



**Korir (Suing as Personal Representative of the Estate of Abraham Kipkorir Tarus) v
Kogo (Sued as Personal Representative of the Estate of the Late Nathan Kimaiyo Tarus)
(Environment & Land Case E065 of 2024) [2025] KEELC 3054 (KLR) (3 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3054 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E065 OF 2024**

**CK YANO, J
APRIL 3, 2025**

BETWEEN

**JOSHUA KIRWA KORIR PLAINTIFF
SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ABRAHAM
KIPKORIR TARUS**

AND

**RASALEEN CHELAGAT KOGO DEFENDANT
SUED AS PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE
NATHAN KIMAIYO TARUS**

RULING

1. By a Notice of Motion dated 12th November, 2024, brought pursuant to the provisions of Sections 1A & 3A of the [Civil Procedure Act](#), and Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules, the Plaintiff/ Applicant seeks the following orders: -
 - a. Spent.
 - b. Spent
 - c. That pending the hearing and final determination of this suit, the Defendant/Respondent either by herself, through her agents, employees, servants, workers and/or any other person acting under her direction be restrained by a temporary order of injunction from alienating, moving onto, trespassing evicting and/or in any manner whatsoever from interfering with the beneficiaries of Abraham Tarus (Deceased) quiet and peaceful occupation, possession and use of her parcel of land No. Turbo West/Osongorai Block 3 (Tapsagoi)/36 measuring 200 Acres.
 - d. That the costs of this Application be provided for.



2. The application is based on the 9 grounds on its face and on the Applicant's Supporting Affidavit evenly dated. He states that the late Nathan Kimaiyo Tarus is the registered owner of land parcel No. Turbo West/Osongorai Block 3 (Tapsagoi)/36 measuring approx. 600 Acres, having purchased the subject land from the Settlement Fund Trustee.
3. It is however his claim that at the time of the said purchase, the late Nathan Kimaiyo Tarus was unable to complete the payment of the agreed purchase price, whereupon he agreed with the late Abraham Kipkorir Tarus, who was his son, that he would help him make the payment. He avers that the said agreement was with the common intention that the late Abraham K. Tarus would take ownership of half share of the land parcel amounting to 300 Acres.
4. He thus contends that upon payment of the agreed amount of Kshs. 35,767/= to the Settlement Fund Trustee, a trust was established between the said parties; Nathan K. Tarus and Abraham K. Tarus, who are both deceased, to the extent that the late Nathan Kimaiyo Tarus held a section of the suit land measuring 300 Acres in trust for the late Abraham Kipkorir Tarus.
5. That the late Nathan Kimaiyo Tarus consequently gave the late Abraham Kipkorir Tarus 100 acres, which was registered in his name. That he later gave, a further 100 Acres which is now occupied by Abraham Kipkorir Tarus's sons, but the land is still registered in the name of the late Nathan Kimaiyo Tarus. He contends that the late Nathan Kimaiyo Tarus died before giving or transferring the remaining balance of 100 Acres to Abraham Kipkorir Tarus, who is also since deceased.
6. It is the Applicant's claim that despite being aware of the ownership claims by the estate of the late Abraham Kipkorir Tarus over a portion of the subject land, the defendant proceeded and listed the whole subject land as property of the estate of the late Nathan Kimaiyo Tarus including the 100 Acres portion given to the late Abraham Kipkorir Tarus but not transferred, and which is occupied by the widow and beneficiaries of the late Abraham Kipkorir Tarus.
7. It is further his claim that the defendant and her agents/servants have engaged in acts of destruction and wastage of the said properties hence the instant application.
8. The Applicant avers that the balance of convenience tilts in favor of the applicant and thus urged the court to allow the application in the interest of justice.
9. Despite being duly served with the application, the order/directions issued by the court, the various Mention Notices, the defendant/respondent neither filed a response nor submissions to the instant application. The Application is therefore deemed unopposed.
10. The Application was canvassed by way of written submissions and only the applicant filed his submissions and authorities, which I have read and considered. Be that as it may, I will proceed to determine the application herein on merit as hereunder.
11. I have carefully considered the application, the supporting affidavit together with the annexures thereto and the submissions filed. It is my considered view that the only issue arising for determination is whether the Applicant has met the requirements for the grant of a temporary order of injunction sought.
12. The law relating to injunctions is found under Order 40 (1) (2) of the Civil Procedure Rules which provides as follows: -
 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;

(b),

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.”

