



**Saina & another v Saina & another (Environment & Land Case  
E036 of 2022) [2025] KEELC 4475 (KLR) (11 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4475 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE E036 OF 2022**

**CK NZILI, J  
JUNE 11, 2025**

**BETWEEN**

**LINDA CHELIMO SAINA ..... 1<sup>ST</sup> PLAINTIFF**

**CALVIN KIPTOO SAINA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**STELLA CHEPCHUMBA SAINA ..... 1<sup>ST</sup> DEFENDANT**

**PAUL KIPYEGO MARUS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By an application dated 28/1/2025, the applicants seek:
  - (a) A temporary order allowing them to cultivate 30 acres of Title No. Kitale Municipality No. 2217/3 during the planting season and pending the hearing and determination of this suit.
  - (b) Order that the County Land Registrar and Surveyor to demarcate 30 acres from the larger Title No. Kitale Municipality No.2217/3 for purposes of handing over to the applicants to cultivate.
  - (c) Specific performance to the effect that the 1<sup>st</sup> respondent be compelled to effect orders by giving an enabling environment for the execution of the above orders.
2. The application is based on the reasons on its face and in a supporting and further affidavits of Linda Chelimo Saina sworn on 11/2/2025.
3. The application is opposed by the 1<sup>st</sup> defendant through a replying affidavit sworn on 12/2/2025 by Stella Chechumba Siana, for being frivolous, vexatious, lacking merits and an abuse of the court process. The 1<sup>st</sup> respondent deposes that the applicants seek land that does not exist to divert attention from related proceedings namely, Eldoret HCFP & A Case No. 12 of 2001, where she is



meddling with the estate of the late William Morogo Saina, which is under contest, and in which she had unsuccessfully filed similar application dated 28/11/2022. The 1<sup>st</sup> respondent deposes that the applicants do not meet the requirement for a grant of temporary injunction, application is fraught with uncertainties and is based on a cause of action that arose close to 14 years ago.

4. The 1<sup>st</sup> defendant deposes that the applicant has no capacity to institute this suit on behalf of the 1<sup>st</sup> defendant's late father's estate. Further, the 1<sup>st</sup> respondent deposes that she entered into an agreement with the applicants dated 8/7/2011, to forfeit to them a portion of her share of LR No. 2217/3, measuring 30 acres in exchange of their interest in LR No. Eldoret Municipality Block 14/371, hived off the land in 2011 and took possession as per affidavit of Mr. Kibiwott Bungei, attached as SC-1.
5. Again, the 1<sup>st</sup> respondent deposes that the applicants have concealed to this court that they already sold the subject parcel of land to Mr. Paul Kipyego Marus, the 2<sup>nd</sup> respondent who has since taken ownership, possession, occupation and use of the land as per attached sale agreement marked SC-2. The 1<sup>st</sup> respondent deposes that part of the settlement of the purchase price was for the purchaser to buy a tractor for the applicants, as per copies of RTGS Form, Delivery Note and log book for tractor Reg. No. KTCB 3959, attached as annexure SC-3(a), (b) and (c).
6. According to the 1<sup>st</sup> respondent, the 2<sup>nd</sup> respondent has filed a statement of defence and counterclaim confirming the foregoing and the 2<sup>nd</sup> respondent already has a title deed under his name facilitated by the 1<sup>st</sup> applicants, hence the application amounts to unjust enrichment. The 1<sup>st</sup> respondent deposes that the applicants have not challenged the claim by the 2<sup>nd</sup> respondent, pointing to a clear admission of the sale and receipt of payments for the suit land. The 1<sup>st</sup> respondent terms the application as made in bad faith to distract the court from dealing with the fraudulent dealing of the applicants with the estate, where she is at the verge of seeking revocation of the fraudulently acquired amended certificate of confirmation of grant.
7. Similarly, the 1<sup>st</sup> respondent terms the applicants as mischievously and deliberately concealing material facts that there is an ongoing proceeding over the estate in Eldoret HCFP & A Cause No. 12 of 2011 as per attached application, marked SC-4, regarding an irregularly or fraudulently obtained amended certificate of confirmation of grant attached as SC-5. The 1<sup>st</sup> respondent deposes that, it was ironical that the 1<sup>st</sup> applicant after allocating herself the entire parcel of land could turn back to demand a portion of it from her and also need to be asked where she will extract this portion, after the 1<sup>st</sup> applicant surrendered title for LR. No. 2217/3 for subdivision, which took place and closed in 2018, and the resultant subdivisions were effected as per annexed surrender instrument, letter lodged 15/3/2018 and a letter dated 18/9/2023 from both the Director of Surveys and the County Land Registrar, annexed as SC-6(a), (b) and (c).
8. Further, the 1<sup>st</sup> respondent deposes that the applicants have failed to explain the basis for facilitating issuance of title for the 2<sup>nd</sup> respondent, if indeed she had not sold the land to him which demonstrates her propensity to misled the court. The 1<sup>st</sup> respondent deposes that the applicants have failed to explain why they took 14 years to seek the reliefs sought, hence they are estopped by the doctrine of laches and they are also disqualified from benefiting from the discretion of the court under the maxim 'Vigilantibus non dormientibus aequitas subvenit'.
9. The 1<sup>st</sup> respondent deposes that the applicants have since sensed a possible defeat in the main suit, and the instant application is an afterthought to derail the hearing and the final determination of the suit, brought also with malice to blackmail, intimidate and coerce the 1<sup>st</sup> respondent into abandoning her quest in seeking a revocation of the fraudulently acquired amended confirmation of grant and the subsequent fraudulent dealings with respect to the estate of her late father.



