



**Gitere v Gitere Kahura Investments Limited & 3 others (Environment & Land Case E049 of 2022) [2023] KEELC 20838 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20838 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E049 OF 2022  
OA ANGOTE, J  
OCTOBER 19, 2023**

**BETWEEN**

**SAMUEL MBURU GITERE ..... PLAINTIFF**

**AND**

**GITERE KAHURA INVESTMENTS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**KENNETH KIMARI GITERE ..... 2<sup>ND</sup> DEFENDANT**

**DAVID WAKANGU GITERE ..... 3<sup>RD</sup> DEFENDANT**

**LUCAS WAITHAKA GITERE ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

**Background**

1. Before this Court for determination is the Plaintiff<sup>2</sup>s/Applicants' Notice of Motion application dated 10<sup>th</sup> February, 2022 brought pursuant to the provisions of Sections 1A, 1B and 3A of the [Civil Procedure Act](#), Orders 40 Rule 1-3 and Order 51 Rule 1 of the Civil Procedure Rules seeking for the following reliefs;
  - i. That pending the hearing and determination of this suit, the Defendants/Defendants whether by themselves, their servants and/or agents be restrained from further acting on, or otherwise processing the maps, deed plans and titles for the sub-divisions of Titles L.R No 8943/7 and L.R No 9946(Midas Farm) and L.R No 4872/1 and L.R No 4872/2(Ruiru Farms).
  - ii. That the orders granted above be registered against the respective titles.
  - iii. That the costs of this Application be provided for.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Samuel Mburu Gitere, the Plaintiff, of an even date. The Plaintiff deponed that the 2<sup>nd</sup> -4<sup>th</sup> Defendants



are his younger brothers and Directors of the 1<sup>st</sup> Defendant, a family company and are involved in its day to day management and implementation of its resolutions.

3. It was deposed by the Plaintiff that the 1<sup>st</sup> Respondent was incorporated on 19<sup>th</sup> July, 1977 by their parents as a vehicle to hold their family properties and assets; that at the time of their parents' deaths in 2001 and 2008 respectively, the company held various assets registered under its name including;LR No. 5980/4 (Windsor farm), a 60-acres farm situated within the county of Nairobi and which is partially planted with coffee;LR No. 8943/7 and LR No. 9946 (Midas farm) a 664-acres farm in Nakuru county, a small portion of which is planted with coffee;LR No. 4872/1 and 4872/2 (Ruiru farms), two farms situated in Kiambu County both measuring 224 acres and fully planted with coffee; andNjeneni Farm, a 71 acres farm in Nakuru County planted with coffee.
4. The Plaintiff deponed that vide the distribution of their parents assets in Nairobi High Court Succession Cause No. 265 of 2009, the Estate of Gitere Kahura (deceased) and Nairobi High Court Succession Cause No. 373 of 2016, the Estate of Mary Nyokabi Gitere (deceased) on 20<sup>th</sup> September, 2018, the shares in the 1<sup>st</sup> Respondent were distributed to him, the 2<sup>nd</sup> to 4<sup>th</sup> Defendants and their 8 siblings equally.
5. Consequently, it was deposed, the 1<sup>st</sup> Defendant has twelve (12) shareholders; that vide various resolutions by the 1<sup>st</sup> Defendants' Shareholders and Directors made since 2014, the 1<sup>st</sup> Defendant resolved to sub-divide the agricultural land mentioned above, among its 12 afore listed shareholders and to ensure that each shareholders gets possession and title of his parcel of land.
6. According to the Plaintiff, the sub-division in the proposed resolutions contemplates a fair and equal distribution of the properties in terms of both size and value and in accordance with the equal shareholding of the Company.
7. It was his deposition that in carrying out the shareholder's resolutions with respect to L.R No 5980/4 (Windsor farm), the Defendants have divided the parcel into 12 equal portions out of which he has been allocated and given possession of L.R 5980/66 and that although he was not involved in the balloting process, the sub-division largely accords with the resolution and his issue is regarding the extra parcel which the Defendants need to account for.
8. It was deposed by the Plaintiff that he should be unconditionally issued with his title; that regarding L.R 8943/7 and L.R No 9946(Midas Farm), the Defendants have sub-divided it into 12 portions and allocated to him parcel 31750/2 and 31750/3 measuring approximately 40 acres and that the sub-division of the aforesaid parcel and allocation of his plot is illegal, unfair and in breach of the resolutions of the Shareholders as the parcels arising out of the sub-division are 17 in number instead of 12.
9. The Plaintiff deponed that the Defendants have not explained to him and other shareholders, the purpose of the two parcels; that the whole sub-division is unfair as some parcels are near the tarmac while others are deep in the interior creating portions of unequal values and sizes; that he has been allocated a parcel that is far from the tarmac, not accessible and on riparian area and that the parcel is lesser in size and value than the others.
10. It is the Plaintiff's case that the sub-division with respect to this property should be cancelled and a fresh sub-division undertaken to ensure each shareholder gets a parcel equal in size and value.
11. Mr Gitere deponed that with regard to L.R 4872/1 and 4872/2(Ruiru Farms), the Defendants have apparently already sub-divided the property, balloted and are in the process of titling; that the above notwithstanding, they have despite demands refused to show him his parcel of land and give him



