



**Mwangi v Kimangi & 3 others (Environment and Land Appeal  
14 of 2019) [2022] KEELC 13739 (KLR) (13 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13739 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL 14 OF 2019**

**JO MBOYA, J  
OCTOBER 13, 2022**

**BETWEEN**

**PATRICK GITHINJI MWANGI ..... APPELLANT**

**AND**

**STEPHEN MAINA KIMANGI ..... 1<sup>ST</sup> RESPONDENT**

**PRISCA WANJIKLI KIMANGA ..... 2<sup>ND</sup> RESPONDENT**

**FELISTER NYAMBURALMWANGI ISSUED AS THE ADMINISTRATIX OF THE  
ESTATE OF MWANGI GITHURE (DECEASED) ..... 3<sup>RD</sup> RESPONDENT**

**ABDIRAHMAN SHEIKH MOHAMED T/A TOWHID SHOPPING  
COMPLEX ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**INTRODUCTION AND BACKGROUND**

1. On or about the February 20, 2018, the Appellant herein filed and or lodged Civil proceedings before the Environment and Land Court, which proceedings were designated as Milimani ELC Civil Case No 75 of 2018, wherein the current Appellant sought various Reliefs pertaining to and concerning LR No 36/VII/500, Eastleigh, Nairobi.
2. Simultaneously with the filing of the said suit, the Appellant also took out a Notice of Motion Application on even date wherein same sought for, inter alia, a Temporary Injunction pending the hearing and determination of the main suit.
3. Be that as it may, the suit which had hitherto been filed before the Environment and Land Court was transferred to the Chief Magistrate's Court for purposes of hearing and determination on merits. For clarity, the orders transferring the suit to the Chief Magistrate court were made on the February 20, 2018.



4. Pursuant to the transfer of the suit to the Chief Magistrate, the entire suit and in particular, the Notice of Motion application dated the February 20, 2018 was therefore placed before the Learned trial Magistrate for hearing and determination.
5. Suffice it to point out that indeed the Application dated the February 20, 2018, was heard and disposed of vide the Ruling rendered on the January 24, 2019. For clarity, the Learned Magistrate did not find any merit in the application dated the February 20, 2018 and hence same was dismissed with cost to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents.
6. It is imperative to note that it is the said Ruling, which has provoked the subject appeal.
7. In respect of the subject Appeal, the Appellant has raised various Grounds, whose details are contained at the foot of the Memorandum of Appeal dated the February 22, 2019.
8. For convenience, the grounds of the Memorandum of Appeal are as hereunder;
  - i. The learned trial magistrate erred in fact and law by failing to evaluate and adequately address the import of the documents exhibited in support of the plaintiff's case and thereby failed to appreciate the strength of the Plaintiff/Appellants case.
  - ii. The learned trial magistrate erred in law and fact in the way she weighed the averments and other evidential material before her.
  - iii. The learned trial magistrate erred in fact and law by failing to give previous decisions of other courts in relation to the subject property the weight they deserved.
  - iv. The learned trail magistrate erred in fact on finding that the 4th respondent was in actual occupation and use.
  - v. The learned trial magistrate erred in law by failing to preserve the suit premises despite palpable danger of alienation.
  - vi. The learned trial magistrate erred in fact and law by failing to find the case before her as suitable case for issuance of interlocutory Injunction on account of irreparable harm.
  - vii. The learned trial magistrate erred in law by failing to issue order that would have been suitable to secure justice for all the parties and left the plaintiff appellant with hardly any relief.
9. The subject appeal was duly admitted for hearing and thereafter directions were given pertaining to the manner of disposal of the Appeal. For the avoidance of doubt, it was directed that the appeal be canvassed and disposed of by way of written submissions.

Submissions By The Parties:

- a. Appellant's Submissions:
  10. The Appellant herein filed written submissions dated the October 12, 2021 and same has raised three pertinent issues for consideration.
  11. First and foremost, counsel for the Appellant has submitted that the learned trial magistrate failed to properly evaluate and appreciate the strength of the evidence that was placed before her by the Appellant.
  12. Essentially, counsel for the Appellant has submitted that the Appellant placed before the learned trial magistrate sufficient and credible evidence to show that the Appellant was a Beneficial owner over and in respect of a portion of the suit property belonging to Mwangi Kimanga, Deceased, whilst on



the other hand, same was also the lawful owner of another 1/5 portion of the suit property, hitherto belonging to the Estate of Mwangi Githure, Deceased.