10. The 1<sup>st</sup> respondent contends that the applicants have come to court with unclean hands, hence estopped from benefiting with the discretion of this court, otherwise, they are seeking to abuse the court process to achieve ulterior motives, and where the 1<sup>st</sup> applicant has a parcel of land measuring over 137 acres, hence cannot claim destitution. The 1<sup>st</sup> respondent deposes that in any event, she is the aggrieved party for she is yet to benefit from LR No. Eldoret Municipality/Block 14/381, out of frustration by the applicants.
11. Through a further affidavit sworn on 17/2/2025, Linda Chelimo Saina deposes that the subject land exists as currently registered as LR No. Chepsiro/Kibuswa Block 5, and is the same property previously identified as LR No. 2217/3 before conversion. The applicants depose that they have locus standi, having been recognized in beneficiaries of the estate of the deceased. The applicants further depose that it is not true that there was willingness to hive off or hand over of the 30 acres, since the 1<sup>st</sup> respondent has continuously refused to render vacant possession despite repeated requests.
12. Equally, the applicants depose that the issue in Eldoret HCFP &A Cause No 12 of 2001 does not bar the present suit for the suit herein relates to dealings, breach of agreements and unlawful transfer of the suit property. The applicants depose that they have fully complied with their part of the agreement, relinquishing their interest in LR. No. Eldoret Municipality Block 13/371 as acknowledged by the 1<sup>st</sup> respondent, who unfortunately has refused to hand over vacant possession of the agreed 30 acres, while currently is enjoying benefits from both properties.
13. The applicants deny the alleged sale and transfer of the 30 acres to the 2<sup>nd</sup> respondent for lack of supporting evidence, otherwise they are not aware, or party to and did not consent to any such transaction if any exists. The plaintiff therefore terms annexure marked SC-2 as a fabrication, forgery and unauthentic. Equally, the 1<sup>st</sup> applicant denied the alleged facilitation to have the 2<sup>nd</sup> respondent acquire a title deed or having bought her a transfer, hence annexure marked SC-3 is irrelevant to this suit.
14. Further, the applicants deny the alleged mischief concealment or fraud alleged in the replying affidavit, which lacks foundation and is aimed at diverting the attention of the court from the real issues before it, for handover of vacant possession. The applicants depose that the issue before the Eldoret High Court should not be used to circumvent their rightful claim before this court, otherwise the amended certificate of confirmation of grant was regularly obtained, it is still valid, the pending application therein should not be used to prejudice their case before this court or derail it. The applicants deny the alleged unjust enrichment, otherwise they are only seeking rightful ownership.
15. The applicants insist that they have a legally binding agreement giving rise to right to the land and where the 1<sup>st</sup> respondent has refused to honour it, hence there is a prima facie case, irreparable damage for deprivation of the right to use the land for 12 years, and that the balance of convenience tilts in favour of the application being allowed since the 1<sup>st</sup> respondent is benefiting twice, and in the interest of justice and fairness, to grant the orders sought would restore fairness to enable temporary cultivation of the land.
16. The application was directed to be canvassed by way of written submissions to be filed by 13/2/2025. The applicants rely on written submissions dated 19/2/2025. They submit that they and the 1<sup>st</sup> respondent are siblings and beneficiaries of the estate of the late William Morogo Saina, in which the title No. Kitale Municipality No. 2217/3 was distributed amongst the beneficiaries with the 1<sup>st</sup> respondent getting 137 acres out of which by an agreement dated 8/7/2011, the 1<sup>st</sup> respondent agreed to transfer 30 acres in exchange of Kshs. 6,000,000/=, deduced from her share out of sale proceeds in Eldoret Municipality Block 14/371, which despite receiving, the 1<sup>st</sup> respondent has refused to hand



