



**Samuru Gituto Farmers Co-operative Society Limited v Chief Land Registrar & 10 others
(Environment & Land Case 52B of 2023) [2025] KEELC 3253 (KLR) (2 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3253 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 52B OF 2023**

JM ONYANGO, J

APRIL 2, 2025

BETWEEN

**SAMURU GITUTO FARMERS CO-OPERATIVE SOCIETY
LIMITED PLAINTIFF**

AND

**CHIEF LAND REGISTRAR 1ST DEFENDANT
DIRECTOR OF SURVEYS 2ND DEFENDANT
COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT 3RD DEFENDANT
ATTORNEY GENERAL 4TH DEFENDANT
SIMON NGURE KUNG’U 5TH DEFENDANT
NIMKEN ENTERPRISES LIMITED 6TH DEFENDANT
GATANGA KWAO LIMITED 7TH DEFENDANT
DAVID NG’ANG’A KAMAU 8TH DEFENDANT
ABRAHAM KARUTU 9TH DEFENDANT
SUNSTAR HOTEL LIMITED 10TH DEFENDANT
NJOROGE KIHICO 11TH DEFENDANT**

RULING

1. What is before me for determination is the Notice of Motion dated 28th September 2023 brought under the provisions of Sections 1A, 1B, 3, 3A and 63 (e) of the *Civil Procedure Act*, Order 40 rule 1, 2, 3, 4 and 5 of the Civil Procedure Rules and under Article 159 (2) of *the Constitution* of Kenya, 2010 seeking the following orders:



1. Spent
 2. Spent
 3. Spent
 4. That the honourable court be pleased to issue an interim order of inhibition restricting transactions relating to Title Nos. LR 10743/1, LR 10743/2, LR 10743/3, LR 10743/6, LR10743/8, LR10743/9, LR10743/10 and LR10743/11 pending the hearing of the suit herein.
 5. That this honourable court be pleased to issue an order of temporary injunction against the Respondents by themselves, their servants, agents, employees or any other persons authorized or instructed by them from continuing to develop, construct, charge or otherwise alienate Title Nos. LR 10743/1, LR 10743/2, LR 10743/3, LR 10743/6, LR10743/8, LR10743/9, LR10743/10 and LR10743/11 pending the hearing of the suit herein.
 6. Costs of the application be provided for.
2. The application is premised on the grounds on the face of it and supported by the Supporting and Supplementary Affidavits of George Kuria Njuguna (the chairman of the Applicant) sworn on 28th September 2023 and on 14th December 2023, respectively. He avers that the Applicant held a special general meeting on 28th August 2019, where management committee members were elected. He further avers that on 21st September 2006, the 5th, 6th and 7th Respondents, while masquerading as bonafide officials of the Applicant, convened an illegal special general meeting and subsequently disposed of portions of the Applicant's property LR No. 10743 (hereinafter referred to as the "suit property") measuring approximately 543 acres. He adds that the 5th, 6th and 7th Respondents illegally sold portions of the suit property to the 8th, 9th, 10th, 11th, 12th and 13th Respondents.
 3. The Applicant faults the 1st and 2nd Respondents for facilitating the 5th, 6th and 7th Respondents to fraudulently obtain new documents of title to the suit property despite them not being bonafide officials as confirmed by the 3rd Respondent and by the orders issued in Constitutional Application No. 30 of 2009. The Applicant further faults the 1st and 2nd Respondents for facilitating the issuance of certified copies of deed plans and processing of new illegal certificates for Title Nos. 10743/2, 10743/8, 10743/10 and 10743/11 in favour of the 8th Respondent and 10743/6 in favour of the 10th Respondent. The said titles are for subdivisions of the suit property.
 4. The chairman of the Applicant depones that the 9th, 10th, 11th, 12th and 13th Respondents are currently illegally in occupation and developing LR Nos 10743/1, 10743/2, 10743/3, 10743/6, 10743/9, 10743/10 and 10743/11 without the consent of the Applicant. He adds that there has been a flurry of activities on the suit property, indicating that the Respondents are in the process of altering the status quo by putting up fences and depositing building materials on the suit property. He adds that it is in the interest of justice that the suit property is preserved pending the hearing of the case.
 5. In opposing the application, the 5th, 6th and 7th Respondents filed an undated Replying Affidavit sworn by Carol Mwaura and a Preliminary Objection.
 6. She contends that she is a director of the 7th Respondent which is a company registered for purposes of real estate business. She further contends that the 7th Respondent purchased properties L.R Nos 10743/8, 10743/9, 10743/10 and 10743/11 all measuring approximately 297 acres, from the 6th Respondent for purposes of subdividing and selling the same to its members. She adds that pursuant to Legal Notice Number 215 of 31st December 2010, the four parcels of land were consolidated into one big portion of land and given a new registration number known as Samuru/Muitingiri Block 2.