possession thereof and that the alleged sub-division should be cancelled and a fresh one which accords with the resolutions of the company be done.

12. With regard to Njneni Farm, it was deposed that despite the company resolutions that the same be sub-divided pending the titling in the 1<sup>st</sup> Defendants' name, the same has not been done and neither have the shareholders been granted possession of the property and that the 3<sup>rd</sup> Defendant is in possession of the property and has been earning an income from it without giving an account of the same to the other shareholders.
13. The Defendants filed a Preliminary Objection to the entirety of the suit as well as a response to the application. The Preliminary Objection, dated the 15<sup>th</sup> March, 2022, was premised on the grounds that;
  - i. In the Plaint, the Plaintiff conceded to being a shareholder of the 1<sup>st</sup> Defendant and subsequently any complaint he may have with the Defendants who are his co-shareholders must be strictly prosecuted under the mandatory provisions of the Companies Act, 2015 and the commencement of this suit in this Honourable Courts Division cannot avail the Plaintiff as this Court has no jurisdiction to entertain what is essentially a dispute of a commercial nature.
  - ii. In the pleadings in this case, the Plaintiff conceded to being an Administrator of the Estate of the Late Gitere Kahura and Mary Nyokabi and part of his complaint against the 2<sup>nd</sup> -4<sup>th</sup> Defendants who are siblings should be ventilated in the ongoing Nairobi High Court Succession Cause 265 of 2009-Estate of Gitere Kahura and therefore this Court has no jurisdiction to adjudicate upon succession matters with the result that the Plaintiffs suit should be struck out with costs.
  - iii. The Plaintiffs suit is incompetent, frivolous and an abuse of this Honourable Court as being both a shareholder and Director of the 1<sup>st</sup> Defendant, the Plaintiff should have filed an appropriate resolution authorizing him to commence this suit and in its absence this suit is incompetent, bad in law, frivolous and vexatious and should accordingly be struck out.
  - iv. The Plaintiffs suit constitutes of his complaint against the 1<sup>st</sup> Defendant, a limited liability company and is directed against the 2<sup>nd</sup> -4<sup>th</sup> Defendants who are shareholders and Directors of the 1<sup>st</sup> Defendant in like manner as the Plaintiff and his suit should therefore have been filed strictly in accordance with mandatory provisions of the Company Act and having instituted the suit as a Plaint, renders the same incompetent, baseless, null and void and should be accordingly struck out.
  - v. The Plaintiff having filed his suit by way of Plaint consisting of his complaint against the 1<sup>st</sup> Defendant, a limited liability company, the 2<sup>nd</sup> -4<sup>th</sup> Defendants as shareholders and Directors of the 1<sup>st</sup> Defendant, leave should have been sought for the said suit to proceed as a derivative suit and in the absence of such leave this suit is incompetent and this Court has no jurisdiction to entertain it and should accordingly be struck out thereto.
  - vi. The complaint in the Plaintiff's current suit and the reliefs sought thereto which are in pari material with Nairobi High Court Commercial and Admiralty Civil Case No 119 of 2016-Samuel Mburu Gitere & Anor vs Kenneth Kimari Gitere & 5 Others having been fully adjudicated in the said suit cannot be entertained in this Honorable Court as this offends the doctrine of res judicata and should similarly be struck out.
14. The 3<sup>rd</sup> Defendant deposed that he is a Director of the 1<sup>st</sup> Defendant, duly authorized by the 2<sup>nd</sup> and 4<sup>th</sup> Defendants and fully aware of the facts of the case, hence competent to swear the Affidavit; that vide