- over vacant possession and therefore continuing to benefit from the land to the detriment of the applicants. Therefore, the applicants urge the court to find they are entitled to the interim orders sought guarded by the case law of Patriotic Guards Ltd -vs- James Kipchirchir Samba [2018] eKLR, Giella -vs- Cassman Brown & Co. Ltd [1973] EA 358, Mrao Ltd -vs- First American Bank of (K) Ltd & Others [2003] KLR 125.
17. The applicants submit that their proprietary claim is based on a binding sale agreement which is not in contest and hence, the 1<sup>st</sup> respondent is obliged to honour its contents as held in Reliable Electrical Engineers Ltd -vs- Mantrac Kenya Ltd [2006] eKLR. The applicants further submit that the allegations of sale of the land to the 2<sup>nd</sup> respondent are unfounded for the applicants' signatures or authority are not in the sale agreement or sought and the documents are not authenticated by the 1<sup>st</sup> respondent who bears the burden to prove its authenticity and validity as held in Elijah Makeri Nyangwar -vs- Stephen Mungai Njuguna & Another [2013] eKLR. The plaintiffs submit that the allegations of fraud by the 1<sup>st</sup> respondent are not only baseless, but also require strict proof as held in Alice Chemutai Too -vs- Nickson K. Korir & Others [2015] eKLR, which evidence is lacking before the court.
  18. While acknowledging that at interlocutory stage, a court used not make definitive conclusion on matters in controversy, as held in Mbuthia -vs- Jumba Credit & Finance Co. Ltd [1988] eKLR and in Edwin Kamau Miniu -vs- Barclays Bank of (K) Ltd [2002] eKLR. The applicants submit that they have demonstrated ownership rights through a valid agreement, full compliance with their contractual obligations, the unlawful refusal by the 1<sup>st</sup> respondent to honor her part by handing over vacant possession, despite receiving such consideration and lastly, the questionable authenticity of documents presented by the 1<sup>st</sup> respondent to support the alleged sale of the land to the 2<sup>nd</sup> respondent.
  19. Accordingly, the applicants submit that they have demonstrated that the denial of the use of the land for 13 years causing economic hardship and preventing them from utilizing the land for agricultural purposes, lack of honoring contracts, and respecting right of land owners to enjoy their land once paid for, causing economic hardships, denying the 1<sup>st</sup> applicant's child to obtain education as a constitutional right, all constitute irreparable harm that cannot be compensated by way of damages, in absence of an injunction as held in Nguruman Ltd -vs- Jan Bonde Nielsen & Others [2014] eKLR, Pius Kipchirchir Kogo -vs- Frank Kimeli Tenai [2018] eKLR, Samuel Mbudi & Others -vs- Joyce Wambui Mwachumba & Another [2014] eKLR and Suhail Sheikh Abdalla & Another -vs- Commissioner of police & Others [2015] eKLR.
  20. The applicants also submit that in in doubt, the balance of convenience favour granting the orders sought, for they are facing severe financial hardship for the child of the 1<sup>st</sup> applicant is scheduled to start university in October, 2025, hence the cultivation on the land will go a long way alleviating the financial hardship and will not in any way prejudice the defendant or affect the final determination of the main suit. Reliance was placed on Mrao Ltd (supra). The applicants emphasize that they have a clear legal right to the 30 acres of land as beneficial owners having fulfilled all the obligations under the family agreement dated 8/7/2011, as set under Article 40 of *the Constitution* and that planting season constitutes special circumstance to justify grant of a mandatory injunction and further, costs should be provided for.
  21. It is trite law that parties are bound by their pleadings and issues for the court's determination arise from the pleading. The main pleading by the parties are the further amended plaint dated 13/5/2024 in which the plaintiffs seek:
    - (a) Declaration that 30 acres out of the 1<sup>st</sup> respondent's share in land formerly known as Kitale Municipality No. 2217/3 belong to them.