13. Section 13 (7) (a) of the *Environment and Land Court Act*, 2015 further mandates this court to grant interim preservation orders, including an interim order of injunction in the nature sought herein.

14. The principles guiding the grant of injunctions are well settled. An applicant seeking orders of injunction must satisfy the 3-limb test set out in the celebrated case of *Giella vs Cassman Brown and Co. Ltd* [1973] EA. 358 at 360 as follows: -

a). where he is required to demonstrate that he has a prima facie case with serious triable and arguable issues with a probability of success against the respondent. The test on prima facie case does not mean establishing a case beyond reasonable doubt;

b). He will suffer irreparable harm/injury which cannot be adequately compensated by damages;

c). Balance of convenience: In granting an injunction under this condition the court must be satisfied that the hardship or inconvenience which is likely to be caused to the applicant by declining the injunction will be greater than that which is likely to be caused to the respondent.

15. It has also been held that all the 3 tests indicated above are to be applied as separate, distinct and logical hurdles which an applicant is expected to surmount sequentially. The existence of one pillar alone does not automatically entitle an applicant to an order of injunction without considering the other hurdles. See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86.

16. First, an Applicant must establish that he has a Prima Facie case which raises arguable and triable issues with a probability of success. The Court of Appeal in *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others* (2003) eKLR explained what amounts to a prima facie case and stated as follows:

“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case 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.”

17. The applicant contends that the respondent has included the whole subject land No. Turbo West/ Osongorai block 3 (Tapsagoi)/36 as part of the properties forming part of the estate of the late Nathan Kimaiyo Tarus despite the estate of the late Abraham Kipkorir Tarus being entitled to a portion measuring approximately 200 Acres thereof. That the defendant has further engaged in acts of destruction and wastage of the said properties to their detriment.

18. He gave a brief background on how the ownership claims by the late Abraham Kipkorir Tarus arose and maintained that a trust was established between the late Nathan Tarus and the late Abraham Tarus over a portion of the subject land measuring 300 Acres being equivalent to the amount of money paid.

19. The Respondent on the other hand did not file any response to the application and consequently, from the averments by the applicant it may be said that a prima facie case has been established. Be that as



it may, this court is cognizant of the need of an applicant to prove his case, whether the evidence is challenged or not.

20. I have critically looked at the applicant's Supporting Affidavit and the annexures thereto. It is important to note that even though the applicant contends that the whole subject land was included as part of the properties of the estate of the late Nathan K. Tarus, the applicant did not produce any proof thereof, either in the form of a Schedule of Properties in the Succession Cause which highlights the subject land or the case number of the alleged succession cause.
21. Further, no evidence has been adduced to support the allegations of destruction and wastage of the suit properties by the defendant and/or her agents and servants as averred by the applicant, whether in the form of photographic evidence or otherwise.
22. The law is clear that he who alleges must prove. Without any form of proof to support the averments by the applicant, this court is unable to find in favor of the applicant. From the facts and evidence presented before this court, it is not clear whether the succession cause has indeed been filed and the status thereof and/or whether the estate has been distributed or the status of the said properties or who is in possession. This court is however mindful not to delve into the merits of the main suit at this stage.
23. Thus, based on the material presented before me, it is the finding of this court that the applicant has failed to satisfactorily establish a prima facie case against the defendant/respondent.
24. The second limb is that an Applicant must demonstrate that he will suffer irreparable harm which cannot be adequately compensated by an award of damages unless an Order of Injunction is granted. The onus is on the applicant to demonstrate the nature and extent of the substantial injury likely to be suffered.
25. In the case of Pius Kipchirchir Kogo versus Frank Kimeli Tenai (2018) eKLR the court while defining what amounts to an irreparable injury held as follows;

“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.”
26. This court has a duty to prevent grave and irreparable injury where it is demonstrated that the same is likely to be suffered by an Applicant. An injury is irreparable where there is no standard by which an amount can be measured with reasonable precision and accuracy or is in such a nature that monetary compensation, of whatever amount, will never be an adequate remedy. See Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR; Civil Appeal No. 77 of 2012 (Nairobi).
27. The applicant's claim against the defendant is that the defendant has included a portion of land which the estate of the late Abraham K. Tarus is rightfully entitled to. He contends that even though the portion measuring 100 Acres is still registered in the name of the late Nathan Tarus, the same was given to the late Abraham Tarus and is occupied by the children of Abraham Tarus.
28. Other than simply stating the genesis of the claim and that the sons of the late Abraham K. Tarus occupied the portion measuring 100 Acres, the applicant has not demonstrated the irreparable injury that they are likely to suffer.



