Lewa & 51 others v Mbogo (Environment & Land Case E069 of 2024) [2025] KEELC 3312 (KLR) (9 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3312 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

ENVIRONMENT & LAND CASE E069 OF 2024

LL NAIKUNI, J

APRIL 9, 2025

BETWEEN

MCHENGA MWAHUI LEWA & 51 OTHERS & 51 OTHERS ..... PLAINTIFF

AND

ELIZABETH MBOGO ..... DEFENDANT

RULING

I. Introduction

1. This Honourable Court is called to determine the Notice of Motion application dated 6th November, 2024 by Mchenga Mwahui Lewa & 51 Others, the Plaintiffs/ Applicants herein under the provisions of Order 40 Rules 1,5 and 10 of the Civil Procedure Rules, 2010; Sections 1A and Section 3A of the *Civil Procedure Act*, Cap. 21 and all enabling procedures of the law.

2. Upon service of the Application to the Defendant/Respondent, she responded through a Replying affidavit sworn by herself on 7th February, 2025. The Honourable Court shall be dealing with the issues indepth at a later stage of this Ruling herein.

II. The Plaintiffs/Applicants' case.

3. The Applicants sought for the following orders: -

    a. Spent.

    b. Spent.

    c. That the Court be pleased to issue an order of injunction restraining the Defendant by herself, her agents, her servants and or employees from occupying, alienating, evicting or in any manner interfering with the Plaintiffs occupation and use of the parcel of land known as PLOT

NO.300 at DZOMBO MNANAZINI in Lunga Lunga Sub County within Kwale County pending the hearing and determination of this Suit.

d. That the costs of this Application be provided for.

4. The application was premised on the grounds, facts and testimony on the face of the application and further supported by the 9 paragraphed annexed affidavit of Mchenga Mwahui Lewa, the 1st Plaintiff herein and the advisor of the 52nd Plaintiff herein. The Deponent averred that:

a. The Plaintiffs/Applicants were the owners of the sui premises known as Plot No.300 at Dzombo Mnanazini in Lunga Lunga Sub County within Kwale County herein referred to as the suit premises.

b. The Plaintiffs/Applicants had been residing on the suit premises since time immemorial as they were born there.

c. The Plaintiffs/Applicants grandfathers used to live and graze in the suit premises since time immemorial.

d. The Plaintiffs/Applicants were surprised recently when the Defendant claimed to be the registered owner of the premises having conducted a survey.

e. The Plaintiffs/Applicants were further surprised when they did a search which reflected the name of the Defendant as the registered owner.

f. The Defendant/Respondent had without any colour of right whatsoever and secretly registered a title in her name as the proprietors thereof.

g. The Defendant/Respondent action was fraudulent and unlawful.

h. The Plaintiffs/Applicants stood to suffer irreparable loss if an order was not given stopping the Defendant/Respondent from continuing with their illegal activities.

III. The Responses by the Defendant/Respondent

5. The Defendant/Respondent responded to the Notice of Motion application dated 6th November, 2024 through a Replying Affidavit sworn and dated on 7th February, 2025 by Elizabeth Mbogo where she deposed that: -

a. At time of instituting the notice of motion and the suit, the suit premises known as Title Number Kwale/ Mnanasini/ 300 was not registered in her name but in the name of Dan Elijah Mbogo (Annexed and marked as “EM - 1” was a copy of the official search dated 19th March, 2024 and marked as “EM - 2 was a copy of the title showing the registered owner then).

b. The said Dan Elijah Mbogo was her late husband who was the erstwhile registered owner of the suit premises.

c. Upon the demise of her later husband, she filed for Grand Letters of administration in Succession Cause No. No. 78 of 2015 in the High Court of Nyeri for his estate which included the suit property and which Grant of Administration of estate was confirmed on 17th March 2016 naming him as the beneficiary of the suit premises. (Annexed and marked as "EM - 3” was copy of the Grant of letters of Administration of Estate and marked as “EM - 4” was Certificate of Confirmation of Grant dated 17th March 2016).

d. She only became the registered owner of the suit property on 17th January, 2025 when the Grant of the Letters of Administration were registered at Kwale land registry and a title issued to her. (Annexed and marked as "EM - 5" was a copy of Certificate of title in her name).

e. It was therefore wrong for the Plaintiffs/Applicants to lie on oath that they did a search which reflected that she was the registered owner at the time of filling the Application and the suit and the application and suit should be struck out as they Plaintiffs/Applicants had sued the wrong party and it offended the provisions of the Civil Procedure Rules.

