



REPUBLIC OF KENYA



**Gitere & another (Suing as Administrators of the Estate of Gitere Kahura) v Gitere & another (Civil Case E223 of 2024) [2025] KEELC 3557 (KLR) (6 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3557 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
CIVIL CASE E223 OF 2024**

**JA MOGENI, J**

**MAY 6, 2025**

**BETWEEN**

**SAMUEL MBURU GITERE ..... 1<sup>ST</sup> PLAINTIFF**

**ANN WANJIRU GITERE ..... 2<sup>ND</sup> PLAINTIFF**

**SUING AS ADMINISTRATORS OF THE ESTATE OF GITERE KAHURA**

**AND**

**KENNETH KIMARI GITERE ..... 1<sup>ST</sup> DEFENDANT**

**CIDERSIDE ENTERPRISES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. What is before me is the Plaintiffs' Application brought by way of Notice of Motion dated 4/06/2024 in which the Plaintiffs have sought for a temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants whether by themselves or through their agents, servants and/or workers from selling, transferring, offering for sale, making payments, transferring, charging, mortgaging, constructing, demolishing structures, and developing and/or otherwise dealing with the suit property pending the hearing and determination of the suit.
2. At the same time, the Plaintiffs have sought for grant of a temporary injunction restraining the 2<sup>nd</sup> Defendant, whether by itself, its servants, and/or agents from making payment, transferring the purchase price of Kshs. 64,000,000 to the 1<sup>st</sup> Defendant and/or his agents and nominees. The Application is supported by an Affidavit sworn by Ann Wanjiru Gitere on even date.
3. The Application is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who filed lengthy Replying Affidavits sworn on 22<sup>nd</sup> July and 25<sup>th</sup> July 2024 respectively. The 1<sup>st</sup> Defendant's Replying Affidavit was sworn by Kenneth Kimari Gitere on 22/07/2024 and the 2<sup>nd</sup> Defendant's Replying Affidavit was sworn by



Gladys Gathoni Githua director of the 2<sup>nd</sup> Defendant on 25/07/2024. The Application is premised on grounds outlined in the Application and supported by an affidavit sworn by the Plaintiffs.

4. The Plaintiffs deposed through their Supporting Affidavit and Supplementary Affidavit dated 28/10/2024 that the suit property's lease was slated to expire on 10/9/2024 and the late Gitere Kahura had commenced the process of extension of the lease and on 7/08/2008 the then Nairobi City Council communicated its no objection as evidenced by annexure AWG-2 a letter from Nairobi City Council.
5. However, the late Gitere Kahura passed on before the lease extension was executed. That the 1<sup>st</sup> Defendant instead of working with the Plaintiffs to complete the process started by the late Gitere Kahura for renewal of lease chose to defraud the estate of the late Gitere of the suit property which he transferred to his name and sold to the 2<sup>nd</sup> Defendant.
6. That the Court in the Succession Cause HCC No. 265 of 2009 reviewed the grant in 2014 and the Plaintiffs were appointed as additional administrators as evidenced through annexure AWG-5 being a copy of the order issued on 1/09/2014.
7. That vide two Applications dated 12/10/2020 and 12/11/2020 and High Court ruling date 30/01/2024 the 1<sup>st</sup> Defendant and one David Wakangu Gitere, who is not a party to the suit were found to be unfit to continue to serve as administrators thereby ordered their removal leaving the Plaintiffs as joint administrators of the estate of the late Gitere Kahura as evidence by annexure AWG-6.
8. That the 1<sup>st</sup> Defendant had transferred the suit property to his name and sold it to the 2<sup>nd</sup> Defendant and title was issued on 10/05/2022 having had it extended for further 50 years from 1/09/2003 despite the lease having been slated to expire on 1/06/2004. That the instrument of transfer of the suit property is dated 11/10/2022 having been sold for KSh 64,000,000 to the 2<sup>nd</sup> Defendant which sale price is held by the Advocates of the 2<sup>nd</sup> Defendant pending delivery of vacant possession by the 1<sup>st</sup> Defendant who is currently evicting tenants and demolishing structures with a view to grant vacant possession to the 2<sup>nd</sup> Defendant.
9. The Plaintiffs contend that the extension and eventual registration of the suit property in the name of the 1<sup>st</sup> Defendant was illegal, unlawful, irregular and fraudulent and that the 1<sup>st</sup> Defendant violated the Law of Succession Act when he registered the suit property in his name. With this illegal registration the Plaintiffs contend that the 1<sup>st</sup> Defendant never acquired any property to the said suit property capable of sale and or transfer to a third party. Thus the sale to 2<sup>nd</sup> Defendant is therefore null and void. Thus it is the contention of the Plaintiffs that they have established a prima facie case.
10. On their part, as already stated the 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant filed lengthy Replying Affidavits sworn on 22<sup>nd</sup> July and 25<sup>th</sup> July 2024 respectively defending the action of the 1<sup>st</sup> Defendant and stating that the 2<sup>nd</sup> Defendant has good title. The 1<sup>st</sup> Defendant averred that the lease of the suit property was to run and expire on 1<sup>st</sup> June 2004 and that although his late father had made an effort to have the lease extended he had not succeeded at the time of his death on 24<sup>th</sup> August 2008. Thus his father's title had been extinguished by failure of renewal by the time it expired on 1<sup>st</sup> June 2004.
11. That therefore the extension of lease which has been initiated by his father could not proceed in his persona name due to his death and that he had therefore no proprietary rights over the suit property. Also that the said suit property could not be listed as forming part of the estate of the late Gitere Kahura in High Court Succession Cause No. 265 of 2009 since the interest therein had been extinguished by operation of the law.