- the application and pleadings, the Applicant concedes that he is a shareholder and Director of the 1<sup>st</sup> Respondent, and an Administrator of the Estate of the Late Gitere Kahura and Mary Nyokabi Gitere and that there are ongoing proceedings in HC Succession 265 of 2009 and 373 of 2009.
15. It was deposed by the 3<sup>rd</sup> Defendant that the Plaintiff also conceded that the facts complained of were properly sanctioned by the relevant company resolutions pursuant to the provisions of the *Companies Act*; that he is the only one of the 12 beneficiaries complaining and that from the foregoing, it is clear that he is suing his own company, co-shareholders, co-directors and co-beneficiaries and the suit ought to have been ventilated in the Commercial Division of the High Court.
  16. It was deposed that contrary to the Plaintiff's deposition, L.R No 4872/2 is registered in the name of Kenya Box Body Builders Limited; that the Applicants claim in respect of L.R 4872/1(Ruiru Farm) is mischievous and misleading as he is aware that the same is subject of the proceedings pending before the High Court in Misc Application No E780 of 2022 and that there is a caveat against the title of the property hence it cannot be legally sub-divided.
  17. It was deposed that Njejeni Farm belongs to one David Itibi Gitere; that the suit is essentially a personal grievance and vendetta against his co-shareholders, co-directors and co-beneficiaries; that the Plaintiff is in physical and actual possession of his portions of land which have been sub-divided and balloted by the beneficiaries of the Estate of Gitere Kahura and those belonging to the 1<sup>st</sup> Defendant and that the distribution of part of the properties in respect of which he has filed this suit were effected in the succession cause and any complaints should have been presented in the succession cause for determination.
  18. It was deposed that the suit should be struck out as the Court has no jurisdiction to determine the same; that this suit also offends the doctrine of res judicata on account of similar complaints having been raised in Nairobi High Court Case 119 of 2016-Samuel Gitere Mburu & Another vs Kenneth Kimani Gitere & 5 Others which suit was struck out after hearing.
  19. It was deposed by the 3<sup>rd</sup> Defendant that the Plaintiff's claim does not disclose a prima facie case and the remedies sought can easily be compensated by way of damages and/or restitution; that having come to Court with unclean hands, the Plaintiff is not deserving of the equitable orders sought and that all the 12 beneficiaries, including the Plaintiff, are in actual possession of their respective portions and the omnibus injunctive orders sought are highly prejudicial to all of them.
  20. The Plaintiff filed a Supplementary Affidavit in which he deposed that whereas succession proceedings were held by the Court, it distributed the shares of the company; that the distribution of the assets of the company have been pursuant to company resolutions and that he seeks to give effect to those resolutions and ensure equitable sub-division of its assets.
  21. It was the Plaintiff's deposition that he has a right to pursue his rights even if the other beneficiaries do not wish to do so; that whereas it is true that L.R 4872/2 is registered in the names of Kenya Box Body Builders, his late father owned 50% of the shares in that company and was occupying half the property and that L.R 4872/1 is in the name of the Company and is being used and occupied by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
  22. It was deposed that L.R No 4872/2 has been sub-divided but the Defendants are yet to show him his parcel of land; that the pendency of a Court case does not bar the sub-division of the land so that the parties can have possession and use their portion of land and that contrary to the assertions, Njejeni Farm was purchased by his late parents through the company and whereas the title is not yet out, they took possession of the property.