f. The Plaintiffs/ Applicants were also lying on oath when they said that they had been living in the suit premises from time immemorial as at all material times, the land had always been under her later husband's possession and later in her possession and had been vacant.

g. The issues in the suit land arose sometime in the month of April 2024 when she as the Administrator of the Estate of her late husband then engaged a Private Licensed Surveyor to survey the property for the purposes of establishing the positions, extents and boundaries of the land which already had a title in her late husband's name when people unknown to her came to the land claiming that the survey could not be done without their input.

h. With the help of the local police and administration who provided security, the Survey exercise was done and confirmed the boundaries on the ground matched with the one on the title.

i. It was after the survey around the month of December 2024, his caretaker on the suit property informed her that some strange people unknown to her and had started invading some parts of the land and purporting to clear the shrubs and bushes apparently claiming that the land was theirs.

j. Upon receiving the information, in the month of January 2025 she reported the matter to the local police at Mamba Police Station in Dzombo area in Lunga Lunga Sub County,Kwale County Vide OB No.25 of 15/1/2025 for investigations, only to be surprised when the police told her that the suit property was subject of a civil case and that's when she learnt of the existence of this case.

k. The Plaintiffs/Applicants were telling a lie that the title was registered in her name secretly as her husband had been the first registered absolute proprietor as long as 13th May, 1978 with the indefeasible right of ownership of the suit land and she became the owner thereof by transmission following the succession cause aforementioned there was no registration of land can be done in secrecy in the Republic of Kenya as title deeds are public documents.

l. It was untrue for the Plaintiffs/Applicants to say that she gave them verbal notice to leave and stop farming activities as prior to their invasion of his land which happened after the survey exercise, his land was empty and vacant except his caretaker who was taking care of the same and the applicants were not and had never occupied the land.

m. It was untrue for the Plaintiffs/Applicants to say that they had been the owners of the land and yet if they could had conducted a search they would have discovered that the suit he was registering in her late husband's name then.

n. For anyone to claim ownership over land as ancestral and or community land, he must support his claim with an ownership document and the suit land could not be claimed as ancestral or community when it has a registered owner.

o. It was untrue for the Plaintiffs/Applicants to allege that they would suffer irreparable loss and yet they were the ones that had started invading his land with schemes of making it difficult for him to enjoy the ownership and possession of his land with a view to divest him of the same.

p. Consequent to the foregoing, the Plaintiffs/Applicants had not met the threshold for granting of the orders sought in the Application.

q. The Affidavit was in opposition to the Applicant's application dated 6th November, 2024.

IV. Submissions

6. On 29th January, 2025 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 6th November, 2024 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and a ruling date was reserved on 8th April, 2025 by Court accordingly.

A. The Written Submissions by the Plaintiff/Applicants

7. The Plaintiffs/Applicants through the Law firm of Messrs. J.O.Magolo & Co. Advocates filed their written Submissions dated 18th March, 2025. Mr. Magolo Paul Advocate commenced the submissions by recounting that what was before the Court was the Plaintiff's amended application dated 6th November 2024 which sought the above stated orders. He stated that the said application was opposed by way of a Replying Affidavit. The Learned Counsel provided Court with a brief background of the application. He held that the Plaintiffs/Applicants were at all material times to this suit been the owners of the suit premises known as Plot No.300 at Dzombe Mnanasini – the suit property herein. This was and is their ancestral land. The Plaintiffs/Applicants had been residing on the suit premises since time immemorial as they were born there. Their grandfathers used to graze in the suit premises since the year 1972.

8. In the recent times, they were surprised when the Defendant/Respondent claimed to be the registered owner of the land having contracted a Land Surveyor to conduct a land surveying exercise on the land. Further, upon conducting search, they were equally surprised to find out that the parcel measuring 300 acres was registered in the names of the Defendant/Respondent. The Defendant/Respondent had secretly registered a title in her name as the proprietors thereof. The Defendant/Respondent's action was fraudulent, illegal. It was adverse to the Plaintiff/Applicant's proprietary rights by denying the Plaintiff/Applicant peaceful possession of the Suit property. The Plaintiffs/Applicants stood to suffer irreparable loss should the Court declines to grant orders to restrain the Defendant/Respondent from having any dealings on the land. The Plaintiffs/Applicants risked losing the parcels unless the intervention of this Court prevailed.