12. That the impugned order removing his name and that of his brother David Wahangu Gitere from the Grant of Succession Cause No. 265 of 2009 led to him filing an Application against the impugned Order and the Ruling is awaited.
13. The 1<sup>st</sup> Defendant further contended that once the lease of the suit property expired on 1/06/2004 the property was available to revert to the relevant authority or to be allocated to any other person who approached the authority for allocation. That the late Gitere Kahura the father of the 1<sup>st</sup> Defendant has allotted the suit property to the 1<sup>st</sup> Defendant in 2007 after expiry of the lease of the suit property on 18/04/2019 and that this fact is known to the Plaintiffs.
14. It is undisputed as stated by the 1<sup>st</sup> Defendant that he sold the suit property to the 2<sup>nd</sup> Defendant at a cost of Kesh 64,000,000. Thus the orders sought for status quo cannot prevail since the 1<sup>st</sup> Defendant has already sold and transferred interests in the suit property to the 2<sup>nd</sup> Defendant in 2022 and vacant possession was hand over on 6/05/2024.
15. Further that the Court has no jurisdiction over this matter since this suit ought to have been litigated in the succession and for that the 1<sup>st</sup> Defendant has raised a Preliminary Objection.
16. At the same time the 1<sup>st</sup> Defendant contends that the suit property is not one of the properties in the any Confirmations of Grant that have been issued by the Succession Court in the said Nairobi High Court Succession Cause No. 265 of 2009. Thus the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs have no capacity or locus standi to prosecute any proceedings in regard to a property which does not belong to the estate of the late Gitere Kahura as evidence by annexure KKG1 & 2 which are copies of Confirmation of Grant. The 1<sup>st</sup> Defendant thus states that the law suit is baseless for lack of the requisite substratum as the suit property is not an asset of the said Estate.
17. On his part the 2<sup>nd</sup> Defendant averred that most information in the Supporting Affidavit give historic background to the suit property to which it is not privy and are not aware of and most of those matters relate to the estate of Gitere Kahura which are not known to the 2<sup>nd</sup> Defendant since they came into the picture when the 1<sup>st</sup> Defendant offered to sell the suit property to the 2<sup>nd</sup> Defendant.
18. The 2<sup>nd</sup> Defendant contends to have conducted due diligence which process confirmed that the title was registered in the name of the 1<sup>st</sup> Defendant and there were no encumbrances against the 1<sup>st</sup> Defendant's title and that they never transacted with the estate of Gitere Kahura.
19. That the transfer documents were shared on 20/09/2022 as evidenced per annexure GGG1 since there were disruptions at the land's offices due to the Covid 19 outbreak in early 2020. Other annexures were receipts from KRA for stamp duty and he Application for registration in confirmation of the payment which were marked as annexure GGG2.
20. The 2<sup>nd</sup> Defendant stated that the suit property was transferred to the 2<sup>nd</sup> Defendants and registered in their name on 28/10/2022 as per annexure GGG3 which is the Certificate of Title. Further that the 2<sup>nd</sup> Defendant was not aware about any disputes over the estate of Gitere Kahura while they engaged with the 1<sup>st</sup> Defendant since the title was registered in the name of the 1<sup>st</sup> Defendant.
21. They further averred that having considered the ruling delivered by Hon Justice E.K Ogola on 30/01/2024 it does not make reference to the suit property namely parcel number LR 209/2763/18. Thus that the 2<sup>nd</sup> Defendant purchased the suit property for a consideration of Kesh 64 million after fulfilling all statutory obligations.
22. Further that the 2<sup>nd</sup> Defendant has been in occupation of the suit property long before the institution of the current suit in June 2024. Thus that the 2<sup>nd</sup> Defendant is a bonafide purchaser for value without