13. Nevertheless, the Appellant has contended that despite the placement of such credible evidence before the learned trial magistrate, same found and held that the Appellant had not established any Prima facie case to warrant the grant of orders of Temporary Injunction.
14. Secondly, Learned Counsel for the Appellant has submitted that the learned trial magistrate erred in failing to properly weigh and calibrate the totality of the evidence placed before her. Consequently, counsel for the Appellant has added that the learned trial magistrate therefore did not properly address her legal mind to the salient features of the Appellant's case.
15. At any rate, counsel for the Appellant has added that had the learned trial magistrate properly exercised her discretion, same would have found that indeed the Appellant had established a case to warrant the grant of the Reliefs that were sought.
16. Thirdly, the counsel for the Appellant has submitted that the learned trial magistrate fell in error in failing to grant the orders of Temporary Injunction, yet the suit Property was on the verge of being alienated, sold and disposed of.
17. In a nutshell, counsel for the Appellant has added that the circumstances that were placed before the trial court, were such that it behooved the learned trial magistrate to preserve and maintain the status of the suit property.
18. In the premises, counsel for the Appellant has submitted that the manner in which the learned trial magistrate dealt with the Application for Temporary Injunction was therefore contrary to the established principles and hence there is a basis to warrant the interference with the decision of the learned trial magistrate.
19. In support of the foregoing submissions, Learned Counsel for the Appellant has relied on various decisions, inter-alia *Mrao Ltd versus First American Bank Ltd (2003)eKLR*, [Mwongera Nkuraru versus M'lintaru Mlimbachi \(2010\)eKLR](#), [Judicial Service Commission versus The Speaker of the National Assembly & Another \(2013\)eKLR](#), [Kariuki & 2 Others versus Minister for Gender, Sports, Culture & Social Services & 2 Others \(2004\)eKLR](#) and [Lordship Africa Ltd versus Public Procurement Administrative Review Board & 2 Others \(2018\)eKLR](#).

b. Submissions By The 1<sup>st</sup> And 2<sup>nd</sup> Respondents:

20. On behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents written submissions were filed on the July 15, 2022. Similarly, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have also highlighted three salient issues for consideration.
21. Firstly, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents has submitted that the evidence that was placed by the Appellant before the trial court was credible and sufficient, to warrant the grant of the orders of Temporary injunction which was sought by the Appellant.
22. Secondly, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent has also criticized the manner in which the learned trial magistrate evaluated the evidence and came to the conclusion that the Appellant had not established a prima facie case.
23. Thirdly, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents has submitted that the learned trial magistrate failed to direct her Judicial mind to the critical aspects of the Appellant's case.



24. Consequently, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents has submitted that had the learned trial magistrate correctly appreciated the Appellant's case, same would no doubt have come to the conclusion that the Appellant was entitled to an order of Temporary injunction.
25. On their part, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have cited and relied on the decision in the case of *Shiva Carriers Ltd versus Imperial Bank Ltd & Another (2018)eKLR*, *Mrao Ltd versus First American Bank Ltd (2003)eKLR*, *Bank of Africa K Ltd versus John Ndungu Gachara (2022)eKLR*, *Nguruman versus Jan Bonde Nielsen & 2 Others (2014)eKLR* and *Macharia Mwangi & Others versus Davidson Mwangi (2017)eKLR*.
- c. 4<sup>th</sup> Respondent's Submissions:
26. The 4<sup>th</sup> Respondent filed written submissions dated the March 23, 2022 and same has raised two issues for consideration. First and foremost, the 4<sup>th</sup> Respondent has submitted that the learned trial magistrate correctly evaluated and appreciated the evidence that was placed before her and thereafter reached and arrived at the correct conclusion.
27. At any rate, counsel for the 4<sup>th</sup> Respondent has submitted that the Appellant herein was not seized or possessed of the requisite locus standi to mount and/or commence the subject proceedings in respect of the Estate of Mwangi Kimanga, insofar as same was not the duly constituted Legal administrator.
28. Secondly, counsel for the 4<sup>th</sup> Respondent also submitted that the Appellant's claim to be entitled to the share belonging to the Estate of Mwangi Githure, now Deceased, was similarly unsubstantiated. In this regard, the Appellant drew the attention of the court to the fact that the Sale agreement which was alluded to by the Appellant relating to the purchase of the portion of the Estate of Mwangi Githure, was disputed by the 3<sup>rd</sup> Respondent.
29. Be that as it may, counsel for the 4<sup>th</sup> Respondent also submitted that the impugned sale agreement which was being relied on by the Appellant herein contained a default clause, to be relied on and invoked, in the event that the impugned transfer was inhibited or aborted.
30. In view of the foregoing, Counsel for the 4<sup>th</sup> Respondent submitted that the Appellant herein did not establish nor proved any Prima facie case whatsoever, to warrant the grant of the orders of Temporary Injunction, which were being sought.
31. In a nutshell, counsel for the Respondent contended that the learned trial magistrate properly exercised her discretion and came to the correct conclusion that indeed the orders of temporary injunction were not merited.
32. On his part, counsel for the 4<sup>th</sup> Respondent cited and relied on the case of *Mrao Ltd versus First American Bank Ltd (2003)eKLR*, *Nguruman Ltd versus Jan Bonde Nielsen (2014)eKLR*, *Gilao Company Ltd versus Fabari Trading Ltd & Another (2015)eKLR* and *Ephantus Mwangi versus Duncan Mwangi Wambugu (1984)eKLR*.