- (b) Order compelling the 1<sup>st</sup> respondent to surrender the 30 acres.
  - (c) Specific performance that the 1<sup>st</sup> respondent exchanges the 30 acres out of her land with Kshs. 6,000,000/= vide agreement dated 8/7/2011.
  - (d) Mesne profits of Kshs.105,000,000/= accruing with effect from 2011 out of the 1<sup>st</sup> respondent's illegal use of the applicants' land.
  - (e) Exemplary damages of Kshs.6,000,000/=:, with compound interest with effect from 8/7/2011 when the agreement was made.
  - (f) Costs and interest.
22. The 1<sup>st</sup> plaintiff at paragraph 5 of the further amended plaint describes herself as the current administratrix of the estate of their late father and mother, while the 1<sup>st</sup> respondent is a beneficiary of the estate and also a sibling. The cause of action is described in paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and 32 thereof. A cause of action is described in law as acts on the part of the defendant that give a plaintiff reason to complain. See *DT Dobie & Co. (K) Ltd -vs- Muchina* [1980] eKLR). The 1<sup>st</sup> applicant pleads that she entered into an agreement dated 8/7/2011 in her personal capacity and as a guardian of the 2<sup>nd</sup> plaintiff with the 1<sup>st</sup> respondent and Michelle Saina as purchaser, where the applicants were to sell their residential premises comprising Plot No. Eldoret Municipality Block 14/371 to the purchasers at Kshs. 18,000,000/=:, and that Kshs.6,000,000/= was to be paid to them out of the sale out of the share of Stella C. Saina in LR No. 2217/3 which share was 30 acres, was to be identified, surveyed and excised to the applicants in full and final settlement of their entitlement out of the sale proceeds in Eldoret View House, and the possession of the 30 acres, was to pass to the applicants upon execution of the said property.
23. The applicants aver that the 1<sup>st</sup> respondent did not give out the 30 acres in exchange of Kshs. 6,000,000/=:, instead introduced the 2<sup>nd</sup> respondent alleging that they sold the said shares to the 2<sup>nd</sup> respondent by a sale agreement dated 8/8/2011, which is unknown to them, for they were never granted possession in the first instance and that the said sale agreement is only signed by the 2<sup>nd</sup> respondent and one Kibiwott Bungei. The applicants aver that it was only the 1<sup>st</sup> respondent who introduced the 2<sup>nd</sup> respondent and the court by an order dated 24/5/2023. The applicants aver that they have no claim against the 2<sup>nd</sup> respondent or the 30 acres of land that he owns in the suit land, for they have never entered into any sale or purchaser with him. The applicants insist that the consideration to be offered as per the agreement by the 1<sup>st</sup> respondent was in terms of 30 acres of land, which was exclusive of what the 1<sup>st</sup> respondent had sold to third parties, the 2<sup>nd</sup> respondent, being one of them, but 13 years down the line they are yet to take possession from the 1<sup>st</sup> defendant in breach of the agreement dated 8/7/2011.
24. The applicants aver that they had intended to plant 1000 eucalyptus trees per acre on the land in 2011 and to sell the same at Kshs. 10,000/= per tree after treatment in 2018 to KLPC, which translates to loss of expected income of Kshs. 285,000,000/=:. The applicants aver that efforts to amicably settle the matter have been unsuccessful.
25. The 1<sup>st</sup> respondent opposes the further amended plaint through a statement of defence dated 4/10/2024, insisting that she performed her obligation under the subject sale agreement, hived of the 30 acres of land from the LR No. 2217/3 and sold it to the 2<sup>nd</sup> respondent on 8/8/2011 after which the 1<sup>st</sup> applicant upon obtaining an amended certificate of confirmation of grant facilitated the transfer of the portion to the 2<sup>nd</sup> respondent. The 1<sup>st</sup> respondent averred that by dint of the amended certificate of confirmation of grant dated 27/6/2011, the entire land comprised of the estate solely vested on the 1<sup>st</sup> applicant to distribute to the other beneficiaries, and in so doing, the 1<sup>st</sup> applicant was in-charge of