knowledge of the allegation now made against the 2<sup>nd</sup> Defendant and there was nothing fraudulent or illegal in the entire engagement which has been furnished to the Court.

23. Before the Application was determined the 1<sup>st</sup> Defendant also filed a Preliminary Objection dated 22/07/2024. The Court while giving directions for issuance of a ruling on 21/11/2024 directed the parties to file their submissions for both the Application and the Preliminary Objection.
24. The 1<sup>st</sup> Defendant in the Preliminary Objection has urged the Court to strike out the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff's Notice of Motion dated 4/06/2024 on the following grounds;
  1. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs suit is premised on a dispute between the Plaintiffs as brother and sister of the 1<sup>st</sup> Defendant in respect to a property purportedly belonging to their late father whose proceedings are subject to Nairobi high Court succession cause no 265 of 2009 which is still ongoing and it being purely a succession issue cannot be entertained by this Honourable Court as its Jurisdiction under Article 162 (2) (b) does not encompass succession matters.
  2. The title to the suit property allegedly belonging to the late Gitere Kahura whose term expired on the 1<sup>st</sup> of 2004 was extinguished by operation of the law and having not been extended by him the said suit property is not an asset of the said Estate and hence the Plaint is null and void ab initio for lack of the requisite substratum necessary to underpin the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs' claim.
  3. Since the suit property being an immovable property is not one that has been identified and or determined as belonging to the said Estate by not being listed in the Confirmations of Grant in Nairobi HCC Succession cause of no 265 of 2009 - in the Estate of the late Gitere Kahura the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs of the said estate have no capacity or locus standi to commence and entertain any proceedings in regard to it.
  4. Since the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs admit that the suit property's title was extinguished by operation of the law in the year 2004 commencing proceedings more than 20 years later is a reckless and blatant abuse of the requisite provisions of the Limitation of Actions Act and hence the Plaintiffs suit should be struck out not only as an abuse of the process of this Court but for lack of this Honourable Court's Jurisdiction to entertain the said Claim.
25. The Preliminary Objection is opposed. Both the Notice of Motion Application and the Preliminary Objection were canvassed by way of written submissions. Due to the Preliminary Objection I note that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs filed their written submissions after the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. It is understandable since they had to respond to the submission on the Preliminary Objection. Additionally, the 1<sup>st</sup> and 1<sup>st</sup> Plaintiffs filed a supplementary submissions dated 20/11/2024. At the same time the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their submissions and both are dated 15/11/2024.
26. I have taken my time and read and considered the submissions filed including a scrutiny of the authorities relied upon by the parties. I must say each party did a good job on identifying the relevant authorities and legal principles touching on the issues at hand. As Court it is always refreshing to go through well researched and equally well written submissions by the parties. Let me hasten to add though that the pleadings are what carries the day the submissions are as it has been said before marketing language that enables the Court to consider the points of departure by the parties.