#### **Issues For Determination:**

33. Having reviewed the Memorandum of Appeal dated the February 22, 2019, the Record of Appeal, as well as the written submissions filed on behalf of the Parties, the following issues are pertinent and thus germane for Determination;
- i. Whether the Appellant herein was seized of the requisite Locus Standi to commence and mount the suit before the lower court as well as the Application for Temporary Injunction as pertains to the Estate of Mwangi Kimanga, now deceased.



- ii. Whether the Appellant herein proved and established a Prima facie case with overwhelming chances of success before the Lower court.
- iii. Whether the Appellant established and or supplied Evidence of Irreparable loss.
- iv. Whether the Learned Trial Magistrate properly exercised her Discretion in Dismissing the Application for Temporary Injunction.

## **Analysis And Determination**

### **Issue Number 1,**

Whether the Appellant herein was seized of the requisite Locus Standi to commence and mount the suit before the Lower Court as well as the Application for Temporary Injunction as pertains to the Estate of Mwangi Kimanga, now Deceased.

34. The Appellant herein stated and conceded that the suit property, namely LR No 36/VII/500, belonged to or was owned by Mwangi Kimanga, deceased, Thiongo Kiunga, Maina Maranya(deceased) Mwangi Kithure(deceased) and Gichuhi Macharia(deceased) as tenants in common.
35. Other than the foregoing, the Appellant herein also contended that same is a beneficiary of the Estate of Mwangi Kimanga, now deceased. For clarity, the Appellant's claim to the portion of the suit property belonging to Mwangi Kimanga, now deceased, is premised on the basis that same is a beneficiary of the said estate.
36. For the avoidance of doubt, the Appellant herein has proceeded and stated that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had previously sought for and obtained Grant of letters of administration over the Estate of Mwangi Kimanga, Deceased, but the resultant Grant was thereafter revoked vide Judgment rendered in respect of Milimani Hcc Succession 1728 of 2000.
37. At any rate, the Appellant also added that upon the revocation of the Grant of letters of Administration, which had hitherto been issued in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, same (1<sup>st</sup> and 2<sup>nd</sup> Respondent) proceeded to and filed an appeal to the Court of Appeal to wit, Civil Appeal No 176 of 2016.
38. Notwithstanding the foregoing, the Appellant further added that upon the filing of the said Appeal, the Court of Appeal granted and issued orders of status quo over and in respect of the Estate of Mwangi Kimanga, now deceased.
39. The foregoing background is important and critical insofar as same establishes that the Appellant herein, though same claims to be a beneficiary of the Estate of Mwangi Kimanga, Deceased, same has never been issued with the Grant of letters of administration or constituted as the lawful administrator of the Estate of Mwangi Kimanga, now deceased.
40. To the extent that the Appellant herein has never been constituted as the legal administrator of the Estate of Mwangi kimanga, now deceased, the question that does arise is whether the Appellant herein had the requisite Locus standi to commence, originate and mount, not only the Civil Proceedings of the Subordinate court, but also the impugned application that was dismissed.
41. In my humble view, the only person who is authorized and mandated to commence and maintain Civil Proceedings for and or on behalf of the Estate of the Deceased is the duly constituted Legal administrator thereof. For completeness, even approved and established beneficiary cannot commence or maintain such legal proceedings.