9. To buttress his submissions, the Learned Counsel cited the provisions of Order 40 1(a) of the Civil Procedure Rules, 2010. The law stated that; where in any suit it was proved by Affidavit or otherwise that any property in dispute in a suit was in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a Decree, 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 thought fit until the disposal of the suit or until further orders. In addition, the Counsel referred Court to the provision of Section 63(e) of the *Civil Procedure Act*, Cap.21 which provided the Court inherent powers to make such other interlocutory orders as may appear to the Court to be just and convenient in order to prevent the ends of justice from being defeated.

10. According to the Learned Counsel, the suit property was in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold. Thus, there was need to preserve it through the maintenance of status quo. He argued that the application by the Plaintiffs/Applicants herein fulfilled all the conditions precedent to the granting of injunctive orders. These were well settled in the now infamous case of "Giella – Versus - Cassman Brown & Company Limited (1973) E.A 358" and "Waithaka -Versus - Industrial and Commercial Development Corporation (2001) KLR 374".

11. It was the contention by the Counsel that the Plaintiffs/Applicants herein had demonstrated that if the injunctive orders sought were not granted, the injury that they shall suffer was incapable of being compensated by way of damages. The Plaintiffs/Applicants had been residing on the suit premises since time immemorial as they were born there. That the Defendant/Respondent had come up to claim and assert ownership. Their grandfathers used to graze in the suit premises since the year 1972. To support this argument, he cited the case of "Muiruri – Versus - Ban of Baroda (K) Limited (2001) KLR 183" ,the Court, "inter alia, held that:-

> 'Disputes over land in Kenya evoke a lot of emotion and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss'
>
> Similarly, he reiterated the Court's sentiments in the case of "Waithaka Case (Supra)" where the Court emphasised that:-
>
> Money is not everything at all times and in all circumstances and do not think you can violate another citizen's rights only at the pain of damages....'

12. Further, still from the said case, it opined in the dicta thereof that 'doubt' in the third condition referred to the existence or otherwise of a prima facie case. This denotes a scenario where the Court has inherent jurisdiction to grant an interlocutory injunction even where the Judge is less than convinced of the existence of a prima facie case in the proceedings. The Counsel further submitted that the balance of convenience herein lied with the Plaintiffs/Applicants. And no prejudice shall be occasioned by an Order of injunction.

13. In conclusion, the Learned Counsel urged the Honourable Court to therefore allow the Plaintiffs/Applicants' application.

B. The Written Submissions by the Defendant/Respondent

14. The Defendant/Respondent through the Law firm of Messrs. John Kebaso & Co. Advocates filed their written submissions dated 10th March, 2025. Mr. Kebaso Advocate submitted that the Plaintiffs/Applicants brought this motion to Court seeking the above cited.

15. The Learned Counsel submitted that the application was founded on eight (8) grounds and anchored of the supporting affidavit of one Mchenga Mwahui Lewa purportedly on his own behalf and on behalf of the other plaintiffs and as an advisor to the 52nd Plaintiff, Umoja Self Help Group. Briefly, the Plaintiffs/applicants allege that they are the owners of the suit land, and that they have been residing there since time immemorial, and that recently when the defendant conducted a survey of the suit land, was when they were surprised to discover that the defendant had secretly registered the land in her name and that the said surprising registration was fraudulent and unlawful

16. The Learned Counsel further averred that pursuant to the directions of this Honourable court issued on the 29th January 2025. The Defendant/Respondent filed her Replying Affidavit dated 7th February 2025 wherein she articulated by way of facts why the Plaintiffs/Applicants had not met the threshold for grant of the orders sought herein. Consequent to the foregoing introduction and on the basis of the

aforementioned replying affidavit of the Respondent, the Learned Counsel opined that the following issues fall for determination:-

a. Whether the right parties were before the Court in this matter?

b. Whether the Applicant had met the criteria for the grant of orders of temporary injunction pending the hearing and determination of the suit?

c. Who bore the costs of the Application?

17. On whether the right parties were before the Court in this matter, the Learned Counsel submitted that it was trite law that the Civil Procedure Rules, 2010 in Order 1 Rule 1 clearly provides that

> " All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise."

18. Further in Order 1 Rule 3 of the Rules, provides as follows

> " All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise".