23. The parties filed submissions and a bundle of authorities which I have considered.

### **Analysis and Determination**

24. The threshold of a Preliminary Objection was set out by the Court of Appeal in the locus classicus case of *Mukisa Biscuits Manufacturing Co. Ltd. vs West End Distributors* (1969) EA 696 at 700 wherein Law, JA stated that:

“...a ‘preliminary objection’ consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

25. Newbold, P further held as follows:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

26. The Supreme Court in the case of *Hassan Ali Joho & Another vs Suleiman Said Shahbal & 2 Others*, Petition No. 10 of 2013, [2014] eKLR re-affirmed the principle as set out in the *Mukhisa* case stating;

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

27. Considering the above, the question is whether the Preliminary Objection raised by the Defendants is founded on pure points of law or is, as stated by the Plaintiff, unclear and unmerited.

28. The Defendants Preliminary Objection, though wordy, can be summarized under three distinct heads being that the Applicant has no locus to institute the suit, the Court has no jurisdiction to entertain the matter, and the suit offends the doctrines of *res judicata*.

29. An objection to the jurisdiction of the court has been cited as one of the objections that entails a point of law. Indeed, Law J.A in *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd*(supra) succinctly stated as much. The Court need not belabor this point. A Court cannot act without jurisdiction and a successful finding on the issue will dispose of a matter.

30. Closely tied to the concept of jurisdiction is the question of locus. *Locus standi* is defined by the Black’s Law Dictionary, 9<sup>th</sup> Edition at page 1026 as the right to bring an action or to be heard in a given forum.



31. It is trite that the lack of requisite capacity to bring a suit goes to the root of the suit and without locus standi the suit cannot stand. It has also been stated that an objection on locus is a proper Preliminary Objection. The Court in *Priscilla Jesang Koech vs Rebecca Koech & 3 Others* [2018] eKLR, stated thus;

“Locus standi is the cornerstone of any case. Before a party files a case, he or she must be certain that they are clothed with the requisite capacity to sue and be sued. In the case of *BV Law society of Kenya vs Commissioner of Lands & Others*, Nakuru High Court, Civil Case No. 464 of 2000. It was held that:

If a party has no locus standi, then the said party cannot bring a suit to court. The issue of locus standi goes to the root of any suit and the said issue of locus standi is a point of law which is capable of disposing of a matter preliminarily.”

32. The next limb of the objection is with respect to the principle of res judicata. The plea of res judicata is anchored on Section 7 of the *Civil Procedure Act*, 2010 which provides that 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.

33. The doctrine of res judicata is founded on public policy and is aimed at ensuring that there is finality to litigation. The questions on res judicata touch on the jurisdiction of the Court and a plea of res judicata will, where successful, dispose of the suit. In view of the findings above, the Court will now proceed to discuss whether the objections are merited.

34. As aforesaid, locus refers to the right to bring an action or to be heard in a given forum. The Court of Appeal in the case of *Alfred Njau and Others vs City Council of Nairobi* (1982) KAR 229, defined locus standi thus;

“The term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings.”

35. The Defendants contend that the Plaintiff does not have the requisite authority to institute the suit on behalf of a company. The Defendants also contend that this is a derivative suit commenced unprocedurally because the Plaintiff did not seek the requisite leave. In response, the Plaintiff maintains that he has instituted this matter on his own behalf and the same is not a derivative suit.

36. It is trite that a Company, as a distinct legal person, only acts through authorized representatives. The Court in *Assia Pharmaceuticals vs Nairobi Veterinary Centre Ltd. Nairobi* (Milimani) HCCC No. 391 of 2000 held as follows: -

“It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect...As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should



be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so.”

37. As regards derivative suits, Section 238 of the *Companies Act*, 2015 provides as follows:

- “1) In this Part, “derivative claim” means proceedings by a member of a company—
  - (a) in respect of a cause of action vested in the company; and
  - (b) seeking relief on behalf of the company.
- (2) A derivative claim may be brought only—
  - (a) under this Part; or
  - (b) in accordance with an order of the Court in proceedings for protection of members against unfair prejudice brought under this Act.
- (3) A derivative claim under this Part may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.
- (4) A derivative claim may be brought against the director or another person, or both.
- (5) It is immaterial whether the cause of action arose before or after the person seeking to bring or continue the derivative claim became a member of the company.
- (6) For the purposes of this Part—
  - (a) “director” includes a former director;
  - (b) a reference to a member of a company includes a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law.”

