



Ghalia & 2 others (Suing as the Administrator of the Estate of Sadiq Ghalia - Deceased) v Kwale District Land Registrar & 5 others (Environment & Land Case E008 of 2021) [2022] KEELC 14545 (KLR) (10 June 2022) (Ruling)

Neutral citation: [2022] KEELC 14545 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E008 OF 2021**

**AE DENA, J
JUNE 10, 2022**

BETWEEN

**SALEEM GHALIA 1ST PLAINTIFF
WAHIDA GHALIA 2ND PLAINTIFF
MOHAMMED AYUB MUSSA KHAMISA 3RD PLAINTIFF
SUING AS THE ADMINISTRATOR OF THE ESTATE OF SADIQ GHALIA -
DECEASED**

AND

**KWALE DISTRICT LAND REGISTRAR 1ST DEFENDANT
CHIEF LANDS REGISTRAR 2ND DEFENDANT
ABDALLAH SAID KUGWOTWA 3RD DEFENDANT
MOHAMED RAJAB MBWATA 4TH DEFENDANT
OMAR JUMA MBOGA 5TH DEFENDANT
JUMA MWINYI MBATA 6TH DEFENDANT**

RULING

Background

1. The plaintiffs filed this suit on December 8, 2021 as administrators of the estate of Sadiq Ghalia(deceased) in respect of plot number Kwale/Galu Kinondo/665 (herein the suit property). It is pleaded that the deceased was and is still the registered owner of the suit property having acquired it for valuable consideration. The Kwale District Land Registrar and Chief Lands Registrar the 1st and



2nd defendants respectively are alleged to have fraudulently in collusion with the rest of the defendants issued a new title in the names of the 3rd, 4th, 5th and 6th defendants issued on August 7, 2015 without the plaintiffs knowledge. That the said title was being used by the defendants to transfer the suit property despite it being a forgery or otherwise illegal since the 3rd to 6th defendants had unsuccessfully challenged the plaintiffs title in various suits. That as such the defendants did not have any lawful justification for issuing or procuring or making the new title placing the 3rd to 6th Defendants as registered proprietors of the suit property. The particulars of the various cases and their outcome are enumerated in the plaint which will be clearer later in this ruling as pertains the objection on resjudicata. The plaintiffs pray for inter alia a declaration that the Estate of Sadiq Ghalia is the rightful and legal owner of the suit property and an order for cancellation of any entry in the register purporting to register the 3 to 6th defendants as owners of the suit property.

The Plaintiffs Application

2. Together with the plaint, the plaintiff filed an application dated December 6, 2021 seeking for the following orders;
 - a. Spent
 - b. Spent
 - c. Pending hearing and determination of this suit, the court be pleased to issue an injunction restraining the defendants whether by themselves, their agents and servants from transferring, selling, interfering, alienating, disposing, entering into, remaining in occupation on or otherwise dealing with all that parcel of land known as Kwale/Galu Kinondo/665
 - d. Mandatory injunction compelling the 1st and 2nd defendants to produce to the court all the documents including the parcel file, green card, consents, receipts, valuations, register, court order, transfer and any other documents used by the 1st and 2nd defendants to issue the documents dated 7/8/2015 purporting to be the title in the name of the 3rd, 4th, 5th and 6th Defendants
 - e. Costs.
3. The application is premised upon grounds on its face and the supporting affidavit of Saleem Ghalia one of the administrators of the estate of Sadiq Ghalia. The grant of probate of written will of the deceased was issued to the plaintiffs on February 3, 2012. The grounds reiterate what is stated in the plaint as summarized in the background to this ruling. It is averred in the supporting affidavit that the suit property belongs to the late Sadiq Ghalia as evidenced by a title deed issued on May 29, 1980. That it was acquired from one Virus Waruthingo Kirugumi, J Kiringu, Wairangu Mukere, Niyi Mukundi Ngarari and Rahab Mweru on September 20, 2019 at a consideration of Kshs 200,000/-. That it was acquired jointly with Eugene Charnel who later transferred his undivided share to the deceased at a consideration of Kshs 100,000/-. It was also deposed that the defendants were currently in the process of transferring the suit land without the consent of the plaintiffs, the administrators to the deceased's estate.
4. It is further stated that the defendants have unsuccessfully attempted to challenge the plaintiffs title and ownership of the suit property. That the defendants obtained an award under Msambweni Lands Dispute Tribunal Land Dispute No 44/2005 where the deceased title to the suit property was cancelled in favor of the defendants. That vide High Court in Mombasa Civil Suit No 34/2010 (OS) the defendants sought to revoke the deceased title to the suit property where the court directed that Misc Civil Application No 500/2009 be determined first. It was further deposed that the court in Misc



