



Kamau & another v Mururi ((Administrator of the Estate of Julia Waithira Karatu)) (Environment & Land Case E007 of 2022) [2022] KEELC 12729 (KLR) (29 September 2022) (Ruling)

Neutral citation: [2022] KEELC 12729 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E007 OF 2022
LN GACHERU, J
SEPTEMBER 29, 2022**

BETWEEN

MARGARET NJERI KAMAU 1ST APPLICANT

MARY WANGARI KIMEMIA 2ND APPLICANT

AND

**JOSEPH NG'ANG'A MURURI RESPONDENT
(ADMINISTRATOR OF THE ESTATE OF JULIA WAITHIRA KARATU)**

RULING

- 1 Vide a Notice of Motion, Application dated 21st April 2022, the Plaintiffs/Applicants moved this Court for orders;
1. Spent
 2. Spent
 3. That pending the hearing and determination of this suit, the Honorable Court be pleased to issue an Order of injunction restraining the Respondent either by himself, Servants, agents, employees, personal representatives' or anyone acting for him in any capacity from transferring, leasing sub-dividing, dealing, entering, selling, charging, destroying property and or crops, committing any acts of waste, cultivating or in any other manner dealing with Loc 2/ Kangari/ 2886 (suit property)
 4. That pending the hearing and determination of this suit, any transaction entered into by the Defendant/Respondent with third parties pertaining to land parcel Loc. 2/ Kangari/2886 (suit property), be stayed, rescinded, revoked and or annulled.



5. That the Officer Commanding the Station (OCS) of Kigumo Police Station or any other Police Officer of equal rank or higher, do enforce the Orders granted therein by the Honourable Court
6. That costs be provided for.
- 2 The application is premised on the grounds stated on the face of it and the Supporting Affidavit of Mary Wangari Kimemia, sworn on the 21st April 2022, and the annexures thereto.
- 3 It is the Applicants case that they are bonafide purchasers for value of Loc 2/ Kangari/ 2886, having bought the said land from Julia Waithira Karatu, the registered proprietor. They contend that the Defendant/Respondent has apart from destroying tea leaves on the suit property denied them access and ownership of the suit property. The 2nd Applicant depones that the suit property was purchased by her late husband and that the 2nd Applicant had partly financed the purchase of the suit land.
- 4 She further depones that they entered into the suit property in 1999, and extensively did farming thereon until 2020, when the Respondent disrupted their occupation and possession. Additionally, it is their case that the Respondent has interfered with the substratum of the suit property by demarcating, sub-dividing and fencing it off. They urge this Court to preserve the suit property pending the determination of the suit.
- 5 In response to the Application, the Respondent filed his Grounds of Objection dated 10th May, 2022, wherein he raised eleven grounds. The Respondent objects on the grounds that the application is an abuse of the Court's process, is bad in law and a waste of Court's time, as the application is res judicata and subjudice to an already filed Succession Causes No. 3098 of 2007, and 1372 of 2013.
- 6 His claim is that the 1st Applicant is the owner of a distinct parcel of land being Loc 2/ Kangari/ 2887, which is adjacent to the suit property. That contrary to the Applicants' contentions that he uprooted the tea leaves, it is indeed the Applicants who uprooted the trees used as a fence and burnt the same.
- 7 Contemporaneously, the Respondent filed a Replying Affidavit sworn on the 10th May, 2022. It is the Respondent's disposition that the Court revoked the Applicants' titles on the basis that they were obtained fraudulently. He asserts that the Applicants have never lived on the suit property and that they had attempted to mislead the Succession Court into taking ownership of the suit property, by claiming to be cousins of the deceased, but the Grant was revoked. He urged this to dismiss the application and allow him to administer the Estate of his aunt.
- 8 Subsequently, the Respondent filed Notice of Preliminary Objection dated 9th June 2022, on the basis that the instant suit is res judicata. He contends that the issues raised in the instant application were heard and determined in High Court Succession Cause No. 3098 of 2017 and 1372 of 2013.
- 9 The application was canvassed by way of Written Submissions as directed by Court 12th May, 2022.
- 10 The Applicants filed their Written Submissions on the 5th July, 2022, wherein they submitted that the Succession Cause did not determine the issue of injunction, as it did not have the powers to determine the same.
- 11 On injunction, the Applicants submitted on each principle as was enumerated in the case of Giella vs Cassman Brown & Co Ltd{1973} EA 358. Therein the trial Court listed three issues that a party must satisfy to wit establish a prima facie case, demonstrate that the Applicant will suffer irreparable injury that cannot be compensated by costs and determine where the balance of convenience will tilt.