### **Analysis and Determination**

27. Now having given as already stated full consideration to the Application before me as well as the Notice of Preliminary Objection. I find the following issues arise for determination:-



- i. Whether the Preliminary Objection raises pure points of law.
  - ii. Whether the Court has jurisdiction to hear and determine this suit.
  - iii. Whether the Application dated 4/06/2024 is merited.
28. The essence of a Preliminary Objection was set out by the Court of Appeal in the locus classicus case of *Mukisa Biscuits Manufacturing Co. Ltd. vs. West End Distributors* (1969) EA 696 at 700 where Law, JA stated that:
- “ ... 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 may dispose of the suit. Examples are an objection to 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.”
29. Sir Charles Newbold P added at page 701 as follows:
- “ 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.”
30. The Supreme Court addressed its mind on this issue in the case of *Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 Others* [2015] eKLR wherein it stated:
- “ Thus a Preliminary Objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.”
31. From the foregoing it is apparent that a Preliminary Objection should raise pure points of law, argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or if the Court is called upon to exercise judicial discretion. Further, a Preliminary Objection should be capable of disposing off the suit.
32. Thus in determining whether the 1<sup>st</sup> Defendant’s Preliminary Objection passes this test, this Court will be guided by the findings in the case of *Oraro v Mbaja* [2005] eKLR where the Court held that;
- “ Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.
33. However, it is trite law that where the jurisdiction of a Court to hear a dispute before it is challenged, the Court must determine that question at once, and should it find that it lacks jurisdiction, it should down its tools. This position was set down by the Court in the case of *The Owners of Motor Vessel ‘Lillian S’ vs Caltex Oil (Kenya) Ltd* (1989) KLR1. The question of jurisdiction is dispositive in nature and does not require probing evidence. Therefore, this Court finds and holds that the issue of jurisdiction herein is a Preliminary Objection.
34. The second limb of the Preliminary Objection is that the same issue being litigated here lies before the High Court in Succession Cause No. 265 of 2009. In essence the 1<sup>st</sup> Defendant is raising the issue sub judice without necessarily saying the word sub judice. Section 6 of the [Civil Procedure Act](#) sets out the



- threshold for holding that a suit is sub judice. The Applicant is required to satisfy the Court that the parties are the same in both matters or are litigating under the same title and that the subject matter in question is the same in the two suits. This argument is no doubt a point of law and can properly be raised by way of Preliminary Objection.
35. The other issue raised is about limitation of time where the 1<sup>st</sup> Defendant avers that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs admit that the suit property's title was extinguished by operation of the law in the year 2004. Therefore he contends that commencing proceedings more than 20 years later is a reckless and blatant abuse of the requisite provisions of the Limitation of Actions Act and hence the Plaintiffs' suit should be struck out not only as an abuse of the process of this Court but for lack of this Honourable Court's Jurisdiction to entertain the said Claim.
36. It is trite that jurisdiction is everything. The centrality of jurisdiction was succinctly captured by Nyarangi, J.A. in *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited (supra)*
- “Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings ...”
37. The Supreme Court similarly, in *Kalpana H Rawal & 2 Others vs Judicial Service Commission & 2 Others* [2016] eKLR cited with approval the decision in Supreme Court of Nigeria Supreme Case No. 11 of 2012 *Ocheja Emmanuel Dangana vs Hon. Atai Aidoko Aliusman & 4 Others* where Walter Samuel Nkanu Onnoghen, JSC expressed himself as follows: -
- “... It is settled that jurisdiction is the life blood of any adjudication because a Court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a Court or tribunal without requisite jurisdiction is a nullity - dead - and of no legal effect whatsoever, that is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost ...”
38. The jurisdiction of a Court flows from *the Constitution* and or statute or both. This position was affirmed by the Supreme Court in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR where it pronounced itself thus:
- “A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. .... Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation ....”
39. It is the 1<sup>st</sup> Defendant's contention that the instant suit is a succession dispute disguised as a land matter and that this Court does not have jurisdiction to hear and determine the same. On their part, the Plaintiffs contend that the dispute revolves around ownership of land and that this is the proper Court to make that determination.
40. Article 162(2) (b) of *the Constitution* provides that Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation



of, and title to, land. To give effect to Article 162 (2) (b) of *the Constitution*, Parliament enacted the Environment & Land Court Act. Section 13(2) of the said Act provides as follows:-