38. In *Juletabi African Adventure Limited & Another vs Christopher Michael Lockley* [2017] eKLR, the Court of Appeal extensively discussed the nature of a derivative suit stating;

“By dint of *Foss vs. Harbottle* (1843) 67 ER 189 popularly referred to in company law as “the rule in *Foss vs. Harbottle*” there is no argument that the proper plaintiff in any proceedings or action in respect of a wrong done to a company is the company itself. This is based on the principle that a company is a legal personality distinct from its directors and shareholders. However, there are exceptions to the rule which allow a person to sue on behalf of the company. In *Grace Wanjiru Munyinyi & Another vs. Gedion Waweru Githunguri & 5 Others* [2011] eKLR, this Court while discussing the exceptions where such a suit is termed as a derivative action expressed:-

“There is also another remedy arising from the leading English legal precedent on Corporate Law which continues to apply in Kenya more than 160 years since it was decided: *Foss v Harbottle* (supra). As stated earlier, in any action in which a wrong is alleged to have been done to a company, the proper claimant is the



company itself. This is the rule in *Foss v Harbottle*. But there are four exceptions to that rule which appear in the leading case itself but also in subsequent decisions on the subject. Firstly, where the directors or a shareholding majority use their control of the company to paper over actions which would be ultra vires the company or illegal. Secondly, if some special voting procedure would be necessary under the Company's constitution or under the *companies Act*, it would defeat both if they could be sidestepped by ordinary resolutions of a simple majority, and no redress for aggrieved minorities were to be allowed (*Edwards v Halliwell* [1950] 2 ALL ER 1064. Thirdly, where there is invasion of individual rights, such as voting rights (*Pender v Lushington* (1877) 6 Ch D 70. Fourthly, where a fraud on the minority is being committed. In all those cases, a "derivative action" could be brought before the court on behalf of the company where the wrongdoer is in control of the company or by the individual shareholder where his personal right is violated."

..... a derivative suit is basically brought on behalf of a company for wrongs committed against it or in other words for the benefit of the company."

39. The Court has keenly considered the pleadings. It is undisputed that the Plaintiff, as well as the 2<sup>nd</sup>-4<sup>th</sup> Defendants, are co-directors/shareholders of the 1<sup>st</sup> Defendant and that the 1<sup>st</sup> Defendant was incorporated by their deceased parents to hold the family's assets.
40. In the present suit and application, the Plaintiff asserts that it was resolved by the 1<sup>st</sup> Defendant that all its assets would be equally divided among the 12 beneficiaries; that despite the foregoing, sub-division in respect of some parcels of land has been uneven and that he has not been given title and possession of some portions that are due to him.
41. It is apparent from the foregoing narration that the Plaintiff has not instituted this suit on behalf of the company but on his own behalf and as such, there is no requirement for authorization. As to whether the suit is a derivative suit, the Court thinks not. Section 238 of the *Companies Act* makes it clear that a derivative suit must be one in respect of a cause of action vested in the company; and seeking relief on behalf of the company.
42. The Plaintiff did not institute the suit on behalf or for the benefit of the 1<sup>st</sup> Defendant for perceived wrong(s) against it. Rather, he filed the suit for his own benefit for wrongs committed against him allegedly by the Defendants, to wit, breach of his proprietary rights. In the end this objection fails.
43. It is trite that jurisdiction is everything. The significance of jurisdiction was succinctly captured by Nyarangi, J.A. in *Owners of Motor Vessel 'Lillian S' vs Caltex Oil (Kenya) Limited* [1989] KLR 1 as follows:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."



44. Similarly, the Court of Appeal in the case of *Kakuta Maimai Hamisi vs Peris Pesi Tobiko & 2 Others* [2013] eKLR had the following to say on the centrality of the issue of jurisdiction;

“So central and determinative is the jurisdiction that it is at once fundamental and overarching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren *cui-de-sac*. Courts, like nature, must not sit in vain.”