42. To vindicate the foregoing observation, it is appropriate to take cognizance of the provisions of Section 82 of the *Law of Succession Act*, Cap 160 Laws of Kenya.
43. For coherence, the said provisions provide as hereunder;
82. Powers of personal representatives Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—
- (a) To enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;
  - (b) To sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best: Provided that—
    - i. Any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and
    - ii. No immovable property shall be sold before confirmation of the grant;
  - (c) To assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;
  - (d) To appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as to them may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of such estate, and to make any transfer which may be requisite for giving effect to such appropriation: Provided that except so far as otherwise expressly provided by any will—
    - (i) No appropriation shall be made so as to affect adversely any specific legacy;
    - (ii) No appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in which case consent on his behalf by his parent or guardian (if any) or by the manager of his estate (if any) or by the court shall be required.
44. Other than the foregoing provisions, which have been alluded to in the preceding paragraph, the capacity to commence and maintain civil proceedings on behalf of the Estate of a Deceased was also



addressed, deliberated upon and underscored vide the decision in the case of *Edith Virginia Wamboi Otiemo versus Joash Ochieng Ougo (1987)eKLR*, where the court of appeal held as hereunder;

' But the difficulty remains that the general rule in relation to administration is that a party entitled to administration can do nothing as administrator before letters of administration are granted. Section 80(2) of the *Law of Succession Act* provides that a grant of letters of administration, with or without the will annexed, shall only take effect as from the date of the grant. In contrast section 80(1) provides that a grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such. This means that in the case of an executor he may perform most of the acts appertaining to his office before probate including the bringing of a fresh action, because he derives title from the will and the property of the deceased vest in him from the moment of the intestate's death (see 1 Williams on Executors and Administrators (14th edn) paras 84 et seq and 230 et seq).

But an administrator is not entitled to bring an action as administrator before he has taken out letters of administration. If he does the action is incompetent at the date of its inception. The doctrine of the relation back of an administrator's title, on obtaining a grant of letters of administration, to the date of the intestate's death, cannot be invoked so as to render the action competent'.

45. Premised on the foregoing decision, it is common ground that the Appellant herein, who had neither taken out Grant of letters of administration nor been constituted as the administrator of the Estate could not originate or mount the instant proceedings.
46. Similarly, I am also doubtful as to the capacity of the Appellant to maintain or sustain the subject Appeal, as concerns the Interests of the Estate of one Mwangi Kimanga, now Deceased.
47. Other than the foregoing, there is yet another issue that requires to be addressed and deliberated upon. For clarity, the issue relates to whether the Appellant herein is indeed a Beneficiary of the Estate of Mwangi Kimanga, now deceased.
48. To my mind, it is appropriate to point out that the Jurisdiction to determine who is or is not a beneficiary of the Estate of the Deceased belongs to and inheres in the Probate and Administration Court and not in the Environment and Land Court.
49. Suffice it to observe, that the original suit was filed before the Environment and Land Court and thereafter same was transferred to the Chief magistrate court, with the jurisdiction to deal with Environment and land matters and not otherwise.
50. In the premises, the Chief Magistrate Court whilst handling the original suit, was/ is not clothed nor vested with the requisite Jurisdiction to determine whether or not the Appellant is a beneficiary of the Estate of Mwangi Kimanga, Deceased.
51. Consequently, it is also my finding and holding that even assuming that a beneficiary of the estate of the deceased can mount a suit (which is not the case), the Appellant herein has not placed before the Honourable court any evidence to confirm that indeed same was/is a beneficiary of Mwangi Kimanga, now deceased.
52. Premised on the foregoing, I come to the conclusion that the Appellant herein was not seized of the requisite legal capacity to commence and or maintain both the original suit as well as the impugned Application which was dismissed.



53. In a nutshell, I am with agreement with the observation by the learned magistrate who found and held that the Appellant was not the duly constituted administrator of the Estate of Mwangi Kimanga, deceased.

## Issue Number 2

Whether the Appellant herein proved and established a Prima Facie case with overwhelming chances of success before the Lower court.

54. The Appellant herein had sought or prayed for the grant of orders of temporary injunction pending the hearing and determination of the suit. In this regard, it was incumbent upon the Appellant to lay before the learned trial magistrate sufficient evidence or basis to warrant the grant of the orders sought.
55. Particularly, the Appellant was obligated to prove and establish the existence of a Prima facie case to warrant the grant of the orders of Temporary injunction.
56. In the premises, it is therefore appropriate to discern what then constitutes a Prima facie case, which the Appellant was obliged to establish or prove, before being entitled to the grant of the Orders of Temporary Injunction.
57. To this end, it is appropriate to refer to the decision in the case of *Mrao Ltd versus First American Bank of Kenya Ltd & 2 others* [2003] eKLR, the Honourable Court fashioned a definition for 'prima facie case' in civil cases in the following words:

' 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.'