Civil Application No 500/2009 found in favor of the deceased. The Msambweni tribunal award was quashed where the District Land Registrar was prohibited from revoking and cancelling the title deed held by the deceased and issuing a new title deed to the 3rd to 6th Defendants. That the plaintiffs suit Mombasa civil suit No 34/2010 was thereafter dismissed. It is upon this background that the plaintiff alleges the 3rd to 6th Defendants have no justification in procuring the document or title dated August 7, 2015. The court was asked to issue the orders sought to prevent the defendants from transferring the suit land to unsuspecting members of the public and taking occupation of the suit parcel. The court was further asked to issue orders to the effect that all documents purporting to have been used in registering the suit property to the 3rd to 6th defendants vide the document dated August 7, 2015 be produced before court.

5. On December 8, 2021 this court issued orders certifying the application as urgent and an injunction restraining the defendants from interfering with the suit property in any manner whatsoever pending the hearing and determination of the application.

Defendants Response

6. In response to the application the 3rd, 4th, 5th, and 6th defendants filed a Notice of preliminary objection dated February 8, 2021 and a notice of motion of even date. The grounds were that this court lacked jurisdiction to determine the suit since it was res judicata and urged for the application to be dismissed. The Notice of motion sought for orders that the plaintiff's application be struck out for being res judicata and an abuse of the court process. Further that the defendants be excused from filing and serving their replying affidavit, defence, list and witness statements and list of documents until their application and preliminary objection are filed.
7. The defendant's application was supported by an affidavit sworn by Abdalla Said Kugotwa the 3rd defendant. He deposed that he was the co-owner of the suit property together with the 4th, 5th and 6th defendants. That the issues raised in the plaintiffs' suit and the application dated December 6, 2021 had been conclusively dealt with by the courts with competent jurisdiction. He averred that the courts decisions were in favour of the defendants and the plaintiff could not therefore raise the same issues in the instant suit. He further stated that the instant application and entire suit ought to be struck out to avoid abuse of the court process.

Submissions

8. On February 10, 2022 parties agreed that both the PO and the application be heard together and disposed by way of written submissions. Mr Wamuti Ndegwa counsel for the plaintiffs adopted the plaintiffs supporting affidavit be treated as his answer to the preliminary objection as well as the defendants application. This court consequently directed the parties to file submissions. The 1st and 2nd defendants did not participate in these applications despite service.

Plaintiffs Submissions

9. The plaintiffs filed their Submissions on March 21, 2022. In addition to the history of ownership of the parcel and the various litigations, the plaintiffs submitted that they were still in possession of the original title deed to the property. That the plaintiff's application sought to arrest the fraud and that the plaintiffs stood to suffer irreparable damage if the defendants transfer the suit property to a third party. On the prayer for injunction the court was referred to the holding in *Giella Versus Cassman Brown* on when a court can issue a restraining injunction. It was submitted that a prima facie case had been established as per the court of appeal holding in *Nguruman Limited Versus Jan Bonde Nielsen & 2 Others* [2014]. That the plaintiff had demonstrated that the deceased had jointly purchased the suit



property and had later on become its sole proprietor. That the suit property was still registered in the deceased's name with a title deed produced as evidence and that a grant of probate of written will was issued to the plaintiffs. Counsel submitted that under section 12[1] of the [Land Registration Act](#) and the holding in [Nelly Wanjiru Njenga Versus Robinson Maina & 3others](#) [2020] eKLR a title deed was conclusive proof of ownership of land. That the defendants had not controverted this evidence and had not produced any proof that the deceased had at any given time transferred the suit property to the 3rd to 6th defendants. The court was referred to the provisions of section 44[1] and [2] of the [Land Registration Act](#) which required that every instrument effecting and disposition under the Act shall be executed by each of the parties consenting to it by signature or affixing thumb print or other mark.