45. The Defendants contend that this suit should have been filed anywhere else but this Court. They also argue that this suit should have been in the Commercial Division and or in the Succession Division of the High Court.
46. Article 162(2)(b) of *the Constitution* states that this Court shall have jurisdiction over disputes relating to the environment, the use and occupation of, and title to land. This is expounded in Section 13 of the *Environment and Land Court Act*.
47. When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the pre-dominant purpose test. This was persuasively stated in the case of *Suzanne Butler & 4 Others vs Redhill Investments & Another* [2017] eKLR which held as follows:

“When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.

The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.

Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue.”

48. As previously noted, the 1<sup>st</sup> Defendant is a company formed principally to hold assets including land for the Plaintiff's/Defendant's family, which land, it was resolved, would be ultimately transferred to the members of the family. Whereas indeed all the parties are Directors/shareholders of the 1<sup>st</sup> Defendant, the dispute does not relate to the company in itself nor its shareholding or indeed any aspect of the company. The issue concerns the Plaintiff's share of the land currently in the name of the company, not as a shareholder, but as a beneficiary.



49. The Defendants also assert that this matter should have been canvassed in the on-going succession causes. Musyoka, J., expounding on when a matter is best placed for a succession cause stated thus in *Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR;

“.....The *Law of Succession Act*, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

Disputes of course do arise in the process. The provisions of the *Law of Succession Act* and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the *Law of Succession Act* and the Probate and Administration Rules. Such have to be resolved through the structures created by the *Civil Procedure Act* and Rules, which have elaborate rules on suits by and against executors and administrators (emphasize added).

The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3). Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime, the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be functus officio so far as the property in question is concerned (emphasize added). The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court's work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court (emphasize added). The interventions by that court are limited to what I have stated above.” The dispute, ultimately boils down to ownership of land. I would therefore resolve the issue by utilizing the predominant purpose test. The purpose of the suit is predominantly to resolve a dispute on ownership of land.”

50. The Court has considered the succession matters alluded to by the Defendants, and in particular the decision of the Court in *In Re Estates of Gitere Kahura & another (Both Deceased)* [2018] eKLR delivered on 18<sup>th</sup> May, 2018. The Court in that case extensively dealt with the question of distribution of properties ultimately finding that it had no jurisdiction to do so. The Court stated as follows:

“The assets in question belong to the company; the probate court cannot possibly distribute them in any way or form for they do not form part of the estates the subject of these proceedings.

14. It is classic company law, as stated in the celebrated case of *Salomon vs. A. Salomon & Co Limited* (1896) UKHL 1, (1897) AC 32, that a limited



liability company enjoys a separate legal existence apart from its shareholders. It can own property. It can sue and be sued. And it has perpetual existence, which means it can continue to exist despite the demise of its owners, the shareholders.

15. The relationship between the deceased persons and the company was that they were shareholders in the company by virtue of the two shares they held. The fact of being shareholders did not constitute them owners of the property of the company. That remained property of the company, for their sole interest in the company were the shares. It is the said shares that are available for distribution herein amongst the survivors of the deceased. Should the survivors have no interest in continuing to have the company exist, then it is up to them to wind it up or to liquid it, so as to have access to its assets. However, that cannot happen until after the shares in the company have been distributed to the beneficiaries. The jurisdiction of the probate court lies with distribution of the shares, but not the liquidation of the company or the distribution of its assets.”
51. Of the suit properties, three are registered in the names of the company being L.R 8943/7 L.R 9946 and L.R 4872/1. While it is asserted that there is contention over L.R 4872/1, its ownership still remains with the Company. In respect of L.R 4872/2, the assertion is that it is registered in the name of the third party. Ultimately, there is no proof or indeed allegation that any of said parcels of land belonged to the deceased and as such, the succession court has no jurisdiction. This objection fails.
52. The next limb of the objection is with respect to the principle of res judicata. The plea of res judicata is anchored on Section 7 of the *Civil Procedure Act*, 2010 which provides that 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.
53. The Court of Appeal in the case of *The Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others*, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR), set out the criteria for determining whether or not a suit is res judicata thus;  

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must 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 the suit in which the issue is raised.”