- “2. In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes –
- (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
  - (b) relating to compulsory acquisition of land;
  - (c) relating to land administration and management;
  - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests inland; and
  - (e) any other dispute relating to environment and land.”

41. The *Law of Succession Act* in Section 47 provides for the jurisdiction of the High Court in respect of matters falling under the Act as follows:-

“The High Court shall have jurisdiction to entertain any Application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”

42. The jurisdiction of the Environment and Land Court vis a vis the High Court with respect to succession matters was considered by Nyamweya J.(as she then was) in *Mbula Muoki Ndolo & Another vs Kenya Power and Lighting Company Limited* [2017] eKLR as follows:

“In *Salome Wambui Njau* (suing as Administratrix of the Estate of Peter Kiguru Njuguna (Deceased) v *Caroline Wangui Kiguru, ELC* (2013) eKLR, I held that in matters of succession disputes touching on land, Environment and Land Court Pursuant to Article 162(2) of *the Constitution* and the High Court as the Succession Court under Section 47 of the *Law of Succession Act* would appear to have a concurrent jurisdiction. It would thus depend on the circumstances of each case which Court is best suited to hear and determine the dispute.”

43. Similarly, the Court in *In Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR had this to say;

“.....The *Law of Succession Act*, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate Court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate Court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

Disputes of course do arise in the process. The provisions of the *Law of Succession Act* and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors



of the deceased nor beneficiaries, are for resolution outside of the framework set out in the *Law of Succession Act* and the Probate and Administration Rules. Such have to be resolved through the structures created by the *Civil Procedure Act* and Rules, which have elaborate rules on suits by and against executors and administrators.

The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3), which provides as follows –

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the Court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under ... the Civil Procedure Rules ...’

Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil Court, the decree or order is then made available to the probate Court for implementation. In the meantime, the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate Court would in most cases be *functus officio* so far as the property in question is concerned. The primary mandate of the probate Court is distribution of the estate and once an order is made distributing the estate, the Court’s work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate Court. The interventions by that Court are limited to what I have stated above.

44. This suit was commenced by way of an Plaint dated 4/06/2024 wherein the Plaintiffs sought, inter-alia, for a declaration that the suit property herein forms part of the estate of the deceased Gitere Kahura, a declaration that the extension of lease in the name of the 1<sup>st</sup> Defendant was illegal, a declaration that the transfer of the suit property LR 209/2763/18 to the 2<sup>nd</sup> Defendant was illegal, unlawful and fraudulent, an order for cancellation of title to the 2<sup>nd</sup> Defendant and a reversion of the suit property to the estate of the late Gitere Kahura, an order of permanent injunction against the 2<sup>nd</sup> Defendant from transferring, selling, subdividing the suit property, an order of permanent injunction against the 2<sup>nd</sup> Defendant from transferring the purchase price of Kesh 64,000,000 to the 1<sup>st</sup> Defendant, an order of permanent injunction against the 1<sup>st</sup> Defendant from demolishing the buildings on the suit property, selling or evicting tenants and costs of the suit.
45. Briefly, the Plaintiffs’ case is that the suit property belongs to the late Gitere Kahura who is their father. The lease to the suit property expired in June 2004. Their father applied for extension of the lease and the Nairobi City Council vide a letter dated 07/08/2008 approved the extension. However before he completed the approval process he passed on 24/08/2004.
46. When the Plaintiffs started the process of consolidating his estate for distribution to the beneficiaries the said Gitere Kahura having died intestate, they discovered that the 1<sup>st</sup> Defendant illegally, unlawfully and fraudulently extended the suit property lease to himself in September 2003 before expiry of the