19. The Learned Counsel asserted that in her Replying Affidavit and with the support of the evidence in terms of the documents annexed thereto, the Defendant/Respondent had clearly demonstrated the at the time of filing this suit, she was not the registered owner thereof of the suit land. On this assertion, the Defendant/Respondent filed exhibit marked as "EM – 3" being the Certificate of Confirmation of Grant, "EM – 4", being the Grant of Letters of Administration, "EM – 5" being the Certificate of Title in her name issued after the suit. It was apparent that at the point of filing this suit, the Defendant/Respondent was not the absolute and registered owner of the suit land and therefore she was the wrong party. Thus, for this very reason, this Application should be dismissed under those grounds.

20. Clearly, it was apparent that the 1st Plaintiff/Applicant were not being truthful as in their Supporting Affidavit under Paragraph number 9 he said that they did a search which reflected the name of the Defendant/Respondent as the registered owner. This was a not true representation of facts as they neither attached the said search. If at all they would have conducted the same, they should have discovered that the suit land was not in the name of the Defendant/Respondent but rather in the names of Dan Elijah Mbogo, deceased, who the Defendant/Respondent succeeded via the succession process. Further again, the alleged Plaintiffs/Applicants number 52, Umoja Self Help Group has not provided any Certificate of Registration under which they were incorporated under the Laws of Kenya to help ascertain whether it was a legal entity capable of being granted the reliefs they are seeking. They have also not provided any minutes or resolutions appointing the 1st Plaintiff/Applicant to swear the supporting affidavit of their behalf. In the absence of the above, they opined that the 52nd Plaintiff/Applicant was a non-existent entity. Therefore, the application must fall by being brought by a party who cannot be properly defined as a person under the law.

21. On whether the Applicant had met the criteria for the grant of orders of temporary injunction pending the hearing and determination of this suit. The Learned Counsel submitted that Order 40 of the Civil Procedure Rules, 2010 provides for temporary injunction and temporary orders. It was within the discretion of the court to Grant temporary injunctive relief.The guiding principles thereof were laid

down in the celebrated "Giella case" (Supra) and in many other decisions from Kenyan courts. Of particular emphasis is the case of "Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others *CA No.77 of 2012* (2014) eKLR" where the Court of Appeal held that;

> "in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to be, by showing that the balance of convenience is in his favour. These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially."

22. On whether the Plaintiffs/Applicants had a prima facie case with the probability of success, they submitted that they had not demonstrated that. On the contrary, the Defendant/Respondent had provided evidence in court that showed clearly she was the registered owner thereof of the suit land. On the other hand, the Plaintiffs/Applicants apart from general averments in their affidavit which have fallen short of the truth, they had not provided any iota of evidence to prove that they were the owners thereof as they claim. Further, the Defendant/Respondent had clearly demonstrated in her affidavit that she had been having quiet possession of the land until the Plaintiffs/Applicants started invading the suit land when she sought to conduct a survey for the purposes of identifying the boundaries and the beacons thereof. The Plaintiffs/Applicants could only be described as trespassers who were seeking to disposes the Defendant/Respondent of her land and therefore in the absence of them providing any ownership documents, have not proved to have a prima facie case with any probability of success.

23. As to whether the Applicant had demonstrated that they may suffer irreparable injury if a temporary injunction was not granted. The Learned Counsel argued that there was no injury they stood to suffer. On the contrary, they were the one who had invaded the Defendant/Respondent's land. Indeed, she had proven ownership with the title documents and thus was one who stood to suffer irreparable injury. To buttress on the foregoing, the Plaintiffs/ Applicants had stated that they discovered the Defendant/Respondent was the registered owner when they undertook the official search. The question to be answered at the onset, who between the two parties stood to suffer irreparable injury – was it the Plaintiffs/Applicant who had no title documents or the Defendant/Respondent who had title to the ownership of the suit land. The Learned Counsel averred that it was the Defendant/ Respondent who would do so. For this reason, the Plaintiffs/Applicants were not entitled to the temporary reliefs they sought.

24. According to the Learned Counsel, the Plaintiffs/Applicants in their motion had made allegations that the Defendant/Respondent had the land registered in her name secretly. The Defendant/Respondent had annexed in her affidavit Annexure marked as "EM - 2" being a Certificate of Title registered in the name of her late husband who she succeeded pursuant to a succession cause. It was trite law that the first registered owner had an indefeasible right of ownership incapable of impeachment except on grounds of fraud. The Plaintiffs/Applicants had provided not an iota of evidence to suggest that the titles were obtained by fraud. Further, the title documents were public documents in Kenya and registration of ownership of title could not be done in secrecy. As such, the Plaintiffs/Applicants had not proven that the balance of probability tilted to their side.