10. Counsel for the Plaintiff submitted that so far, no response had been filed to the plaintiff's application and hence the same remained unchallenged. That the preliminary objection raised res judicata issues and was not a proper response to the application. Reliance was placed on the holding in [Kennedy Otieno Odiyo & 12 Others V Kenya Electricity Generating Company Limited](#) [2010] eKLR.
11. On whether the plaintiffs will suffer irreparable damage in the event that the injunction is not granted. It was submitted that the defendants were likely to register and transfer the suit property to a third party and more so to unsuspecting members of the public before the determination of the suit. That such actions would amount to irreparable injury which cannot in anyway be compensated by monetary compensation. It was submitted that the balance of convenience tilted more towards grant of the orders sought as per the holding in [Pius Kipchirchir Kogo V Frank Kimeli Tenai](#) [2018] eKLR. It was emphasised that the defendants would not in any way be inconvenienced if the orders sought were granted as they do not hold a legitimate title to the suit property and neither were they in possession of the same.
12. On the prayer seeking information relating to the making of the document/title dated August 7, 2015 it was submitted that the same had the backing of the provisions of Article 35[1] of the [Constitution](#) on the right of access to information. That under the provisions of section 12[1] of the [Land Registration Act](#), the 1st and 2nd Defendants who are public officers had the obligation to give access of the information sought to the Plaintiffs. That the said information was with regards to the transactional basis of the title deed allegedly held by the 3rd to 6th Defendants. The High Court holding in [Nairobi Law Monthly Company Ltd Vs Kenya Electricity Generating Company & 2 Others](#) (2013)eKLR was cited.
13. On the defendant's preliminary objection counsel pointed that no evidence had been adduced by the defendants in proof of the allegation that the issues raised in the application and suit had already been conclusively dealt with. It was submitted that one cannot raise a ground of res judicata by way of a preliminary objection as the court needs to look at the facts, pleadings and proceedings in the former suit and the best way to do this was by way of Notice of Motion as held in [George Kimani & 4 Others Versus County Government of Transzoia and Another](#) [2014] eKLR. Further that the objection that the suit was resjudicata was not a pure point of law as stated in the *Mukhisa Biscuits Manufacturers Ltd Vs West End Distributors Ltd* 1969.
14. Citing section 7 of the [Civil Procedure Act](#) it was submitted that the matter directly and substantially in issue in the instant case was whether the defendants fraudulently transferred the suit property using a false document dated August 7, 2015. That this has never been directly or substantially in issue in any former suit involving the suit property. That the legitimacy of the impugned document/title cannot be said to be resjudicata to cases that were filed and determined even before the existence of the purported/ title. Further that the three basic conditions laid by the High Court in [in Re Estate of James Karanja alias James Kioi \(deceased\)](#) (2014) eKLR had not been satisfied since the defendant failed to adduce evidence of former court proceedings. The three conditions are 1) that there was a former suit or proceeding in



which the same parties as in the subsequent suit litigated; 2) the matter in issue in the latter suit must have been directly and substantially in issue in the former suit and 3) that the court competent to try it heard and finally decided the matters in controversy between the parties.

Counsel urged this court to grant the application.

3rd to 6th defendants' submissions

15. The firm of Makasembo Advocates filed submissions on behalf of the 3rd to 6th respondents on March 30, 2022. It was submitted that the present suit is res judicata and therefore incompetent and a contravention of the provisions of section 7 of the *Civil Procedure Act*. That the plaintiffs had refused to serve the 1st and 2nd defendants who were in a position to produce the documents sought. Further that all the mentioned suits that had previously been litigated upon between the parties herein had conclusively been dealt with.
16. Counsel submitted that the application by the plaintiffs had been brought with malice and in bad faith and with no cogent evidence and explanation. It was submitted that the 3rd to 6th defendants were in possession of the suit parcel and had been on the same for over 13 years. The Plaintiffs were asked to explain why for the said period they had not sought to acquire full administration of the estate of the deceased. Counsel relied on *Panga EA Holding LLC & Ano Vs Hacienda Development Ltd & 2 Others*; Civil Appeal No 231 of 2004 *Peter Kimondo Gotonga, John Kanyungu Njogu; Daniel Kimani Maingi* and Civil Suit No E 512 and Civil suit No E512 of 2020 *Per Formworks Scabolding Engineering (PTY)Ltd Vs Mayfair Insurance*. The court was asked to dismiss the plaintiff's application dated December 6, 2021 as well as the suit herein.
17. The plaintiff in brief response to the defendant's submissions reiterated that the previous proceedings cannot render the present suit res judicata for reasons earlier cited. In addition, while the 3rd to 6th Defendants were challenging the registration of the plaintiff and his predecessors in title, the plaintiff in the current suit was challenging the purported registration of the said defendants as proprietors of the suit land bordering on criminality. Further the that the attempt to transfer the suit property to third parties was carried out around March 11, 2021 as evidenced by a transfer produced by the plaintiff (see G8).