- 12 On prima facie case, the Applicants invited this Court to the definition of a prima facie case in *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others*{2003} where the Court defined it as an arguable case. The Applicants submitted that by dint of being purchasers of the suit property, and having lived thereon for over 20 years, they have demonstrated that they have a right which has been infringed on and this Court ought to protect it. It is their submissions that they have on a balance of probability established that there exists a right which has been infringed on.
- 13 On irreparable injury, the Applicants submitted that should an injunction not be issued, they will likely lose their livelihoods which they have relied on for a number of years. They invited this Court to consider a litany of cases in finding that they will suffer irreparable injury. It is the Applicants' further submissions that the balance of convenience tilts in their favour and invites this Court to consider that the Respondent is a man of no means who might not adequately compensate the Applicants for the loss suffered.
- 14 The Respondent filed his submissions on the 13th June 2022, wherein he maintained that the application is res judicata. He further submitted on the history of the land and how parties moved the Succession Court and added that the parcel of land subject to this proceeding solely belonged to his late aunt. It is his submissions that the land was previously referenced to as Loc.2/ Kangari/ 1578, before being subdivided into Loc.2/Kangari/2886, and Loc.2/ Kangari/2887. That the Applicants occupy Loc. 2/ Kangari/ 2887, which was registered in their names in 1994, and they therefore have no claim over the other parcel of land.
- 15 The Respondent raised an issue with the Applicants annexures in his submissions wherein he submitted that the purported sale agreement is false, as at the time the same was signed, the seller was deceased. He further submitted that the Applicants have attempted to acquire ownership of the land through corrupt scheme, including fraudulently obtaining a grant over the suit property. In the end, he urged this Court to dismiss the application and relied on a litany of cases in support of his submissions.
- 16 Having now considered the pleadings and the rival submissions, this Court notes and appreciates that the suit property was first registered in the name of Juliah Waithira Karatu on 20th May, 1994 and a title deed was issued on 24th May, 1994. Subsequently, the land was issued to the Applicants on the 20th June, 2012 through a transmission process in Succession Cause No. 3098 of 2007. On 2nd December, 2013, the mother title was closed for sub-division and two titles were issued being 4784 and 4785. However, on 7th July, 2020, there was an entry for cancellation of the Applicants title and transmission process by dint of an Order of Court of 1st July, 2020.
- 17 A further perusal of the pleadings and annexures therein informs this Court that the dispute between the Applicants and the Respondent started in a Succession Court. Attached to the Applicants' application is Sale Agreement marked "MWK2" entered on the 15th March 1999, which shows that one Juliah Waithira Karatu, sold one acre of land from Loc.2/Kangari/2886, to Charles Kimemia Nganga, for a consideration of Kshs.200,000/=. As per the ruling of the Succession Court in No. 3098 of 2007, marked as "JNM2" the said Juliah Waithira Karatu, who is the Respondent's aunt died on the 12th May, 1999.
- 18 The Applicants herein are claiming interest on the suit land and this Court has the requisite jurisdiction by application of Section 13 of the *Environment and Land Court Act*, to adjudicate issues of ownership of land. The 2nd Applicant is an administrator of the Estate of Charles Kimemia Nganga, who was the purchaser of the suit property. While there is no clear indication how the 1st Applicant is interested in the suit property, the 2nd Applicant in the Supporting Affidavit contends that she contributed to the purchase of the suit property.