- the subdivisions, surrender, registration and transfers of the resultant portions from LR No. 2217/3, hence it is illogical how she did not get her 30 acres from the 1<sup>st</sup> respondent and it could be ridiculous to sign ignorant of how the 2<sup>nd</sup> respondent obtained ownership of the 30 acres of land, whereas she is the one who facilitated its transfer and registration, before distribution the rest of the balance to the beneficiaries of the estate. The 1<sup>st</sup> respondent avers that the 1<sup>st</sup> applicant is the one who received the envisaged 30 acres of land and subsequently sold it to the 2<sup>nd</sup> respondent, otherwise to seek to reclaim it through this suit would amount to unjust enrichment.
26. The 1<sup>st</sup> respondent avers that the 2<sup>nd</sup> respondent has unequivocally acknowledged having purchased 30 acres from the 1<sup>st</sup> applicant and is enjoying a title, possession, occupation and use of the suit land, hence any claim against the 1<sup>st</sup> respondent is baseless and laughable. Toby Traser is a stranger to the family, and is colluding with the 1<sup>st</sup> applicant to grab their rightful inheritance, the claim is deceitful and malicious, since the 1<sup>st</sup> applicant is the one who sold the 30 acres to the 2<sup>nd</sup> respondent and that LR No. 2217/3 ceased to exist after the surrender, conversion, subdivision and transfer to its respectively beneficiaries, hence the reliefs sought by the applicants are legally and practically untenable.
27. Subsequently, the 1<sup>st</sup> respondent avers that the 1<sup>st</sup> applicant is a person of extremely manipulative character in collusion with her alleged boyfriend, Toby Traser, who are out to intimidate, coerce, and blackmail her and other beneficiaries of the estate to cede their interest in the ancestral home situate in Kibuswa Farm, more so, filing the suit after an application was lodged for revocation of the amended certificate of confirmation of grant.
28. The 2<sup>nd</sup> respondent opposed the suit by a statement of defence and counterclaim dated 2/10/20203. It was averred that he purchased for value of Kshs. 6,000,000/= and took immediate possession use and occupation of the suit land, hence the applicants have no cause of action against him. Further, the 2<sup>nd</sup> respondent averred that he was not privy to the agreement before court between the applicants and the 1<sup>st</sup> respondent. He denied any alleged fraud. The 2<sup>nd</sup> respondent termed the suit as bad in law, fatally defective, the applicants as lacking locus standi, an abuse of the court process and discloses no cause of action against him.
29. By a counterclaim which lack titular heading, the 2<sup>nd</sup> respondent avers that he obtained a clean title to the land after the sale agreement dated 8/8/2011 which followed earlier agreed terms of the said agreement in the presence of all family members of the applicants, to which subdivision and hiving off of his portion and taking up vacant possession occurred, and the applicants consented to registration of title in respect of the 30 acres under his name. The 2<sup>nd</sup> respondent averred that he has been on the land continuously for 12 years. He prayed for:
- (a) Declaration that he was a lawful and bona fide owner of the 30 acres excised form LR No. 2217/3.
  - (b) An order compelling the plaintiffs and the 1<sup>st</sup> respondent to sign transfer forms and or provide documents to facilitate transfer of the 30 acres to him.
  - (c) Permanent injunction stopping the plaintiffs and the 1<sup>st</sup> respondent from encroaching, alienating and or interfering with his quiet possession of 30 acres, out of LR No. 2217/3.
30. From the pleadings, it is clear that each of the parties have pleaded before the court. The court record shows that the plaintiff came under certificate of urgency application dated 28/11/2022 seeking for temporary injunction to restrain the defendants from carrying out cultivation, selling, subdividing or in any dealing with Kitale/Municipality LR No. 2217/3 and for specific performance for the 1<sup>st</sup> respondent to surrender the 30 acres of land for onward registration under the name of the plaintiff.



The 1<sup>st</sup> respondent filed a replying affidavit sworn on 24/1/2023. A further affidavit sworn by Linda Chelimo Saina dated 13/3/2023 was also filed.

31. By a consent dated 24/5/2024, the application dated 3/5/2022 was withdrawn with no orders as to costs. The parties were granted leave to amend the plaint. According to the applicants, a prima facie case has been established to warrant the grant of the reliefs sought. A prima facie case is one based on the material before court, a right has been infringed by the other to call for a rebuttal or explanation from the opposite party. See *Mrao Ltd* (supra). In this suit the further amended plaint refers to an agreement on 30 acres of land described as formerly known as Kitale Municipality Plot No. 2217/3. The respondents equally, other than stating that it does not exist and the orders sought cannot legal and practically be tenable, have not described in their pleadings the subsequent subdivisions of the initial land.
32. Again, the 1<sup>st</sup> respondent has attached a surrender dated 16/8/2017, in which the 1<sup>st</sup> applicant surrendered the grant title No. IR. 18294/1 and deed plant No. 76360 in respect of LR No. 2217/3, being approval of subdivision, conversion and issuance of title deeds under Cap 300. Through a letter dated 15/3/2018, the Director of Surveys tilted conversion of Registration of Titles Act Cap 281 to Registered Land Act Cap 300 on LR No. 2217/3 and 4 Trans Nzoia County, forwarded new RIM to the Chief Land Registrar Nairobi for the new registration Block Chepsiro/Kibuswa/Blocks 5-97 F/B 399/3-4, 564/177. By another letter dated 18/9/2023, the Land Registrar Trans Nzoia wrote to the Deputy Registrar, Eldoret Law Courts confirming that green card for Chepsiro/Kibuswa Block 5 had been opened. The Land Registrar also provided the area list for Chepsiro/Kibuswa Block 5.
33. In the 1<sup>st</sup> applicant's further affidavit dated 17/2/2025 at paragraph 4, she admits that the suit land is currently registered as Chepsiro/Kibuswa Block 5. There are no copies official search certificates attached to either the applicants or the respondents replying affidavits for the court to know who is the registered ownership of the land described as comprising 30 acres, formerly LR No. 2217/3.
34. A copy of record, certificate of lease or title is what a court of law is to take as prima facie evidence that the person described there is the absolute owner of the suit land. There is evidence that the 1<sup>st</sup> applicant is the legal representative of the estate of their late father and mother. Under the law, the estate of a deceased person vests and devolves in a legal representative. It is not clear to me if the estate after the conversion of the LR No. 2217/3 to Chepsiro/Kibuswa Block 5-97 vested and or revolved in the names of the 1<sup>st</sup> applicant as the legal administratrix. The respondents have pleaded that the initial title does not exist, and that the 1<sup>st</sup> applicant is the one who facilitated the subdivision, issuance, transfer and registration of the 30 acres of land in favour of the 2<sup>nd</sup> respondent, hence it defeats logic why she would not know how the 30 acres of land out of the sale agreement dated 8/11/2022 came to be owned by the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent in his statement of defence and counterclaim has not defined the date, time, parcel numbers, the date and the particulars of when he acquired the 30 acres through the participation of the 1<sup>st</sup> applicant. Strangely, the 2<sup>nd</sup> respondent has not sworn an affidavit to oppose the application before court. All what he has done is to file an amended statement dated 10/2/2025 where he says that he is a lawfully registered owner of parcel known as Chepsiro/Kibuswa Block 5/49 5/77, 5/79, 5/88, 5/93 and 5/97. The said parcels of land were never captured if they ever existed, in the statement of defence and counterclaim or in the earlier witness statement.
35. The 2<sup>nd</sup> respondent refers to a purchase of the 30 acres by an agreement dated 8/8/2011. The said agreement as attached to the replying affidavit of the 1<sup>st</sup> respondent as annexure marked SC-2. From the face of it, the vendors described as Linda Chelimo Saina and Calvin K. Saina, the applicants herein. The signatures of the vendors are missing in the sale agreement. The witnesses to the sale agreement have not appended their signatures to it, including the law firm which prepared the sale. It is trite law