- lease period. That the 1<sup>st</sup> Defendant claims that the late Gitere Kahura who is their father had given him the suit property. A claim the Plaintiffs contend is not supported by any documentation.
47. According to the Plaintiffs, the 1<sup>st</sup> Defendant fraudulently sold the suit property to the 2<sup>nd</sup> Defendant for a consideration of Ksh 64,000,000 and that the 1<sup>st</sup> Defendant has moved to demolish the structures on the suit property and evicting of tenants so as to facilitate the vacant possession to the 2<sup>nd</sup> Defendant and to be paid the agreed amounts. It is the Plaintiffs' case that the said transfers were based on illegalities within the meaning of Section 26 of the [Land Registration Act](#). The Plaintiffs have sought for an order cancelling the title that was issued in favour of the 2<sup>nd</sup> Defendant and declaratory orders as to the ownership of the suit property to revert to the estate of the deceased Gitere Kahura.
48. Now, I have carefully studied the pleadings, and I realize that it is abundantly clear to this Court that the main point of contention is the ownership of the suit property. The Plaintiffs, as I understand them, are not claiming the suit property as beneficiaries of the deceased Gitere Kahura. According to the Plaintiffs, the succession Court has already dealt with the issue of the distribution of the Estate of their late father. The Plaintiffs are seeking to impeach the title held by the 2<sup>nd</sup> Defendant pursuant to Section 26 of the [Land Registration Act](#), 2012.
49. As was held in the case of *In Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR, the [Law of Succession Act](#), and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate Court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested in the estate of the deceased. The Plaintiffs have not asked this Court to do any of those functions.
50. Indeed, as the Court rightly observed in *In Re Estate of Alice Mumbua Mutua (Deceased)* (supra) disputes as between the estate of a deceased person and third parties need not be determined within the succession cause. The legal infrastructure in place provides for a resolution elsewhere, and upon a determination being made by the civil Court, the decree or order can be made available to the probate Court, if need be, for implementation.
51. From the filed pleadings, it is apparent that the suit property is outside the realm of the succession Court, the same having been sold off to the 2<sup>nd</sup> Defendant. Who is seeking to rely on the defence of a bona fide purchaser for value without notice, a question which undoubtedly involves the Application of the law on title to land and which this Court is competent to determine. That being the case, it is the finding of this Court that this Court is vested with jurisdiction to determine this suit.
52. On the issue of whether this suit is sub judice, Section 6 of the [Civil Procedure Act](#) provides as follows:
- “No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they are any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.”
53. The 1<sup>st</sup> Defendant has submitted that the subject matter of this suit is being handled by the High Court in High Court in Succession Cause No. 265 of 2009. Whereas admittedly an objection on the grounds of sub judice can be properly raised as a Preliminary Objection, the objection has not been properly invoked in this instance.