19 Before delving into the merits of the application, this Court must as a matter of law determine the Preliminary Objection raised by the Respondent. The legal position on Preliminary Objection was well established in *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd.* (1969) EA 696, where the Court held as follows:

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

20 The Court further held:

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

21 The purpose of Preliminary Objection was well stated by the Supreme Court in Civil Application No. 36 of 2014 *Independent Electoral & Boundaries Commission Vs Jane Cheperenger & 2 others* [2015] eKLR, where it was held:-

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection— against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

22 Thus for a Preliminary Objection to succeed, the same must raise pure points of law, that it would not be difficult to ascertain and secondly there must be no proper contests of facts. Having been well guided as above, this Court shall move to determine whether the Notice of Preliminary Objection is merited or not.

23 The Respondent’s Preliminary Objection is premised on the ground that the Application is Res Judicata Succession Cause No. 3098 of 2017, and 1372 of 2013. He contends that the issue of injunction was heard and determined by the foregoing Courts. The law on Res Judicata is laid out in Section 7 of the *Civil Procedure Act* which provides

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

24 While some Courts have found that the issue of res judicata can be determined through a Preliminary Objection, some have held otherwise. It is the finding of this Court that the same varies depending on



the facts laid out in the case where it is certain and clear then a Preliminary Objection can dispense with (See *Accredo AG & 3 others v Steffano Uccelli & another* [2019] eKLR)

25 Instantaneously, to establish whether the claim is true or not this Court will have to investigate facts and that being the case, such an action will fall short of the threshold of what constitutes a Preliminary Objection. This Court is persuaded by the finding of the Court in *George Kamau Kimani & 4 Others v County Government of Trans-Nzoia & Another* [2014] Eklr, where the Court opined:

“One cannot raise a ground of res judicata by way of preliminary objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the Court to determine whether the current suit is res judicata”.

26 The upshot of the above is that this Court finds and holds that the Preliminary Objection must fail for want of facts.

27 This Court will move to determine the application. Having perused the Application and the annexures thereto, Grounds of Objection, the Replying Affidavit and annexures thereto together with the rival submissions by the parties, the issues for determination by this Court are:

- i. Whether the Application is Res Judicata
- ii. Whether an Order for injunction can issue
- iii. Whether prayer five of the application can issue
- iv. Who should bear costs for the application

Whether the Application is Res Judicata

28 A perusal of the record shows that the succession cases referenced to by the parties herein is in respect of the Estate of Julia Waithira Karatu. Whereas the Applicants moved the succession Court in Succession Cause No. 3098 of 2007, purporting to be cousins of the deceased, while the Respondent moved the Court in Succession Cause No. 1372 of 2013, as a nephew. In the application of 10th December, 2020, the Applicants herein had moved the Court in Succession Cause No. 1372 of 2013, seeking restraining orders against the Respondent from destroying the plantation on the suit property and their occupation. The Court in its ruling of 11th June, 2021, dismissed the said application on the premise that the Applicants were intermeddlers and had thus not established any prima facie case.

29 On 7th July 2021, the Applicants moved the same Court for restraining orders in the nature of barring the Respondent from interfering with the suit property through any act of *inter alia* transferring, and/or selling the suit property. The Court in its ruling in paragraph 21 found that the Applicants were claiming as purchasers of the suit property. The Court in dismissing the application found that the ELC Court has the jurisdiction to determine disputes on ownership and there being no decree to show that the Applicants are owners, the Court did not find the Applicants had established a prima facie case.