Analysis and Determination

18. I have considered the application, pleadings, affidavits, rival submissions of the respective parties and case law cited. The issues for determination in my view are as follows;
 - a. Whether the suit and the application dated December 6, 2021 are res judicata as alleged in the defendant's preliminary objection.
 - b. Whether the parameters of an application for injunction have been proved.
 - c. Whether the 1st and 2nd Defendant should be compelled to deliver the documents sought before or at the trial.

Whether the suit and the application dated December 6, 2021 are res judicata

19. I have chosen to first consider whether the suit and the application dated December 6, 2021 are res judicata. This court is aware that jurisdiction is everything and for without jurisdiction this court cannot make one more step in terms of the plaintiff's application as was held in *Owners of Motor Vessel Lillian S' Vs Caltex Oil (Kenya) Ltd* (1989) eKLR. Counsel for the plaintiff already alluded to the ingredients (see paragraph 7) that would render a matter res judicata). These are also enunciated in



Uburu Highway Development Limited –versus Central Bank of Kenya & 2 others [1996] eKLR, where the Court held *inter alia* that, in order to rely on the defence of res judicata, there must be a previous suit in which the matter was in issue; The parties were the same or litigating under the same title; A competent Court heard the matter in issue and the issue has been raised once again in a fresh suit.

20. I have noted the plaintiff's contention that a plea of res judicata raised in the preliminary objection is not a pure point of law since the court must delve into evidence to ascertain the facts to determine if the above ingredients have been satisfied. Up to this point I agree with the plaintiff's submission. It has also been urged that res judicata is best raised through a notice of motion application. Again, this court agrees. The Notice of motion sought for orders that the plaintiff's application and the entire suit be struck out for being res judicata. Prima facie the notice of motion seems to support the preliminary objection save for the fact that the evidence of the proceedings were not attached as observed by Mr Ndegwa. I'm however inclined to look at the preliminary objection from the point of view of jurisdiction which must be determined at the earliest opportunity and saving judicial time. Assuming that this court finds that it will not sustain the preliminary objection on the basis that it is not a pure point of law or that it ought to have been brought by way of notice of motion, the defendant would still have an opportunity to go back and raise the objection in the right way. This court would be obligated to hear the application for the reason that it was not decided on merit. This in my view would not be a prudent use of resources and would go against the very objectives of the Civil Procedure Act (section 1A, 1B). I will ignore the technicalities and proceed to determine within this ruling whether the suit is res judicata and put the issue of jurisdiction to rest.
21. I have carefully considered the material placed before this court in respect of the previous litigation touching on the suit property. In Mombasa Judicial Review Misc Civil Application 500 of 2009 the applicant Sadiq Ghalia (now deceased) moved the court to quash the tribunals award on the basis that the land disputes tribunal lacked jurisdiction to determine ownership among other grounds. The court then granted an order of certiorari quashing the award and prohibited the district land registrar from proceeding to revoke and cancel the title deed held by the deceased in respect of the suit property. On July 19, 2017 the Originating Summons filed by the defendants herein Civil Suit No 34 of 2010 (OS) was dismissed with costs. I have noted that in the Originating Summons of 34 of 2010 the defendants herein sought a declaration that the registration of Sadique Ghalia as the registered owner of the suit property was fraudulent and illegal and sought for cancellation of the same in place of the defendants which matter was dismissed. Moreover, no evidence has been led by the defendants appealing the decision. Despite the orders given by the court in Judicial Review Misc Civil Application 500 of 2009, the defendants went ahead to have the suit property registered in their names on August 7, 2015. It is this alleged registration in favor of the 3rd to 6th defendants that is being contested which was not an issue in the previous litigations. Indeed, I agree with the plaintiff that the said purported registration did not exist during the pendency of the previous proceedings. These new claims of alleged transfer and possible illegal dealings on the suit property are yet to be determined and considered by any court. I therefore find that the suit and application herein are not res judicata.