54. Having not pleaded the issue of sub judice in their defence and noting that the pleadings in High Court in Succession Cause No. 265 of 2009 have not been placed before this Court, this Court is unable to make a determination in that respect.
55. Further, I note that there is a copy of an Order given on 30/01/2024 by Justice E.K Ogolla Nairobi High Court Succession Cause 265 of 2009, which required that the 1<sup>st</sup> and 2<sup>nd</sup> continue with the process of distribution of the estate of the late Gitere Kahura and the order removed the 1<sup>st</sup> Defendant from being an administrator of the estate. My close scrutiny of this order clearly shows that the 2<sup>nd</sup> Defendant is not a party to the suit and neither is the suit property in contest herein part of the property mentioned in the Ruling.
56. In any event, and as I have stated above, the issues in the succession cause must have been strictly in respect to the distribution of the estate of the deceased, and not the alleged fraudulent registration of the suit property in favour of the 2<sup>nd</sup> Defendant, The upshot of the foregoing is that the 1<sup>st</sup> Defendant's Preliminary Objection fails.
57. Infact it is the 2<sup>nd</sup> Defendant's assertion that it is not a necessary party to the Succession suit because there is no nexus between it and the Plaintiffs; that it is an innocent purchaser for value without notice; that the Plaintiffs are guilty of laches and that any rights they may have had in respect to the suit property have been extinguished.
58. Order 1 Rule 3 of the Civil Procedure Rules provides as follows;
- “ All persons may be joined as Defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”
59. The Plaintiffs claim is for ownership of the properties known as LR 209/2763/18. The 2<sup>nd</sup> Defendant has admitted it purchased the parcel of land known as LR 209/2763/18; that by virtue of that purchase, it is the legal owner of that portion land, and that it is an innocent purchaser for value.
60. For one to be considered a bona fide purchaser for value as the 2<sup>nd</sup> Defendant claims to be, certain elements must be met. The question of whether or not these elements have been met can only be determined at trial. That being the case, it is clear that the 2<sup>nd</sup> Defendant is a necessary party to this suit, more so if it wishes to protect its stake to the parcel of land it purportedly purchased.
61. The 1<sup>st</sup> Defendant contends that the Plaintiffs herein are subject to Section 7 of *Limitation of Actions Act*, since they are bringing this action more than 20 years since the extension of lease by the 1<sup>st</sup> Defendant in 2003.
62. The Plaintiffs have maintained that they discovered the fraud relating to the sale of LR 209/2763/18 after succession proceedings were initiated in respect of their deceased father's estate, the same having been filed in 2009 by the 1<sup>st</sup> Defendant and them being added as administrators by the Court in 2014 following a Court decision.
63. Considering that the suit property was sold to the 2<sup>nd</sup> Defendant in 2022 and this suit filed in 2024, and in the absence of any evidence to show that the alleged fraud was discovered earlier than alleged by the Plaintiffs, the Court is unable to make a finding that the Plaintiffs are time-barred.
64. Thus as already stated, it is this Court's finding that the 1<sup>st</sup> Defendant's Notice of Preliminary Objection dated 22/07/2024 is devoid of merit and the same is hereby dismissed.



65. The Court will now deal with the Plaintiff's Application. The issue for determination for this Application is whether the Plaintiff/ Applicant has met the threshold for grant of Interlocutory Injunction. The principles for grant of injunction have long been settled in the celebrated case of *Giella Vs. Cassman Brown* (1975)E.A, in which the Court held that an Applicant has to establish:-
- a. Whether the Plaintiff has established prima facie case with a probability of success.
  - b. Whether the Plaintiff will suffer irreparable injury.
  - c. That the balance of convenience tilts in their favour.

**a) Whether the Applicant has established a prima-facie case with probability of success.**

66. The Applicants have averred that the suit property LR No. 209/2763/18, which is now registered in the name of the 2<sup>nd</sup> Defendant was transferred by the 1<sup>st</sup> Defendant in circumstances that are unclear since the Nairobi City Council had vide a letter dated 7/08/2008 approved that the lease be extended. The said lease had expired on 1/06/2004. The Applicants however noted that the 1<sup>st</sup> Defendant had extended the lease from 1/09/2003 long before its expiry.
67. Further that despite the late Gitere Kahura getting a nod for the extension from the defunct Nairobi City Council on 07/08/2008 be passed on, 28/08/2008 before undertaking the task of extension of lease. Since he passed on intestate it was the responsibility of the administrators to follow up and complete the process of extension granted by Nairobi City Council.
68. The Applicants produced the letter of approval of extension to argue their contention about the suit property. The 1<sup>st</sup> Defendant on his part contended that the suit property had been allocated to him by the late Gitere Kaho his father in 2007. That he then had the extension of lease approved to him on 18/04/2019. The 1<sup>st</sup> Defendant did not however produce any documents to support the claim for allocation to him by the late Gitere Kahura in 2007 neither the letter of extension as claimed by the City Council which led to the approval on 18/04/2019.
69. Whereas the 1<sup>st</sup> Defendant sold the suit property to the 2<sup>nd</sup> Defendant on 11/04/2022 it is not clear how he came into the ownership of the said suit property and this will certainly be an issue to be canvassed during the hearing of the suit. The Applicants have produced documents showing that that approval of extension of the lease had been approved before Gitere Kahura passed on but the process had not been completed. These allegations have not been refuted by the Defendants and even so as to whether or not the documentations are in order, it is a matter that will be determined during trial and the Court is unable to make a determination on this at this stage. See the Case of *Hosea Kiplagat & 6 Others Vs. National Environment Management Authority & 2 Others* (2015) eKLR, where the Court held that:-

“At the interlocutory stage the Court should not venture into making definitive findings of fact law and particularly where the affidavits filed are contradictory as the Court cannot believe or disbelieve the statements made on oath of either party without in effect trying the case.”