58. Additionally, the meaning of what constitutes a prima facie case was revisited in the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* [2014] eKLR, where the court observed as hereunder;

' 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. The leading English House of Lords case of the *American Cyanamid Co. Ethicon Ltd* [1975] AC 396 is a case in point. The meaning of 'prima facie case', in our view, should not be too much stretched to land in the loss of real purpose. The standard of prima facie case has been applied in this jurisdiction for over 55 years, at least in criminal cases, since the decision in *Ramanlal Trambaklal Hatt V Republic* [1957] EA 332.

59. Having taken cognizance of what amounts to or constitutes Prima facie case, it is now appropriate to interrogate the facts that were placed before the Honourable court by the Appellant and thereafter to ascertain whether indeed the facts as pleaded constitutes a prima facie case.
60. As concerns the Estate of Mwangi Kimanga, deceased, I have found and held that the Appellant herein was not the duly constituted legal administrator. Consequently, the Appellant would therefore not be competent to espouse, a prima facie case of whatsoever nature in respect to the Estate of the said deceased.



61. In respect of the claim pertaining to the Estate of Mwangi Githure, Deceased, it is sufficient to observe that the Sale agreement dated the January 22, 2010, upon which the Appellant relies, appears to be illegal and unlawful.
62. To this end, it is imperative to take cognizance of clause three (3) thereof which provides as hereunder;  

' The completion date is:  
Upon the successful transfer of the sale property to the purchaser for which the vendor guarantees to pursue after the succession proceedings at Muranga Law Courts'.
63. My understanding of the said clause is that even though it appears that the vendor had been constituted as the Administrator of the Estate of Mwangi Githure, Deceased, there were still outstanding proceedings which were to be dealt with and concluded.
64. To my mind, the outstanding proceedings which were to be pursued by the vendor at Muranga law courts would obviously mean or better still, suggest that the Grant, if any had not been confirmed.
65. If indeed, there were still Succession proceedings to be pursued then it means that the vendor was still not seized of the requisite Capacity to sell, alienate and or dispose of a segment of the Estate of the deceased.
66. Whereas I am not called upon to make precipitate and final findings on issues of facts, it is appropriate to point out that if the Grant in respect of the Estate of Mwangi Githure had not been confirmed, then the Sale Agreement being relied upon may very well be incapable of anchoring the claim on behalf of the Appellant.
67. Be that as it may, the issue as to whether or not the Grant had been issued and if at all, confirmed are issues that shall await a plenary hearing.
68. Notwithstanding the foregoing, it is my finding that on the basis of the facts and the Evidence that was placed before the trial court, the Appellant herein failed to establish and prove the existence of a Prima facie case.
69. Similarly, on this account I cannot fault the conclusion by the Learned trial magistrate that the Appellant had failed to established a prima facie case.
70. Perhaps, it is imperative to add that in the absence of a Prima facie case, the learned trial magistrate would not have been disposed to grant the orders of Temporary Injunction.

### **Issue Number 3**

Whether the Appellant established and or supplied Evidence of Irreparable Loss.

71. Other than the requirement of proof of Prima facie case, an Applicant seeking for orders for Temporary Injunction must also place before the Honorable Court evidence of Irreparable loss.
72. In the premises, there is no gainsaying that the Appellant herein was bound and or obligated to place evidence of Irreparable loss before the Honourable court.



73. What then is irreparable loss. The answer to the question herein was aptly answered vide the dictum in the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* [2014] eKLR, where the court observed as hereunder;

' On the second factor, that the applicant must establish that he 'might otherwise' suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot 'adequately' be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy'.

74. As concerns the Estate of Mwangi Kimanga, now deceased, I have observed and underlined that the Appellant herein has not established any nexus to the said estate. For clarity, same is neither the duly constituted legal administrator nor has his claim to be a beneficiary been determined by the court of competent jurisdiction.

75. In this respect, it is my finding and holding that the Appellant herein cannot contend that same would be disposed to suffer Irreparable loss, over and in respect of a property that same does not own.

76. As pertains to the claim relating to the Estate of Mwangi Githure, now deceased, it is appropriate to state that the Sale agreement, upon which the Appellant lays his claim contains a Default clause.