Whether the parameters of an application for injunction have been proved.

22. The finding that the suit and the application are not res judicata the previous litigation touching on the suit property paves way for determination of the plaintiff's application dated December 6, 2021. The application is brought under the provisions of Order 40 Rule 1(a) of the Civil Procedure Rules, sections 1A, 3A, of the Civil Procedure Act and Article 35 of the Constitution. The law on



granting of interlocutory injunction is set out under order 40(1) (a) and (b) of the [Civil Procedure Rules 2010](#) which provides: -

“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 [Rev 2012] Civil Procedure Cap 21 [Subsidiary] C17 – 165;
- (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.”

23. The principles for granting of interlocutory injunctions are laid out in the case of *Giella v Cassman Brown Co Ltd & Anor* (1973) EA 358 as affirmed in among others *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR. The applicant must prove a prima facie case with a probability of success, that they will suffer irreparable harm if the injunction is not granted and must demonstrate that the balance of convenience tilts in their favor. The Court of Appeal in the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 others* [2014] eKLR stated as follows;-

“...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 stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... 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 are 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.”

On prima facie case the court had this to say; -

“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.”

24. It is the Plaintiffs case that they are the beneficiaries to the estate of the deceased Sadiq Ghalia and who died on February 7, 2011 in Mombasa. The probate of written will issued on February 3, 2012 in Mombasa HC Succession Cause No 188 of 2011 were exhibited. It has been stated that the deceased jointly purchased the suit land from several parties but later on purchased the property from his co-owner hence owning the property solely at the time of his death. The plaintiffs produced a copy of the land certificate issued on May 29, 1980 as proof of ownership of the suit parcel by the deceased. From the pleadings it can be gathered that the suit parcel has been subject of contested litigation as to its rightful owners between the parties herein. Details of the cases were enumerated and their outcome. From this courts perusal and understanding, the suits over ownership of the suit parcel as filed by the defendants have all failed. The award by the Msambweni Land Disputes Tribunal in favor of the defendants was eventually quashed. The defendants however purport to own a document allegedly proving their ownership of the suit property. It has not been demonstrated how the defendants came to be registered as the owners. The plaintiffs allege that the document(title) held by the defendants as proof of ownership of the suit land is a forgery. Further that the defendants were using the said document to advertise the suit property for sale to unsuspecting members of public who have no history of the suit parcel. The plaintiffs are apprehensive that any interference with ownership of the suit and will mean that their right of ownership of the same is abused and or put at stake. In my view the plaintiff has shown a need for their ownership rights to be protected. I find that a prima facie case has been proved.
25. On whether the plaintiff stands to suffer irreparable loss, this court is further guided by *Nguruman Limited vs Jan Bonde Nielsen & 2 others* which guided that the injury should be one that cannot be adequately remedied by damages in the absence of an injunction and should not be speculative or mere apprehension. That there must be more than an unfounded fear or apprehension on the part of the applicant. The plaintiffs are wary of the fact that the defendants are keen on disposing off the suit parcel. In seeking the injunctive orders herein, they are keen on ensuring that the same does not happen as it will render the instant proceedings nugatory. I have seen the annexure G8 in the plaintiffs supporting affidavit which is an application to transfer. I have also seen the document dated August 7, 2015 exhibited as G7. It is a title deed showing Abdalla Said Kugotwa, Mohamed Rajab Mbwata, Omar Juma Mboga and Juma Mwinyi Mbata the 3rd to 6th defendants as the registered owners of the suit property. Since the said defendants have already allegedly fraudulently registered the suit parcel in their names it follows that they might take a step further and dispose the same. The apprehension is justifiable. It is the plaintiff's case that such actions will cause irreparable harm that may not be able to be compensated monetarily. It is this court's finding that in the event that the orders sought are not granted the suit parcel may be dispensed and hence rendering the trial an academic exercise and a futility in the dispensation of justice.
26. The court in *Chebi Kipkoeb vs Barnabas Tuitoek Bargaroria & Another* [2019] eKLR, stated that; -
- “The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to them would be greater than that caused to the defendants if an injunction is granted and suit is ultimately dismissed.”
27. It is imperative that the balance of convenience automatically tilts in favor of the applicant. I need not belabor the point since my findings with regard to the irreparable damage also speak to the balance of convenience being in favor of the applicants. The defendants did not file a replying affidavit to convince



