suffer irreparably should an injunction be granted at this stage. The customers with waiting supplies and tenders would sue them for breach of contract and loans would go un serviced leading to untold loss. The interested parties wondered why the applicant was raising the issue ten years since the companies took possession of the first 70 acres.

32. It was therefore submitted that the applicant is not approaching this court with clean hands since it is more convenient for her to wait for results of the application on revocation of titles than for the companies to have their business operation suspended. The court was therefore urged not to grant the application or otherwise direct the applicant to deposit the sum of not less than 500 million as security for the loss to be suffered in the event she losses her applications**.**

Determination

33. I have considered the application, the affidavits both in support of and in opposition to the application as well as the submissions filed.

34. The principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in **East African Industries vs. Trufoods [1972] EA 420** and **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358. In Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR** the Court restated the law as follows:

> **"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;**
>
> **(a) establish his case only at a *prima facie* level,**
>
> **(b) demonstrate irreparable injury if a temporary injunction is not granted, and**
>
> **(c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.**
>
> **These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit *"leap-frogging"* by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted."**

35. While reiterating the said principles, **Ringera, J** (as he then was) in **Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani) HCCC No. 1234 of 2002** stated that in an interlocutory application the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law. That was the same position adopted in the dicta in **Nairobi High Court Civil Case No. 517 of 2014 – Lucy Nungari Ngigi & 4 Others -vs- National Bank of Kenya Limited & Anor (eKLR)** where it was stated:

> **"....I am also aware that the 1st Defendant has raised issues in respect of the mortgage herein, their right to exercise the statutory power of sale, breach of the addendum, default of repayment of the loan etc. They have also raised some accountability issues from the 2nd Defendant on the purchase price. But even these queries should be reserved for and determined at the trial. These issues are in direct conflict with issues raised by the Plaintiffs and the 2nd Defendant. At this stage I should not make any comments or findings, or express opinions on the substantive issues in controversy in order to avoid hurting the trial herein....."**

36. However, the Court is not excluded from expressing a *prima facie* view of the matter and the Court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true, for example, when he denies being served with the statutory notices and considering the already exposed untruth of the applicant with regard to service of statutory notices one is not inspired to have much confidence in the truth of her deposition that she did not appear before an advocate to execute the charge and have the effects of the pertinent provisions of law explained to her.

37. It was therefore held by **Ringera, J** (as he then was) in **Dr. Simon Waiharo Chege vs. Paramount Bank of Kenya Ltd. Nairobi (Milimani) HCCC No. 360 of 2001**:

"The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show he has a prima facie case with a probability of success at the trial. If the Court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the Courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as appertains to the subject matter of the suit does not meet the approval of the eye of equity."

38. According to the Court of Appeal in **Esso Kenya Limited. vs. Mark Makwata Okiya Civil Appeal No. 69 of 1991**:

"The principles underlining the granting or refusal of injunction are well settled in several decisions of the court. Where an injunction is granted, it will preserve or maintain the status quo of the subject matter pending the determination of the main issue before the court. The merits or demerits of granting injunction orders deserve greater consideration. The court should avoid granting orders which have not been asked for in the application before it or determine issues in the suit before the actual hearing. In cases where an award of damages could be adequate compensation, an injunction should not be granted. On an application for an injunction in aid of a plaintiff's alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course...The court ought to look at the allegations in the affidavits by the plaintiff and the defendant and weigh them whether there is a possibility of the plaintiff succeeding or whether there is a possibility of quantifying damages. Only in cases of doubt court will proceed on the basis of the balance of convenience while being aware that formal evidence will be adduced at the hearing...The principle underlying injunctions is that the status quo should be maintained so that if at the hearing the applicant obtains judgement in his favour the respondent will have been prevented in the meantime from dealing with the property in such a way as to make the judgement nugatory…As it is settled law that where the remedy sought can be compensated by an award of damages then the equitable relief of injunction is not available."

39. What then constitutes *a prima facie* case? In the case of **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125,** the Court of Appeal held as follows:

"The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show 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...A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true that the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms "prima facie" case, and "genuine and arguable" case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words "prima facie" are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant's interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two...In civil cases a prima facie case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

40. While adopting the same position the Court of Appeal in **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR** added that:

> **"The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The applicant need not establish title it is enough if he can show that he has a fair and *bona fide* question to raise as to the existence of the right which he alleges. The standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."**

41. In this case, the Applicant's case is that the property in question was the property of the deceased and that the same was fraudulently transferred to the company without her knowledge or consent. It is not in doubt that the applicant is a beneficiary of the estate of the deceased herein and therefore has an interest in the deceased's properties. However, that interest depends on whether the properties the subject of this application falls under the estate of the deceased herein. According to section 3 of the ***Law of Succession Act***, "estate" means "the free property of a deceased person" while "free property", in relation to a deceased person, means "the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death." It is therefore clear that the only property that forms part of the estate of the deceased is that property which the deceased herein was legally competent to dispose of during his lifetime and in which by the time of his death, interests had not been terminated.

42. In **Mpatinga Ole Kamuye vs. Meliyo Tipango & 2 Others (2017) eKLR**, the Learned Judge observed that:

> **"This Court's view before distribution of the estate of the deceased under Section 71 of the *Law of Succession Act* Cap 160; the Court must satisfy itself that the beneficiaries of the estate are the legitimate beneficiaries of the estate; that there are assets that comprise of the deceased's estate and are available for distribution after settling all liabilities and having the net estate for distribution."**

43. It is therefore clear that any property which the deceased was not legally competent freely to dispose during his lifetime, and in respect of which his interest had been terminated by his death cannot form part of his estate. Section 109 of the ***Evidence Act,*** provides that: -

> ***The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie in a particular person.***

44. The burden is therefore upon the applicant to prove that the said properties not only belonged to the deceased but that by the time of his death, the deceased's interests therein had not been terminated and that he was legally competent freely to dispose of it.