25. In conclusion, the Learned Counsel submitted that consequence of the foregoing, the Application had failed to prove that they were fit to be granted the orders they sought. Hence, they prayed that the Application be dismissed with costs in favour of the Defendant/Respondent.

V. Analysis and Determination

26. I have carefully read and considered the pleadings herein and the relevant provisions made by the by the parties. Before I diverge into the issues for determination, in the Replying affidavit and submissions by the 1st Plaintiff/Applicant, she has raised the issue of the capacity of the 52nd Plaintiff/Applicant to sue. Being that the same is a substantive issue for determination, it is the Court's opinion that the Plaintiffs/Applicants should approach the court appropriately for the same as an issue on capacity is not one to be taken lightly. In order to arrive at an informed, reasonable and fair decision, the Honorable Court has framed the following two (2) issues for determination: -

    a. Whether the Notice of Motion dated 6th November, 2024 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.

    b. Who will bear the Costs of Notice of Motion application 6th November, 2024.

Issue No. a). Whether the Notice of Motion dated 6th November, 2024 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.

27. Under this sub – title, the main issue here is whether the Plaintiffs are entitled to be granted the relief of an interlocutory injunction. The application herein is premised under the provision of Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst the provisions of the law. Which provides as follows: -

    Order 40, Rule 1

    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 of 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.

28. Fundamentally, the principles applicable in an application for an injunction were laid out in the celebrated case of "Giella – Versus - Cassman Brown & Co Limited (1973) EA 358", where it was stated: -

> " 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 be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

29. The three conditions set out in "Giella (supra)", need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out

by the Court of Appeal in the case of "Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others [2014] eKLR": -,

> " 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. Limited - Versus - 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".

30. In dealing with the first condition of prima facie case, the Honorable Court guided by the definition melted down in the famous case "MRAO Limited – Versus - First American Bank of Kenya Limited & 2 others (2003) KLR 125" of: -,

> " 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 would 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"

31. As the Court previously observed in this ruling, the Plaintiffs/Applicants claim to be the owners of the sui premises known as PLOT NO. 300 at DZOMBO MNANAZINI in Lunga Lunga Sub County within Kwale County herein referred to as the suit premises. The Plaintiffs/Applicants had been residing on the suit premises since time immemorial as they were born there. The Plaintiffs/Applicants' grandfathers used to live and graze in the suit premises since time immemorial. The Defendant/Respondent on the other hand contended that she is the registered owner of the suit property which she evidence with annexture as "EM - 1 to 5" showing how the property changed hands from her later husband to herself. She only became the registered owner of the suit property on 17th January, 2025 when the grant of the letters of administration were registered at Kwale land registry and a title issued to her. In the case of "Mbuthia – Versus - Jimba credit Corporation Limited 988 KLR 1", the court held that;

> " In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the party's cases."

32. Similarly, in the case of "Edwin Kamau Muniu – Versus - Barclays Bank of Kenya Ltd" the court held that:-

> " In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria."

33. In the present case, a Certificate of title by the Plaintiffs/Applicants would have been "prima facie" conclusive evidence that they were the true owners of the land and the Defendant/Respondent threatened their occupancy of the same through trespass. Clearly, regarding this first condition, the Plaintiffs/ Applicants have not demonstrated a prima facie case with a probability of successat the trial as enunciated in the case of "Giella -Versus - Cassman Brown & Co. Ltd (Supra)".

34. The court has further considered the annextures on record against the second principle for the grant of an injunction, that is, whether the Plaintiffs/ Applicants might suffer irreparable injury which cannot be adequately compensated by an award of monetary damages. With regards to the second limb of the Court of Appeal in "Nguruman Limited (supra)", held that:-

> " 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."

35. On the issue whether the Plaintiffs/Applicants will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Applicants must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. It is not hidden fact that the suit property belongs to the Defendant/Respondent from the empirical documentary evidence attached so far. On the contrary, the Plaintiffs/Applicants have not shown their root rights to the said property that they claim to own. The judicial decision of "Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (2018) eKLR" provides an explanation for what is meant by irreparable injury and it states;

> " Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury."