this court otherwise. I have noted that in the notice of motion application the defendants sought to be excused from filing and serving their replying affidavit among other documents until their application and preliminary objection are filed. This leave was never pursued neither was it granted in the first instance and parties agreed that both applications be heard together. I'm inclined to find that based on the material before this court the balance of convenience tilts in the applicants favor. In any event I see no prejudice that will be occasioned in restraining the applicants from disposing of the suit property. Infact it is stated in the defendant's submissions that the defendants have been in physical possession of the suit property for over 13 years.

Whether the 1st and 2nd defendant should be compelled to deliver the documents sought before or at the trial.

28. The applicants also seek an order of mandatory injunction compelling the 1st and 2nd defendants to produce to the court all the documents including the parcel file, green card, consents, receipts, valuations, register, court order, transfer and any other documents used by the 1st and 2nd defendants to issue the documents dated August 7, 2015 purporting to be the title in the name of the 3rd, 4th, 5th and 6th defendants. They have cited the right to information as provided by the *Constitution of Kenya 2010*. In opposition the defendants argue in their submissions that the plaintiffs had refused to serve the 1st and 2nd defendants who were in a position to produce the documents sought. Indeed, the orders were not directed at the rest of the defendants. The applicant has stated in paragraph 12 of the supporting affidavit that they have demanded that the 1st and 2nd defendants release the said documents to them and severally visited the land registry at Kwale seeking the documents and information but the said defendants declined. A copy of application for search dated November 10, 2021 and copy of unfiled certificate of search were placed before this court (G16 and G17). The plaintiffs case is that the suit property belongs to the estate of the deceased herein and are challenging the authenticity and validity of the title held by the defendants. To me the relevancy of the documents sought to the dispute between the parties is what is key. To enable this court effectively determine the dispute with fairness to both the parties it is of utmost importance the history of how the current registration was arrived at is shown. This can only be seen from the parcel file including the documents sought which are ordinarily in the custody of the 1st and 2nd defendants. I'm also inclined to consider this prayer from the objectives of Section 22 of the *Civil Procedure Act* which confers upon the court at any time, either of its own motion or on the application of any party to make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence. This court finds the documents are relevant in the determination of the issues before this court and must be availed. In arriving at this finding I have also been guided largely by the holding in *M/S Ramji Meghji v Kisii University* [2016] eKLR where relevancy of the documents sought and the purpose of discovery were enumerated at length.
29. The upshot of the foregoing is that the defendants' preliminary objection dated February 8, 2022 and the Notice of Motion of even date are hereby dismissed.
30. To dispose of the Notice of Motion application dated December 6, 2021 the following orders do and shall hereby issue; -
1. Pending hearing and determination of this suit, an order of injunction restraining the defendants whether by themselves, their agents and servants from transferring, selling, alienating, disposing, all that parcel of land known as Kwale/Galu Kinondo/665.



2. Mandatory injunction compelling the 1st and 2nd defendants to produce to the court all the documents including the parcel file, green card, consents, receipts, valuations, register, court order, transfer and any other documents used by the 1st and 2nd defendants to issue the documents dated 7/8/2015 purporting to be the title in the name of the 3rd, 4th, 5th and 6th Defendants.
 3. Costs shall follow the event.
31. Leave is also hereby granted to the defendants to file their documents in response to the main suit within 14 days of this ruling.

DELIVERED AND DATED AT KWALE THIS 10TH DAY OF JUNE 2022.

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Mwai holding brief for Mr. Ndegwa for the Plaintiffs

No appearance for the 1st and 2nd defendants.

No appearance for the 3rd – 6th Defendants

Mr. Denis Mwakina- Court Assistant.