- that property belonging to the estate of a deceased person can only be sold, transferred and registered through a legal representative. Any sale, transfer and dealing with the estate of the deceased person without the involvement, participation and approval of a legal representative is invalid, null and void ab initio. The 1<sup>st</sup> applicant as the legal representative of the estate, part of it being Chepsiro/Kibuswa Block 5, formerly LR No. 2217/3. In my view, she cannot be said to have no locus standi to file this suit.
36. At the time the transactions involving the estate were taking place, the person holding power to sanction such activities was the 1<sup>st</sup> applicant. The 1<sup>st</sup> applicant is now before this court to enforce legal powers and obligations which vest in her as a legal representative of the estate, including the manner in which the suit properties were dwelt with to the detriment of the estate by the defendants generally and in particular to defeat the intention of the beneficiaries, through an agreement dated 8/7/2011 said to have been executed through a purported agreement dated 8/8/2011 to give the 30 acres to the 2<sup>nd</sup> respondent without the knowledge, consent and approval of the 1<sup>st</sup> applicant.
  37. The 1<sup>st</sup> respondent has pleaded that the current suit is aimed at defeating her application to challenge the amended certificate of confirmation of grant before the High Court Eldoret. The jurisdiction of the High Court and courts of equal status is clearly spelt out under Articles 162 2(b) and 165 of *the Constitution*. The High Court has no jurisdiction whatsoever over matters that fall within the jurisdiction of the Environment and Land Court under Article 162(2) of *the Constitution*. The issue of whether the sale agreement between the applicants and the 1<sup>st</sup> respondent has been breached or not and the legal consequences of the breach falls under the jurisdiction of this court. Secondly, the issue of claim on land by third parties to the estate which ideally is where the 2<sup>nd</sup> respondent's statement of defence and counterclaim falls, cannot be handled by the High Court in a succession cause.
  38. In Re Estate & Alice Mumbua Mutua, (Deceased) [2017] eKLR the court held that a dispute between a buyer and a seller of land, hinges on whether the buyer should have possession or occupation thereof, is about title, for the buyer is no doubt asserting entitlement to the property having exchanged money with the sellers over the same. The court said that such a dispute falls squarely under Article 162(2) of *the Constitution*, effectively ousting the jurisdiction of the High Court by virtue of Article 165(5) of *the Constitution*. The court went on to say that the function of a probate court is to facilitate collection, or preservation of the estate, identify the survivors and beneficiaries and to distribute the assets, and to deal with any disputes between the personal representatives, survivors, dependants and beneficiaries. The court said that claims by and against third parties, who are neither survivors of the deceased nor beneficiaries are for resolution outside of the frameworks set out in the *Law of Succession Act* and Probate and Administration Rules. The court said that disputes between the estate and third parties are to be dwelt with through the legal infrastructure before a civil court, and where they arise after confirmation of the grant, then they ought to be determined outside the probate court, for the probate court would most probably be functus officio.
  39. In this suit, there is no dispute that the estate of the deceased was distributed to the beneficiaries going by the annexed confirmation of grant issued on 27/6/2011. LR No. 2217/3 from that date was given to vest on the 1<sup>st</sup> applicant. Any transaction over the estate comprised of the LR No. 2217/3 falls for determination before this suit. The 1<sup>st</sup> applicant's capacity is clearly stated in the amended confirmation of grant, that has not been set aside, varied and or revoked. The rights of the 1<sup>st</sup> applicant to challenge any dealings, title, use and occupation of land belonging to the estate are properly before this court. A prima facie case has been established.
  40. The applicants are challenging sale of the land that occurred almost a month after the 1<sup>st</sup> applicant became a legal representative, to give out 30 acres of what ideally had been shared out in a previous agreement on 8/7/2011 between the beneficiaries. Taking away 30 acres of land in a manner not