29. As stated hereinabove, this court cannot ascertain the status of the suit parcel or the wanton destruction and wastage that is allegedly being perpetuated by the respondent and whether the same can be compensated by an award of damages, measured with accuracy and precision.
30. Consequently, it is my considered opinion that the Applicant has not sufficiently demonstrated the irreparable loss that the estate of the late Abraham Tarus is likely to suffer unless the orders sought are granted, to the required standard.
31. The final element that must be established is on the balance of convenience. The court needs to be satisfied that the inconvenience likely to be caused to the Applicant by declining the injunction is greater than that which is likely to be caused to the Respondent. The court is called upon to balance the inconveniences of both parties and possible injuries to them and their properties. (See Charter House Investment Limited vs Simon K. Sang and 3 Others [2010] eKLR.
32. At paragraph 9 of the Supporting Affidavit, the applicant has urged the court to find that the balance of convenience tilts in his favor since he is the registered proprietor of the suit parcels. This is despite stating at paragraph 2 of the same supporting affidavit that the subject land reference No. Turbo West/Osongorai Block 3 (Tapsagoi)/36 measuring 600 Acres is registered in the name of the late Nathan Kimaiyo Tarus. This clearly is a contradiction.
33. Be that as it may, no registration document was annexed to the supporting affidavit as proof of the said averments, either in the form of a copy of the title deed, copy of the green card or a copy of the certificate of official search to confirm the said claims of ownership.
34. Further, I have carefully looked at the annexure marked “JK 3(c)”, a letter by the late Abraham K. Tarus to the District Commissioner dated 18/4/1988, stating that the subject land has been divided into 34 plots. From the facts of the case, in explaining the portions given to the late Abraham Tarus, he outlined that his share entitlement of 300 Acres was issued as follows;
 - i. 100 Acres – given to the late Abraham Kipkorir Tarus and was registered in his name.
 - ii. 100 Acres - given to Abraham Kipkorir Tarus and is occupied by Abraham’s sons but the portion is still registered in the name of the late Nathan Tarus
 - iii. 100 Acres – the late Nathan Tarus died before giving Abraham Kipkorir Tarus this portion or transferring the same in his name. The same is therefore still registered in the name of the late Nathan Tarus.
35. In view of the foregoing, the extent of the applicant’s claim in respect to a portion measuring 200 Acres from the subject land is not known. The applicant’s share entitlement is not ascertainable from the facts presented before this court.
36. An order of injunction cannot therefore issue without clearly outlining the extent of the portion claimed particularly when it is clear that the subject land was subdivided a while back and that the 100Acres portion was never given to the late Abraham Tarus. Further, the status of the said 100 acres is not known, or whether the same is occupied by third parties who are not parties in this suit or if the same is vacant.
37. It is therefore my considered view that the balance of convenience does not lie in favor of the applicant or in granting the orders of temporary injunction as sought.
38. An order of injunction will only be granted on circumstances where it is proved sufficiently and the rules of evidence are clear on this regard.



Costs:

39. It is well settled that costs follow the event. However, in this case, despite not finding in favor of the applicant, the respondent did not file any response to the application and did not therefore incur any expenses or inconvenience with regards to the instant application.

Conclusion:

40. In view of the foregoing, I find that the Notice of Motion Application dated 12th November, 2024 is not merited and is hereby dismissed with no orders as to costs.

41. It is so ordered.

DATED, SIGNED AND DELIVERED IN ELDORET THIS 3RD DAY OF APRIL, 2025.

C. K. YANO

JUDGE

Ruling delivered in the presence of: -

Ms. Luseria for the Plaintiff/Applicant.

No appearance for the Defendant/Respondent.

Court Assistant – Laban