77. For coherence, clause 5 of the said Sale Agreement provides as hereunder;

' If for any reason of default on the part of the vendor, the transfer is inhibited, then the purchaser shall be entitled to refund of any monies paid and the agreement will be deemed as revoked'

78. To my mind, the Sale Agreement between the Appellant and the 3<sup>rd</sup> Respondent, whose validity is disputed, had neither been completed nor registered.

79. In the premises, the breach, abortion and or failure attendant to the said agreement would therefore, subject to proof of its validity, entitle the Appellant to Refund of the monies which were paid thereunder.

80. Simply put, where damages can be computed, ascertained and paid, then Irreparable loss does not ensue or arise. Consequently, it is my finding that there was no Evidence of Irreparable Loss that was established or proven before the Learned Magistrate.

81. In respect of the foregoing observation, it is appropriate to take cognizance of the decision in the case of *Kenya Commercial Finance Co Ltd Versus Afraha Education Society* [2001] Vol 1 EA 86, where the court stated as hereunder;

' 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'.

82. In the circumstances, I find and hold that whatever loss that the Appellant herein may suffer, particularly in respect of the claim pertaining to the Estate of Mwangi Githure, now deceased, same is compensable in monetary terms, which can be assessed and be paid at the appropriate time.

#### **Issue Number 4**

Whether the Learned Trial Magistrate properly exercised her Discretion in Dismissing the Application for Temporary Injunction.

83. Before delving into the issue herein, it is appropriate to observe that the grant or refusal to grant an order of Temporary Injunction is an exercise of discretion by the trial court, albeit subject to established conditions.
84. To the extent that the Jurisdiction to grant or decline an order of temporary injunction, constitutes an exercise of Discretion, it then means that the first appellate court must exercise restraint and caution, before interfering with the exercise of discretion by the trial court.
85. At any rate, the 1<sup>st</sup> Appellate court must satisfy him/herself that the trial court committed evident and discernable errors, before impeaching the decision or ruling of the trial court, premised and anchored on Discretion.
86. In short, this court would only be called upon to interfere with the discretion of the trial court, if the trial court had misconceived the salient features of the Appellant's case, failed to take into account sufficient material issues or took into account extraneous and irrelevant facts or better still, arrived at a conclusion which was ex-facie Erroneous.
87. However, in the preceding analysis, I have shown that the Learned trial magistrate correctly addressed her legal mind to the issues that were canvassed before her and indeed arrived at conclusions, which this court has affirmed and ratified.
88. In the premises, it is evident that the learned trial magistrate correctly exercised her discretion whilst dealing with the application dated the February 20, 2018.
89. In the circumstances, I come to the conclusion that the ruling and decision of the learned trial magistrate was legally sound, save for the aspect where the Learned Trial Magistrate attempted to interpret the import and tenor of the orders of status quo issued by the Court of Appeal.
90. Nevertheless, I must leave the issues of the import and tenor of the status quo orders of the Court of Appeal to be dealt with and addressed by the said court or otherwise by the Probate and Administration Court, subject to the outcome of Court of Appeal Civil Appeal No 176 of 2016.
91. For the avoidance of doubt, I affirm the decision of the learned trial magistrate dated the February 24, 2019 and essentially the outcome thereof, wherein same dismissed the Application dated the February 20, 2018.

#### **Final Disposition:**

92. Having addressed and analyzed the issues that were set out in the body of the Judgment herein, it must have become evident and apparent that the subject Appeal is devoid/ bereft of merits.



93. However, before making the Final Orders in this matter, it is appropriate to state that if the Suit Property, which is the Basis of contest herein was allegedly sold to and in favour of the 4<sup>th</sup> Respondent for the sum of Kshs 160,000,000 only, then the Chief Magistrates' Court would certainly not be seized of Jurisdiction to entertain and adjudicate upon the Dispute herein.
94. Nevertheless, I must point out that the Issue was not raised by either Party and none of the Parties addressed same. In this regard, it would not be in the Interest of Justice to deal with the said issue effectively and conclusively.
95. In any event, it is also worthy to recall that the suit herein was first filed before this Court before same was transferred to the Chief Magistrates Court by a Judge of this Honourable Court. Certainly, not the author of the instant Judgment.
96. Be that as it may, the Appeal herein be and is hereby Dismissed with costs to the 4<sup>th</sup> Respondent only.  
It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13th DAY OF OCTOBER 2022.**

**OGUTTU MBOYA**

**JUDGE**

**In the Presence of;**

**Kevin Court Assistant.**

N/A for the Parties.