45. According to the Respondents, the subject property, though initially the property of the deceased was given to the 3rd Respondent as a gift. The deceased herein died on 15th May, 2013. According to the copy of the register exhibited by the applicant, the said property was registered in the name of the deceased on 23rd July, 2009 and it was transferred to the 3rd Respondent on 18th March, 2015. Clearly therefore the property was registered in the name of the deceased as at the time of his death and prima facie formed part of his estate. Accordingly, the Applicant being a beneficiary of the estate had an interest therein and if the same was fraudulently transferred, then that issue constitutes a prima facie case for the purposes of an injunction.

46. As regards the 2nd requirement, that the applicant establishes that she might otherwise suffer irreparable injury which cannot be adequately compensated in damages, the Court in **Nguruman Limited case (supra)** expressed itself as hereunder:

> **"On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."**

47. The applicant did not address her mind to this particular issue. The interested parties have on the other hand contended that they have made heavy investments on the subject property and have as a result acquired other parcels of land neighbouring the subject property and their investments are in excess of half a billion Kenya Shillings which far surpasses what they paid in purchase of the subject property. The nature of their undertaking is such that is restrained, not only themselves but third parties are bound to be adversely affected. This contention has not been challenged by the applicant. The remedy of injunction is an equitable relief. Accordingly, the Court will decline to exercise its discretion if the supplicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity. The court is enjoined to look at the conduct of the supplicant for the injunctive orders, the surrounding circumstances whether the orders sought are likely to affect the interests of non-parties to the suit.

48. In this case it is alleged that third parties are likely to be adversely affected. If the injunction is granted, it means that the interested parties' operations will come to a stop and those third parties are likely to take legal steps against the interested parties. In other words, the consequences will not have been the intended object of maintaining status quo but the opening of other fronts for fresh litigation.

49. According to the documents on record, the 1st interested party herein was registered was the proprietor of land parcel no. Machakos/Nguluni/3882 on 15th August, 2019 and Machakos/Nguluni/3881 on 23rd September, 2015. This application was filed on 30th October, 2020, some five years after the first registration. No explanation has been offered by the applicant why it took her that long to challenge the transaction. It is an equitable principle that delay defeats equity as equity aids the vigilant, not the indolent.

50. The Court is also, by virtue of section 1A(2) of the ***Civil Procedure Act***, enjoined to give effect to the overriding objective as provided under section 1A(1) of the said Act in exercising the powers conferred upon it under the ***Civil Procedure Act*** or in the interpretation of any of its provisions. One of the aims of the said objective is the need to ensure equality of arms, the principle of proportionality. Therefore, in considering whether or not to grant an injunction, an equitable relief, , it is my view that the principle of proportionality plays a not remote role. As was stated by **Ojwang, AJ** (as he then was) in **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589** the Court, in responding to prayers should always opt for the lower rather than the higher risk of injustice. The learned Judge expressed himself as follows:

> **"…Although the court is unable at this stage to say that the applicant has a prima facie case with a probability of success, the Court is quite convinced that it will cause the applicant irreparable harm if his prayers for injunctive relief are not granted; and in these circumstances, the balance of convenience lies in favour of the applicant rather than the respondent. There would be a much larger risk of injustice if the court found in favour of the defendant, than if it determined this application in favour of the applicant."**

51. In this case, it seems that the challenge to the disposal of the suit property is only from the applicant. Her claim, should she succeed, would be only to a portion of the said property. It would be disproportional if the injunction was granted in those circumstances since her interest is capable of being determined and she has not alleged that the same is incapable of being quantified and if quantified the

Respondents and the interested parties will not be in a position to compensate her accordingly.

52. In light of my finding above, I agree with the 1st Respondent that in the event that the injunction sought is granted, the net effect shall be to inflict greater financial hardship on the interested parties and third parties than to the Applicant if the injunction is not granted.

53. It is clear, whether lawfully or not, that the property is now registered in the name of the company. The process through which that registration was effected will need to be investigated since the company is not a beneficiary to the estate of the deceased herein. **Musyoka J** in **Re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR** expressed himself as hereunder:

> **"Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates' courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that that court can give effect to it."**

54. In my view, the issues regarding the manner in which the interested parties acquired the said properties ought to properly be dealt with by the Environment and Land Court. In **re estate of P N N (Deceased) [2017] eKLR,** it was held that:

> **"According to Article 162(2) of the Constitution the Environment and Land Court (ELC) is vested with jurisdiction to determine disputes touching on ownership and the right to occupy and use land. Article 165(5) of the Constitution states that the High Court has no jurisdiction over matters that are the subject of Article 162(2) of the Constitution. It is my considered view that the matter of Ngong/Ngong/[particulars withheld]. falls within the purview of Article 162(2) of the Constitution, meaning that this court then, by virtue of Article 165(5) of the Constitution, does not have any jurisdiction over it."**

55. Accordingly, I find that the Applicant has failed to satisfy all the conditions necessary for the grant of the injunction sought. In the premises, the Summons dated 30th October, 2020 fails and is dismissed but with no order as to costs as the applicant and the Respondents are members of the same family.

56. It is so ordered.

Read, signed and delivered in open Court at Machakos this 25th January, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kilonzo for Mr Kituku for the 1st and 2nd Respondent

Mrs Kingoo for the 3rd Respondent and the three companies

CA Geoffrey