The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded



by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable 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 or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

54. The test in determining whether a matter is res judicata as stated was summarized in Bernard Mugo Ndegwa vs James Nderitu Githae and 2 Others (2010) eKLR, as follows that;

- i. The matter in issue is identical in both suits;
- ii. The parties in the suit are the same;
- iii. Sameness of the title/claim;
- iv. Concurrence of jurisdiction; and
- v. Finality of the previous decision

55. The Court has considered the proceedings in Nairobi High Court Commercial and Admiralty Civil Case No 119 of 2016-Samuel Mburu Gitere & Another vs Kenneth Kimari Gitere & 5 Others. Vide the Motion thereof, the Applicants had sought for leave to proceed with the suit as a derivative suit.

56. As summarized by the Court, the issues in the suit concerned inter alia, the shareholding and management of the company and assertions that the company was run contrary to the provisions of the Company Act. This is clearly distinguishable from the issues herein dealing with the Plaintiff’s proprietary rights. Considering the jurisdiction of the Commercial Court vis a vis this Court, it cannot be said that the Applicant’s issues herein were capable of being canvassed in that Court. HCCC 119 of 2016 also involved several parties, who are not parties to this suit. In the end. this objection fails.

57. The law on the grant of interlocutory injunctions is provided for in Order 40 Rule 1 of the Civil Procedure Rules, 2010. The same provides as follows;

“Where in any suit it is proved by affidavit or otherwise-

- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution if any decree that may be passed against the defendant in the suit,

The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

58. Therefore, under Order 40 Rule 1 of the Civil Procedure Rules, an order of temporary injunction may issue where the court is satisfied that there is a likelihood of the suit property being wasted or alienated before the suit is heard and determined.



59. Being an application for injunctive orders the same shall be weighed against the requisite essentials set out in the celebrated case of *Giella vs Cassman Brown* (1973) EA 358 as follows:

“The conditions 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 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.”

60. The Plaintiff/Applicant in this case is expected to meet those three principles and surmount them sequentially. This was stated by the Court of Appeal in *Nguruman Limited vs Jan Bonde Nielsen & 2 Ors* [2014] eKLR where the Court stated thus;

“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 vs. 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.”

61. The Court will be guided by the foregoing principles as well as the general principle that no definitive findings on law or facts should be made at this interlocutory stage.

62. The Court of Appeal in *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* [2003] eKLR defined prima facie thus;

“...So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”



63. More recently, the Court of Appeal in the case of Nguruman Limited vs Jan Bonde Nielsen & 2 others(supra) while agreeing with the definition of a prima facie case in the Mrao Case (supra) went ahead to further expound as follows;

“We adopt that definition save to add the following conditions by way of explaining it. 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.”

64. To begin with, it is undisputed that the Plaintiffs and the 2<sup>nd</sup> -4<sup>th</sup> Defendants are siblings and Co-directors and shareholders of the 1<sup>st</sup> Defendant Company, a company set up by their deceased parents to hold the family’s assets; that they have 8 others siblings who are equally Co-directors and shareholders bringing their total number to 12 and that it was a resolution of the shareholders and Directors that the company divides the properties it holds equally among the 12 of them.
65. Vide the present application, the Plaintiff seeks to have the Defendants restrained from undertaking any further actions on L.R No 8943/7 and L.R No 9946 which he contends were unfairly sub-divided creating extra unaccounted parcels; that the sub-division also resulted in portions of uneven size and value and that he was allocated portions 31750/2 & 3 measuring approximately 40 acres but the same are inaccessible and on riparian area and that the 2<sup>nd</sup> -4<sup>th</sup> Defendants took the best parcels for themselves.
66. The Plaintiff also seeks to have the Defendants restrained from any interference with L.R 4872/1 and L.R 4872/2 which he asserts he has not been given possession nor title despite sub-division and balloting having already been allegedly done.
67. The Plaintiff adduced in evidence the Certificate of Incorporation and MEMOARTS of the 1<sup>st</sup> Defendant, a copy of the search for L.R 5980/4, copies of the Titles and sub-division maps for L. R’s 8943/7 and 9946, 4872/1 and 4872/2, Certificate of Confirmation of Grant in respect of the deceased dated 20<sup>th</sup> September, 2018, and the minutes of the meeting of the Board/Directors/Shareholders of the 1<sup>st</sup> Defendant dated 24<sup>th</sup> October, 2018.
68. In contrast, the Defendants assert that L.R 4872/1 is subject to Court proceedings being Misc Application E780 of 2022-Gitere Kahura Investments vs Kenya Planters Co-operative Union and that there is a caveat registered against the same land and that L.R 4872/2 does not belong to the 1<sup>st</sup> Defendants but to another entity known as Kenya Box Builders Limited.
69. The Defendants adduced into evidence the notification of discharge as regards L.R No 4872/1, copy of the application for Caveat with respect to L.R 4872/1, Land Control Board Consent with respect of Njejeni Farm, pleadings in Misc E780 of 2022; and Motion and ruling in HCCMisc119 of 2016.