The said block was then subdivided into over one thousand parcels of land of minimum acreage of 0.15 hectares and sold to various buyers. She deposes that as a result of the subdivision, the 7th Respondent has divested itself of all land, given that it had surrendered the same to the Government of Kenya, which in turn issued 99-year leases to the buyers. She argues that the process has been ongoing since 2010 and that there has been no other previous suit filed by the Applicants against them.

7. In opposing the application, the 9th Respondent filed a Replying Affidavit sworn by Abraham Karuti Itabari on 28th November 2023 where he deposes that in 2014, he purchased various properties, including LR No. 10743/5/16 and 10743/5/17 from one Priscillah Wairimu Karachi. He further deposes that he had intentions of building a hotel on the said properties which are adjacent to LR No. 10743/6 (the suit property) which is adjacent to the main road. He adds that he purchased LR No. 10743/6 from the 8th Respondent and successfully registered it in the 10th Respondent's name. He later built a hotel on the said property. He avers that he is a bona fide purchaser of LR No. 10743/6 and that he followed all legal procedures and purchased the property for valuable consideration.
8. In opposing the application, Sunstar Hotel Limited, the 10th Respondent filed a Replying Affidavit also sworn by Abraham Karuti on 1st December 2023, where he deposes that the 8th Respondent sold L.R No. 10743/6 to the 10th Respondent pursuant to a sale agreement dated 14th March 2016 for valuable consideration of Kshs 50,000,000. He denies that the 10th Respondent was party to any fraud or illegality. He adds that the internal disputes between the Applicant's old committee and new committee members ought not to cause unwarranted prejudice to innocent purchasers for value without notice. He urged this court to dismiss this application.

Submissions

9. The application was canvassed by way of written submissions. The Applicants filed written submissions dated 1st October 2024. The 5th, 6th and 7th Respondents filed their written submissions dated 6th November 2024. The Respondents filed theirs dated 25.10.24.

Applicants' submissions

10. Counsel for the Applicants submitted that the 9th and 10th Respondents did not dispute the facts presented by the Applicant; instead, they merely stated that they purchased Land Reference Number 10743/6 from the 8th Respondent, and as such, they were bonafide purchasers for value without notice.
11. Counsel relied on the decision in the case of *Dina Management Limited vs County Government of Mombasa & 5 Others* [2023]eKLR to submit that a bonafide purchaser for value is not protected where the process of getting the title was irregular or unlawful. He added that in such a case, the seller has no title to pass.
12. Counsel contended that the court in Civil Appeal No. 300 of 2010 and Nairobi ELC Judicial Review No. 1 of 2022 held that the process of subdividing and alienating L.R No. 10743 was unlawful and irregular. Counsel argued that subsequent transactions which gave ownership of portions of the suit land to the 6th to 11th defendants were illegal, hence null and void. Counsel urged the court to allow this application so as to preserve the suit land.