30 As stated above, the law on Res judicata is a creation of Section 7 of The *Civil Procedure Act*. The intent of *res judicata* is to bring litigation to a halt and avoid re-litigation. In essence it saves judicial precious time and protects the sanctity of the court to do just what it should do. In sum, it prevents the abuse of the court process. The Court in *Independent Electoral and Boundaries Commission VS Maina Kiai & 5 others*, Nairobi COA Civil Appeal No. 105 of 2017 ([2017] eKLR) held that:

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



by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to them. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice

- 31 The principles of res judicata were set out in the case of^{* **} *John Florence Maritime Services Limited & Another VS Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015]eKLR, where the Court of Appeal outlined them as follows:

From the above, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally (see *Karia & Another v the Attorney General and Others* [2005] 1 EA 83.”

- 32 Further in the case of *The Independent Electoral and Boundaries Commission VS Maina Kiai & 5 others*, supra, the Court of Appeal further held that:

Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a) The suit or issue was directly and substantially in issue in the former suit.
- b) That former suit was between the same parties or parties under whom they or any of them claim.
- c) Those parties were litigating under the same title.
- d) The issue was heard and finally determined in the former suit.
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

- 33 Undoubtedly, the parties in both Succession Causes and the instant suit are litigating against each other over the suit property. Additionally, the Applicants in the Succession Court moved the Court for injunctive orders just as is in the present Case. The context of injunction as was determined in the succession Court concerns distribution of the Estate of Julia Waithira Karatu, which is a preserve of the High Court. The Applicants involvement in the suit is on purchasers’ interest, which is not the jurisdiction of the said Court. In fact the Court in its ruling of 11th February, 2022 in Succession No. 1372 of 2013 held:

34. It is clear that the dispute between the parties herein revolves around ownership of the suit land. This is a Family Court whose primary jurisdiction is probate of the distribution of an estate amongst the genuine heirs.”

- 35 Presently, the Applicants are claiming ownership over the suit property as purchasers which is a preserve of this Court. It is thus right to conclude that while the issue for determination was on



injunction in both Courts, the context under which the said is sought is not substantially the same in both cases.

36 A Succession Court has the jurisdiction donated by Section 47 of the *Law of Succession Act* to: ascertain the assets of a deceased person, to determine the beneficiaries and distribute the estate of the deceased. (Nairobi Succession 1298 of 2011 In Re Estate of G K K (Deceased) [2017] Eklr).

37 This Court on the other hand draws its jurisdiction from Section 13(2) of the *Environment and Land Court Act* to hear any disputes relating to land. The Court in Succession Cause No. 3098 of 2007 and Succession Cause No. 1372 of 2013 had the jurisdiction to issue such orders as to preserve the estate of Julia Waithira Karatu, including injunctive orders.

38 Though Order 40 of *Civil Procedure Rules* is one of the Orders not applicable to succession proceedings, the Court of Appeal in *Floris Piezzo & Another –vs- Giancarlo Falasconi* (2014) eKLR, rightly stated:

we are of the same view that Section 47 of the Act gives the Court all-embracing powers to make necessary orders, including injunctions where appropriate to safeguard the deceased’s estate. This section must be read together with Rule 73 of the Probate and Administration Rules which further emboldens Court’s jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court. We would imagine such orders would also include injunctive orders.”

39 As stated above, the Succession Court has the power to protect the estate of a deceased person, and which power may include issuing injunctions within the armpits of the principles of injunction. The issue for determination in the present suit is on ownership of the suit property, which the Succession Court did not have jurisdiction to determine. In stating so, this Court finds and holds that the issue of injunction as raised in the present suit has not been determined by any Court of competent jurisdiction and is therefore not res judicata.

Whether an Order for injunction can issue

40 Order 40 of the *Civil Procedure Rules* makes provisions for grant of temporary injunctions and interlocutory orders. Rule 1 of the said Order provides for cases in which temporary injunctions can be granted. It states

Cases in which temporary injunction may be granted.

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 y g 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.