70. Taking into account the foregoing narration, the question that lends itself is whether the Applicant has shown a clear and unmistakable right to be protected which is directly threatened by the actions sought to be restrained. The Applicant alleges to have interest in the properties the subject of this application. As regards the parcel known L.Rs 8943/7 and 9946, the same are registered in the 1<sup>st</sup> Defendant's name and he is indisputably entitled to an equal share thereof.
71. He asserts that whereas he has indeed been issued with parcels, they do not constitute the "equal" share he is entitled to. The Applicant also lays claim to L.R No. 4872/1 and 4872/2. The Defendants contend that he is not entitled L.R 4872/1 as there are Court proceedings over the same and a caveat registered against the property.
72. The Caveat has however was not adduced. While contending that L.R. No.4872/2 belongs to a 3<sup>rd</sup> party, it is noted that this property is indicated to be part of the 1<sup>st</sup> Defendant's property as captured in the 1<sup>st</sup> Defendants minutes of 24<sup>th</sup> October, 2018 which is not disputed. Further, through the pleadings adduced by the Defendants with respect to the succession proceedings, it is noted that this is severally mentioned to be part of the 1<sup>st</sup> Defendants property. In the end, the Court finds that the Applicant has indeed established a prima facie case.

### **Irreparable harm?**

73. With regard to irreparable harm, the damage caused to the Applicant should be such that it cannot be remedied by damages. In *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* (supra) the Court stated as follows on irreparable injury or damage:

“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.”

74. The Plaintiff asserts that if injunctive orders are not issued, the property is in danger of being alienated and it will be difficult to monetarily compensate the same. The Defendants contend that on the contrary, any loss to the Applicant can be easily compensated.
75. In this case, the property in question, though company owned by the Plaintiff's family property, which is by its nature sentimental. The Applicant claims what he considers his equitable entitlement thereto. It is trite that a crystalized right which is violated cannot be equated to compensation by damages. In *Joseph Siro Mosioma vs Housing Finance Company of Kenya Limited & 3 Others* [2008] eKLR, Warsame J (as he was then) stated;

“damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substituted for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction.”



76. The Court finds that the Applicant will suffer irreparable damage if the injunction is not granted.
77. For those reasons, the Notice of Motion dated 10<sup>th</sup> February, 2022 is merited and the same is allowed as hereunder;
- i. A temporary injunction does hereby issue restraining the Defendants from further acting on, or otherwise processing the maps, deed plans and titles for the sub-divisions of Titles L.R No 8943/7 and L.R No 9946(Midas Farm) L.R No 4872/1 and L.R No 4872/2(Ruiru Farms) pending the hearing of the suit.
  - ii. The costs shall be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 19<sup>TH</sup> DAY OF OCTOBER, 2023.**

**O. A. ANGOTE**

**JUDGE**

In the presence of ;

Ms Mbire for AG N Kamau for Defendant

Mr. Gacheru for Plaintiff/Applicant