5th, 6th and 7th Respondents' Submissions

13. The 5th, 6th and 7th Respondent's counsel submitted that the 5th, 6th and 7th Respondents asserted that the Applicant's suit was time-barred pursuant to Section 4 of the *Limitation of Actions Act*. Counsel further submitted that the Applicant's suit was an action to invalidate contracts on grounds



of fraud. Counsel added that 23 years had elapsed from 2009 when the suit property was bought and sold. Counsel argued that even if the Applicant's claim was for recovery of land, the suit would still be time-barred, given that actions to recover land must be brought within twelve (12) years as provided for under Section 7 of the *Limitation of Actions Act*.

14. In response to the issue of the doctrine of "lis pendens" relied on by the Applicant as its defence to the suit being time-barred, counsel submitted that the Applicant could not rely on the said doctrine because no previous suit has been mentioned.
15. Counsel contended that there was a misjoinder of parties in the suit; hence, the suit should be dismissed. Counsel further contended that the subject matter of the suit was different and that the subject properties contained different title numbers. He added that the seven parcels identified in the pleadings were not registered in the name of the same Applicant.
16. Counsel submitted that the 6th Respondent bought the subject land in 2008 and sold it to the 7th Respondent, who had been in quiet possession thereof since 2009 without any interruption from the Applicant.
17. Regarding Land Reference Numbers 10743/8, 10743/9, 10743/10 and 10743/11, counsel submitted that the nature of the said properties had drastically changed and that they no longer existed in the form claimed by the Applicant. He added that the four parcels were consolidated and later subdivided into many smaller portions which were eventually sold to third parties. He maintained that any order to the effect that the parcels of land can be restored to the Applicant as they were originally, was an exercise in futility.
18. The 10th Respondent filed submissions dated 25.10.24 through the firm of Kimani Michuki & Company Advocates. Learned counsel for the 10th Defendant submitted that the 10th Respondent was a bona fide purchaser for value without notice who had heavily invested on the suit property. He submitted that the Applicant had previously obtained similar orders in Civil Appeal No. 300 of 2010 (2019) eKLR where the Court of Appeal reinstated the conservatory orders issued by Justice Nyamu on 19.1.2009 restraining any dealings with the suit property pending the hearing of the main suit. He submitted that the said order had been registered across all the properties.
19. Counsel further submitted that in ELC JR No. 1 of 2022 (Formerly JR 8 of 2008) Justice Omollo issued a prohibitory order directed to the 1st, 2nd, 3rd and 4th Respondents prohibiting them from effecting or registering any documents, transferring, alienating or in any manner dealing with L.R No. 10743 belonging to the Applicant Society by the Interested Parties. The Applicant has now sought another injunction even though the previous orders are still in place.
20. It was his submission that the Applicant had failed to demonstrate that it had prima facie case with a probability of success as it had not annexed a copy of the authority of the committee members of the Society authorizing it to file this suit. Further that the Applicant had not demonstrated that it was likely to suffer irreparable loss if the injunction was not granted. He urged the court to dismiss the application.

Analysis and Determination

21. Having considered the issues raised in the application and the rival submissions, the two main issues for determination are: (i) whether the preliminary objection should be sustained and (ii) whether the application dated 28th September 2023 is merited.



22. Before delving into the merits of the Preliminary Objection it is important to consider whether what has been raised herein falls within the definition of a Preliminary Objection. In the case of *Mukisa Biscuit Company Ltd v West End Distributors Limited* (1969) E.A 696, the court held as follows:

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

23. The 5th, 6th and 7th Respondents have stated that the suit is time-barred by virtue of Sections 4 and 7 of the *Limitation of Actions Act*. This is no doubt a point of law. The 5th, 6th and 7th Respondents contended that the Applicant’s suit is an action to invalidate contracts on grounds of fraud. They added that 23 years have elapsed from 2009, when the suit property was bought and sold.

24. They further contended that even if the Applicant’s claim is for recovery of land, the suit would still be time-barred, given that actions to recover land must be brought within twelve (12) years as provided for under Section 7 of the *Limitation of Actions Act*.