sanctioned by the legal representative in favour of the 2<sup>nd</sup> respondent, who is not a beneficiary or survivor to the estate of the deceased is an affront to the power, right and duties of the 1<sup>st</sup> plaintiff as the legal representative and the 2<sup>nd</sup> applicant who is a beneficiary of the estate of the deceased.

41. Irreparable damage held in *Nguruman Ltd* (supra) is where if damages are recoverable in law, as an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted. The court said that speculative injury will not suffice, there must be more than unfounded fear or apprehension on the part of the applicant, as the equitable remedy of injunction is issued solely to prevent grave and irreparable injury that is actual, substantial, and demonstrable that cannot adequately be compensated by way do damages. In *Mrao Ltd*, (supra) the court said that evidence must be there to show an infringement of a right and the probability of success of the applicant's case upon trial. In this suit, there is an unmistakable right to the 1<sup>st</sup> applicant and the 2<sup>nd</sup> applicant as legal representatives and or beneficiaries to the suit land that has invariably been invaded by a third party, the 2<sup>nd</sup> respondent. Material which is substantive has been laid bare before this court and to which the 2<sup>nd</sup> respondent has admitted that he is now bona fide owner of the 30 acres of land courtesy of the 1<sup>st</sup> applicant. The sale agreement giving rise to that bona fide purchaser's 'right' unfortunately does not comply with Section 3(3) of the *Law of Contract Act* and Section 38 of the *Land act*.
42. In *Nguruman Ltd* (supra), the court said that an applicant need not establish title, so long as he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. In *Paul Wanjohi Mathenge -vs- Duncan Gichane Mathenge* [2013] KECA 1999 [KLR], the court observed that the right to a hearing is sacrosanct and the court should protect the integrity of court processes from abuse that would amount to injustice and that at the end of the day there should be proportionately as held in *Richard Nchapi Leiyagu -vs- IEBC & Others* Civil Appeal No. 18 of 2013. Preservation of the estate of the deceased and which belongs to the 2<sup>nd</sup> applicant and the 1<sup>st</sup> respondent and especially the suit property pending their hearing and determination of the suit is what the court is called upon through as interlocutory stage to undertake.
43. Temporary injunctions are granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and grant to the plaintiff of the relief to which his cause of action entitles him which may or may not be a final injunction. See *Siskena* [1977] 3 ALLER 824. What the applicants however are claiming are to enter into the suit premise are temporarily plough 30 acres of land. They also want an order in nature of specific performance that 30 acres be demarcated by the County Land Registrar and Surveyor from the larger Kitale Municipality No. 2217/3.
44. In *Paul Gitonga Wanjau -vs- Gathuthi Tea Factory Co. Ltd & Others* [2016] KEHC 7263 [KLR], it was observed that a court makes a determination as to which party will suffer the great harm with the outcome of the motion, and that the court will maintain the status quo in determining where the balance of convenience lies. In *Nation Media Group & Others -vs- John Harun Mwau* [2014] KECA 308 [KLR], cited *KBL -vs- Washington Okeyo*, Civil Appeal No. 332 of 2000, that a mandatory injunction can be granted at interlocutory application where there are special circumstances, the case is clear and where the defendant attempted to steal a match on the plaintiff. The court said that besides existence of exceptional and special circumstances temporary mandatory injunction can only be granted in exceptional and in the clearest of cases.
45. In *Reliable Electricals Engineers Ltd* (supra), the court said a mandatory injunction requires the taking of positive steps that may sometimes require the dismantling or destruction of something already effected or constructed. The test of granting mandatory interlocutory injunction was laid in *Kamau Machuha -vs- The Ripples Ltd* Civil Appl. Nairobi 186 of 1992. The court said that it is granted



where there is a high degree of assurance that at the trial it would appear that the injunction was rightly granted. Guided by *Naftali Ruthi Kinyua -vs- Patrick Thuita Gachure & another* [2015] eKLR .