36. Quite clearly, the Plaintiffs/Applicants would be able to be compensated through damages as their occupancy of the suit property is in doubt. Therefore, the Plaintiffs/Applicants have not satisfied the second condition as laid down in "Giella's case".

37. Thirdly, the Applicants have to demonstrate that the balance of convenience tilts in their favour. In the case of "Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (Supra)" which defined the concept of balance of convenience as:

> " The meaning of balance of convenience will favour of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show

that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".

38. Similarly, in the case of "Paul Gitonga Wanjau – Versus - Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR", the court dealing with the issue of balance of convenience expressed itself thus:-

> " Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies."

39. From the surrounding facts and inferences so far, The balance of convenience tilts in the favour of the Defendant/Respondentwho will be prevented from getting into her property before the suit herein is heard and determined on merit. The decision of "Amir Suleiman – Versus - Amboseli Resort Limited [2004] eKLR" where the Learned Judge offered further elaboration on what is meant by "balance of convenience" and stated:-

> " The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice."

40. In this case, it goes without saying that, the balance of convenience tilts in favour with the Defendant/Respondent. Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the main suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the claim of the Plaintiffs/Applicants and it would be in the interest of both the Plaintiffs/Applicants and the Defendant/Respondent that the suit property is preserved until the hearing and determination of the suit.

41. In saying this, I seek solace from the case of:- "Robert Mugo wa Karanja – Versus - Ecobank (Kenya) Limited & Another [2019) eKLR" where the court in deciding on an injunction application stated;

> " circumstances for consideration before granting a temporary injunction under Order 40 Rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts..."

42. Based on the Principles of "Lis Pendent" anchored under the provision of Section 52 (1) of the Indian Transfer of Property Act and the decisions of "George Kadenge – Versus - Azzuri Limited and "Mawji –

Versus - United States International University (USIU) by H.A. Madan JA who held that there would be need to preserve the suit properties. Therefore, I am convinced that if orders of status quo are not granted in this suit, the property in dispute might be in danger of being dealt in the manner set out in the application and apprehended by the parties herein. In view of the foregoing, in as much as I find the application by the Plaintiffs/Applicants unmerited, I make an order for status quo pending the hearing and determination of the suit.

Issue c). Who will bear the Costs of Notice of Motion application 6th November, 2024.

43. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 Laws of Kenya holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of "Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and "Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise.

44. I have well stated in previous precedence and most especially in "Sagalla Lodge Limited – Versus - Samwuel Mazera Mwamunga & another (Suing as the Executors of Eliud Timothy Mwamunga – Deceased) [2022] eKLR", that:

> " 58. The Black Law Dictionary defines "Cost" to means, "the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other".
>
> The provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. The issue of Costs is the discretion of Courts. From this provision of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in this case is that the Notice of Motion application dated 7th December, 2021 by the Plaintiff has succeeded and hence they are entitled to costs of the application and that of the Defendants dated 21st December, 2021."

45. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. In the case of "Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In the present case, the Honourable Court elects to have the costs to be in the cause

VI. Conclusion and Disposition

46. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards the principles of Preponderance of Probabilities and the balance of convenience.

47. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-

    a. That the Notice of Motion application dated 6th November, 2024 be and is hereby found to lack merit and the same is dismissed.

b. That the above notwithstanding, based on "the Doctrine of Lins Pendents", an order of Status Quo to be maintained do issue restraining both the Plaintiffs/Applicants and Defendants/ Respondents being the parties in this suit either by themselves, their servants, agents and or otherwise from disposing, selling, transferring, charging, leasing, constructing or continuing construction or in any other manner interfering with land in Plot Title No. Kwale/Pungu Fuel Area/96 pending the hearing of the main suit.

c. That for expediency sake there be a mention on 3rd July 2025 for purposes of conducting an intensive Pre – Trial conference pursuant to the provision of Order 11 of the CPR, 2010. There be a hearing on 3rd November 2025.

d. That the cost of the Notice of Motion application dated 6th November, 2024 shall be in the cause.

It is so ordered accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT KWALE THIS 9TH DAY OF APRIL 2025.

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HON. MR. JUSTICE L. L. NAIKUNI

ENVIRONMENT AND LAND COURT AT

KWALE

Ruling delivered in the presence of:

a. Mr. Daniel Disii, the Court Assistant.

b. Mr. Paul Magolo Advocate for the Plaintiffs/Applicants.

c. Mr. Kebaso Advocate for the Defendant/Respondent

HON. JUSTICE LL NAIKUNI