41 The principles for grant of injunctions are well settled in the case of *Giella VS Cassman Brown Co. Ltd* 1973 E.A. 358 to wit;

- i. The applicant has to make out the existence of a prima facie case with a probability of success
- ii. The applicant must demonstrate that he/she will suffer substantial loss which may not be remedied with an award of damages
- iii. Balance of convenience

41 Further in the case *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others* [2016] Eklr, which captured the principles in *Giella vs Cassman Brown* as follows:

- i) Is there a serious issue to be tried?;
- ii) Will the applicant suffer irreparable harm if the injunction is not granted?
- iii) Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (Often called "balance of convenience")

42 Similarly in *American Cyanamid Co. vs Ethicom Limited* (1975) A AER 504 where three elements were noted to be of great importance namely:

- i. There must be a serious/fair issue to be tried,
- ii. Damages are not an adequate remedy,
- iii. The balance of convenience lies in favour of granting or refusing the application.

43 Having established the foregoing principles, this Court will then seek to determine whether the Plaintiffs/Applicants have demonstrated that they have a prima facie case.

44 On the first principle of Prima Facie case, this Court will align itself with the meaning of “a prima facie case” as was defined in *Nguruman Limited VS Jan Bonde Nielsen & 2 Others* [2014] Eklr, where the Court held:

Prima facie” is a Latin phrase for “at first sight”, whose legal meaning and application has been the subject of varying interpretation by courts in many jurisdictions. Phrases like a serious question to be tried”, “a question which is not vexatious or frivolous”, “an arguable case” have been adopted to describe the burden imposed on the applicant to demonstrate the existence of prima facie case.

45 This Court is also guided by the meaning espoused in *Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others* supra as quoted by the Applicants. Where the Court held:

In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues, but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”



46 To determine whether the Applicants have demonstrated an arguable case, this Court does not have to hold a mini trial or determine the merits of the case at the preliminaries. What will guide the Court was well enunciated in Nguruman Limited v Jan Bonde Nielsen & 2 Others, supra, where the Court held:

"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."

47 It is the Applicants' case that they acquired the suit land through purchase from the registered proprietor, Julia Waithira Karatu. Certainly ownership over land can be obtained through purchase and the right that is protected is a purchaser's right. While this Court has perused a copy of a Sale Agreement marked "MWK2" none of the Applicants was a party to the sale Agreement. However, attached thereto the application is for a Limited Grant marked "MKW3" which shows that, the 2nd Applicant took out the limited grant on behalf of Charles Kimemia Nganga, who appears to be the purchaser.

48 Despite the fact that there is no link between the suit property and the 1st Applicant, this Court has no reasons at this point to doubt the averments that the 1st Applicant aided in the purchase. The Respondent objected to the averments that the suit land was subject to any purchase and instead claims the land that was subject to the purported sale is Loc. 2/ Kangari/ 2887. As per the sale agreement, the subject matter for the sale is the suit property any contrary to this can only be ascertained at the hearing. To this end, this Court finds and holds that the Plaintiff/Applicants have a purchasers' right over the suit property.

49 The question this Court will then seek to determine is whether the said right has been or is likely to be infringed. It is the Applicants' case that the Respondent interfered with their occupation of the suit property and uprooted the tea bushes and trees thereon an allegation the Respondent objects to. This Court has had the benefit of perusing a number of photographs attached to the application showing that some tea bushes were uprooted and at the same time shows an intact fence and untouched plantation. It is not clear whether the tea bushes were uprooted as a malicious act by the Respondent or that indeed they were uprooted from the suit property. Such a determination cannot be drawn at this preliminary stages. Furthermore, in a letter dated 13th August, 2020 attached to the application and marked "MWK6" from the Ministry of Agriculture, Livestock and Irrigation, the Ministry confirmed that indeed there are plantations on the suit property and affirmed that the same belong to the Applicants. That notwithstanding the agricultural officer in his assumption did not make any finding for destroyed tea bushes or trees.