46. I think the dispute herein consists competing interest of the applicants and the 2<sup>nd</sup> respondent to the suit property limited to 30 acres and the balance in favour of the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent who is a third party to the estate of the deceased says that he has been in occupation out of a sale agreement. On the other hand, the 1<sup>st</sup> respondent is silent on the balance of the estate which she undertook to subdivide and give out that he applicants in exchange of the Kshs. 6,000,000/= given to her out of the Elgon House sale. The respondents defiantly appear to be stealing a match from the applicants, in order to defeat the sale agreement which, the applicants are seeking for specific performance. In *Joseph Kaloki T/A Royal Family Assembly -vs- Nancy Atieno Ouma* [2020] KECA 831 [KLR], the court cited with approval *Sharif Abdi Hassan -vs- Nadhif Jama Adan* [2006] eKLR, that mandatory injunction may not be granted unless the party it is sought against is on the wrong and to ensure that justice is meted out without the need to wait for full hearing of the entire case.
47. In this suit, the court is aware that before the initial application was withdrawn, there were attempts by the parties to agree on maintenance of status quo, but were unable to define what the status quo was. There has been material non-disclosure on the part of the defendants. The 2<sup>nd</sup> respondent's counterclaim is for declaration that he is a bona fide owner of 30 acres excised from LR No. 2217/3 having bought from the applicants for Kshs.6,000,000/= and an order compelling the applicants and the 1<sup>st</sup> respondent to transfer the suit land to his name. He also seeks a permanent injunction. The 2<sup>nd</sup> respondent has now signed an amended witness statement mentioning several title deeds. There is no replying affidavit to the motion before court by the 2<sup>nd</sup> respondent. He has not challenged the supporting and further affidavits by the applicants. The 1<sup>st</sup> respondent cannot speak for the 2<sup>nd</sup> respondent on matters regarding how the 2<sup>nd</sup> respondent has obtained titles to the land under contest during the pendency of the suit. If the titles for LR No. Chepsiro/Kibuswa Block 5/49, 5/77, 5/79, 5/88, 5/93 and 5/97 were available at the inception of this suit and at the time the 2<sup>nd</sup> respondent filed and served the statement of defence and counterclaim he would definitely have disclosed at the very least what he owns. He would not have been seeking to be declared the owner and sought an order compelling the plaintiffs and the 1<sup>st</sup> respondent to transfer or facilitate the process of excision and transfer of the 30 acres out of the initial parcel Number.
48. Equally, there appears to be double speak on the part of the 1<sup>st</sup> respondent, that there was sale transfer and registration of 30 acres of land meant for the plaintiffs with the 1<sup>st</sup> applicant's full consent, participation and approval.
49. I decline to grant the order of specific performance at this stage. In the interest of justice, I issue orders for the maintenance of status quo, that is to say that the Land Registrar is inhibited from registering any dealings over register for LR No. Chepsiro/Kibuswa Block 5/4-97, which are the resultant titles to the conversion of former LR No. 2217/3, following surrender of the grant by the 1<sup>st</sup> applicant through a notice dated 16/8/2017 and letter of conversion from Registered Titles Act to Registered *Land Act* dated 15/3/2018 by the Director of Surveys to the Chief Land Registrar and confirmation by the Land Registrar, Kitale on opening of green cards thereof dated 18/9/2023.
50. The applicants having been aware of the surrender, conversion and issuance of new titles to the land, have not specified out of which titles the court should order for temporary cultivation pending hearing and determination of the suit. Court orders cannot issue in vain. A party moving to court should be specific to what really the court should grant. From the perspective of all the parties pleading and disposition, it is quite evident that both sides are being economical with the truth. Though the applicants have established a prima facie case, in find that the applicants have failed to demonstrate



irreparable loss and damage and the balance of convenience titles in favour of issuing temporary mandatory orders. Special or exceptional circumstances have not been demonstrated. There has also been non-material disclosure on both sides. See Lucy Wangui Gachara -vs- Minudi Okemba Lore [2015] eKLR.

51. The second prayer sought can only be issued at a final hearing. The application, save for issuance of inhibitory orders under inherent jurisdiction of this court under Section 68 of the [Land Registration Act](#), Section 18(c) [Environment and Land Court Act](#) and Section 3A of the [Civil Procedure Act](#), stands dismissed with no order as to costs.

**RULING DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 11<sup>TH</sup> DAY OF JUNE 2025.**

**HON. C.K. NZILI**

**JUDGE, ELC KITALE.**

In the presence of:

Court Assistant - Dennis

Simiyu for Applicant present

Kosgei for 2<sup>nd</sup> Defendant present

Kenei for the 1<sup>st</sup> Defendant present