25. The Applicant made reference to Civil Appeal No. 300 of 2010 and Nairobi ELC Judicial Review No. 1 of 2022 and relied on the doctrine of *lis pendens* to state that the suit was not time-barred.

26. In response to the issue of the doctrine of “*lis pendens*” relied on by the Applicant as its defence to the allegation that the suit was time-barred, counsel submitted that the Applicant could not rely on the said doctrine because no previous suit had been mentioned.

27. In the case of *Ruthi Kinyua v Patrick Thuita Gachure & another* [2015] eKLR, the Court of Appeal had the following to say;

“Black’s Law Dictionary 9th edition, defines *lis pendens* as the jurisdictional, power or control acquired by a court over property while a legal action is pending.

Lis pendens is a common law principle that was enacted into statute by section 52 Indian Transfer of Property Act (ITPA)-now repealed. While addressing the purpose of the principle of *lis pendens*, Turner L. J, in *Bellamy vs Sabine* [1857] 1 De J 566 held as follows;

“It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation *pendent lite* were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings *de novo*, subject again to defeat by the same course of proceedings.”

28. The Applicant could, therefore, not file this suit when Civil Appeal No. 300 of 2010, which was concluded on 1st July 2016, was still pending before the court. A perusal of the Applicant’s plaint shows that this is an action for recovery of land, which the Applicant contends was acquired by some



of the Respondents through fraud. Twelve years have not yet lapsed since 2016, hence, the suit is not time-barred. This court finds that the P.O is therefore unmerited.

29. On the second issue, the law on temporary injunction is provided under Order 40(1) (a) and (b) of the Civil Procedure Rules 2010 as follows:

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

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

30. The conditions for the grant of applications for injunctions were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* (1973) E A 358, where the Court expressed itself in the following terms:

“Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

31. In order to determine whether the application meets the required threshold, the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR where the court held that: -

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. 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.”



32. The case of Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 123 defined a prima facie case as follows;

“ A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

33. A close perusal of the Affidavit in support of the application and the Applicant’s Amended Plaint dated 14th December 2023 reveals that the Applicant’s claim is for land parcel L.R No. 10743, located south of Thika town. The Applicant states that portions of the said property were fraudulently acquired by some of the Respondents. A perusal of the Defences filed by the Respondents reveals that they do not deny that land parcel L.R No. 10743 was initially owned by the Applicant. However, they contend that they legally and procedurally bought portions of the said property for valuable consideration. This court takes the position that the Applicant has demonstrated a prima facie case.

34. Will the Applicant suffer irreparable injury if the injunctive reliefs are not granted? It is clear that the suit property has been subdivided into various portions, and the portions have been transferred to third parties some of who are not parties to this suit. The Applicant has not been in possession of the said portions since the sub-divisions were done in 2008. This court is of the view that the loss likely to be incurred by the Applicant can be compensated by an award of damages. However, it is necessary to preserve the subject matter so that the substratum of the suit is not destroyed.

35. The facts presented in this case are such that the application has to be determined on a balance of convenience. In the case of *Virginia Edith Wambui vs Joash Ochieng Ougo Civil Appeal No. 3 of 1987* eKLR, the Court of Appeal held that;

“The general principle which has been applied by this court is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial.”

36. In view of the foregoing and so as to preserve the subject matter herein, I direct that the status quo with regard to the suit property prevailing at the time of this order be maintained pending the hearing and determination of this suit.

37. The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 2ND DAY OF APRIL 2025.

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J. M ONYANGO

JUDGE

In the presence of:

Miss Muturi for Mr Magee for the Plaintiff

Mr Muhoro for the 5th, 6th and 7th Defendants

Mr Ogango for Mr. Mutugi for the 11th Respondent

Mr Ngichu for Mr Gakunga for the 10th Defendant

Court Assistant: Hinga