70. The Plaintiffs have further averred and attached photographs to support their claim in the Application that the buildings on the suit property have been demolished to pave way for the 1<sup>st</sup> Defendant to hand over vacant possession to the 2<sup>nd</sup> Defendant. This will facilitate the payment of the Ksh 64,000,000 consideration for the suit property agreed upon between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. This Court notes that there is danger of the rights of the Plaintiffs being violated as there is demolition of buildings on the suit property commenced. It is the Court's opinion that, a prima-facie case has been established.



71. In the case of Nguruman Ltd Vs. Jan Bonde Nielson & 2 Others, C.A No.77 of 2012, the Court held that:-

“We reiterate that in considering whether or not a prima-facie 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 violated 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 bonafide question to raise as to 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.”

**b) Whether the Plaintiff will suffer irreparable injury.**

72. It is Plaintiffs’ contention that the suit property was illegally and fraudulently transferred to the 1<sup>st</sup> Defendant and in turn transferred it to the 2<sup>nd</sup> Defendant despite not having good title to pass on. That she has put up hostels that she receives rent from. The Plaintiffs have also averred that the 1<sup>st</sup> Defendant is conducting forceful eviction of tenants to enable him demolish the buildings on the suit property to facilitate indicated that she has been in occupation since she bought the suit land. On the other hand there is evidence that the 1<sup>st</sup> Defendant has already proclaimed on the suit property and levied distress. If the injunction is vacant possession of the suit property to the 2<sup>nd</sup> Defendant.

73. In the likelihood that the 1<sup>st</sup> Defendant succeeds in his schemes then there is a high likelihood that the Plaintiffs may loose the suit property and if in the end the Court will decide in their favour, then there is a likelihood that the Plaintiff will have suffered irreparable harm. In the Case of Joseph Siro Mosioma Vs. Housing Finance Corporation of Kenya & 3 Others, Nairobi HCCC No.265 of 2007 (4R), the Court held that:-

“On my part let me restate that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substituted for the loss which is occasioned by a clear breach of the law. In any case, the financial strength of a party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction.”

74. It is the Courts opinion that the Plaintiffs/Applicants are likely to suffer irreparable harm.

**c) Where does the balance of convenience tilt**

75. As I have noted the 1<sup>st</sup> Defendant transferred the suit property to the 2<sup>nd</sup> Defendant and the process of handing over of vacant possession is in the process. However, the said title is the one that is being questioned. It is not enough to wave the title under challenge. The balance of convenience always tilts in favour of maintaining the status quo.

76. The Court finds that the Plaintiffs/Applicants have met the threshold for grant of interim orders. Consequently, the Court allows the Plaintiffs’/Applicants’ Notice of Motion Application dated 14/06/2024 in terms of prayers No. 5, 6 and 7 with costs to be in the cause. However, the Court dismisses the 1<sup>st</sup> Defendant’s Notice of Preliminary Objection dated 22/07/2024 with costs to be in the cause.

77. It is so ordered.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 6<sup>TH</sup> DAY OF MAY 2025 VIA MICROSOFT TEAMS.**

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**MOGENI J**

**JUDGE**

Judgement read in virtual Court in the presence of:

Mr. Mwangi for 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs

Ms. Mwaura holding brief for Mr. AGN Kamau for the 1<sup>st</sup> Defendant

Mr. King'ara for the 2<sup>nd</sup> Defendant

Court Assistant – Melita

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**MOGENI J**

**JUDGE**