50 Additionally, this Court draws the conclusion that the filing of the instant application by the Applicants was perpetuated by the ruling of the Court in Succession Cause No. 1372 of 2013, of 11th February, 2022.** There is no compelling evidence that the Applicants purchaser's right has been threatened or is likely to be threatened. Having established so, this Court finds and holds that the Applicants have not established a prima facie case, with probability of success at the trial.



- 51 On the second principle of substantive loss or injury that cannot be remedied, the Applicant submitted that they will lose their livelihood should this Court not grant an injunction barring their eviction. They add that the Respondent may not remedy any award of damages as he is a man of modest means.
- 52 Irreparable damage was defined in *Banis Africa Ventures Limited VS National Land Commission* [2021] Eklr, where the Court quoted with approval *Halsbury's Laws of England/Halsbury's Laws of England, Third Edition*, Volume 21, paragraph 739, page 352.] as follows:-
- In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. But what exactly is "irreparable harm"? Robert Sharpe, in "Injunctions and Specific Performance," [Robert Sharpe, *Injunctions and Specific Performance*, looseleaf, (Aura, On: Canada Law Book, 1992), P 2-27] states that "irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."
- 53 As per the attached receipts for payment of monies to the Applicants from the sale of tea, the Applicants continued to receive payments up and until 2021, yet the acts complained off occurred in 2020. The mere fact that the Respondent is a man of modest means is not a fact to be considered by this Court on whether the Applicants will suffer irreparable injury.
- 54 From the case cited by the Applicants, *Paul Gitonga Wanjau vs Gathuthi Tea Factory Company Limited & 2 Others*, where the Court opined that the injury must be continuous, the Applicants have not established on the interim that they are not accessing the suit property or that they have been evicted from the suit property. Thus this principle fails. In the end the balance of convenience tilts in favor of not granting an injunction.

Whether prayer five of the application can issue

- 55 The Applicants has sought for an Order that pending the determination of this suit, any transaction entered into by the Defendant/Respondent with third parties pertaining to land parcel Loc. 2/ Kangari/ 2886 (suit property) be stayed, rescinded, revoked and or annulled.
- 56 The prayer sought above will most definitely require the production of evidence which can adequately be done at the hearing. Revoking such agreements if any will amount to concluding that the land belongs to the Applicants, which is a fact that can only be ascertained at the hearing of the suit. The Court of Appeal in Nairobi Civ Appeal No. 3 & 11 of 2016 *Olive Mwihaki Mugenda & another VS Okiya Omtata Okoiti & 4 others* [2016] Eklr, when determining the granting of certain rights on interim quoted an Indian Case of *Ashok Kumar Bajpai -VS- Dr. (Smt) Ranjama Baijai*, AIR 2004, All 107, 2004 (1) AWC 88 at paragraph 17 of the decision where the Indian Court expressed as follows:
- ...It is evident that the Court should not grant interim relief which amounts to final relief and in exceptional circumstances where the Court is satisfied that ultimately the petitioner is bound to succeed and fact-situation warrants granting such a relief, the Court may grant the relief but it must record reasons for passing such an order and make it clear as what are the special circumstances for which such a relief is being granted to a party."
- 57 Having been well guided this Court finds and holds that prayer five of the Applicants' Notice of Motion Application dated 21st April, 2022 cannot be granted.



(iv) ___ Who should pay costs

58 The Court has discretionary powers donated by Section 27 of *Civil Procedure Act* to make such orders as to costs. This Court shall exercise such orders and directed that costs of the Application shall abide the outcome of the suit.

59 Having now carefully considered the instant Notice of Motion Application dated 21st April 2022, the Court finds it not merited and the same is dismissed entirely with costs being in the cause or to abide to the outcome of the suit.

60 It is so ordered.

Dated, signed and delivered virtually at Murang'a this 29th day of September, 2022.

L. GACHERU

JUDGE

Delivered virtually in the presence of:

Joel Njonjo – Court Assistant

M/s Wangui for the Plaintiffs/Applicants

Defendant/Respondent - Absent

L. GACHERU

JUDGE

29/9/2022

TABLE

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