



**Stuart v Mwalimo & 3 others (Environment and Land Case  
E009 of 2025) [2025] KEELC 5829 (KLR) (9 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5829 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT AND LAND CASE E009 OF 2025**

**LL NAIKUNI, J**

**JULY 9, 2025**

**BETWEEN**

**COLIN STUART ..... PLAINTIFF**

**AND**

**JAPHETH PHIDELIS LUMERENI MWALIMO ..... 1<sup>ST</sup> DEFENDANT**

**KIREGA ..... 2<sup>ND</sup> DEFENDANT**

**TENANTS & SQUATTERS OF KWALE /UKUNDA/397 ..... 3<sup>RD</sup> DEFENDANT**

**TENANTS AND SQUATTERS OF KWALE/DIANI BEACH BLOCK/683 &  
684 ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

**I. Introduction**

1. Before the Honourable Court for its determination is the Notice of Motion application dated 30<sup>th</sup> January 2025. It was brought by Colin Stuart, the Plaintiff/Applicant herein. It was under the dint of the provisions of Order 51 Rule 1, Order 1 Rules 3 and 8, Order 40 Rules 1,2,3, 10 and 11 of the Civil Procedure Rules, 2010 and Sections 1A, 1B, 3A and 91 of the *Civil Procedure Act*, Cap. 21; Sections 152, 152A, 152B, 152E, 152F[2][a] and [b] 152[G][1],152[H] of the *Land Act*, No. 3 of 2012 and Sections 45[1] and [2] of the *Law of Succession Act*, Cap. 160 and all other enabling provisions of the law.
2. The application was opposed vide a Replying Affidavit dated 19<sup>th</sup> May, 2025 and sworn by the 1<sup>st</sup> Respondent and whose contents will be outlined and discussed later in the ruling.

**II. The Plaintiff/Applicant's case.**

3. The Plaintiff/Applicant sought for the following orders:-



- a. Spent.
  - b. Spent.
  - c. That this Honourable Court do issue a temporary injunction against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents pending the hearing and determination of this application to restrain the Respondents by themselves or through their agents and/or assigns from intermeddling with the estate of the late Rolf Robert Meier through continued possession and/or control of and collection of rental income from the 3<sup>rd</sup> and 4<sup>th</sup> Respondents herein.
  - d. That this Honourable Court do issue a temporary injunction against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents pending the hearing and determination of the suit to restrain them from continued control, possession and collection of rental income from the Kwale/Diani Beach Block/683, Kwale/ Diani Beach Block/684 and Kwale/Ukunda/397[ the suit properties]
  - e. That this Honourable Court do issue a temporary injunction against the 3<sup>rd</sup> and 4<sup>th</sup> Respondents to restrain them from remitting rent from the suit properties to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents pending the hearing and determination of this application and suit.
  - f. That thus Honourable Court be pleased to issue a temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from alienating, wasting or dealing with the suit properties in any manner whatsoever pending the hearing and determination of this application and suit
  - g. That this Honourable Court be pleased to grant orders for preservation of the suit properties to prevent any further invasion and /or encroachment into the suit properties and inspection to establish the numbers of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents and actual rents collected on the suit properties pending both the hearing and determination of this instant application and suit
  - h. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be ordered to restore the estate of Rolf Robert Meier through payments of the back rents collected from June 2013 to date and paid to the court to release to the applicant and beneficiaries upon the hearing and determination of this instant application and/ or suit
  - i. That the Applicant be given temporary control or possession of the suit properties pending the hearing and determination of this application in his capacity as creditor of the estate and the recipient of the power to act on behalf of the beneficiaries of the estate of Rolf Robert Meier
  - j. That the 3<sup>rd</sup> and 4<sup>th</sup> Respondents be granted leave to stay on the suit properties only if they negotiate for fresh leases or tenancy agreements and pay rent to the Applicant in his capacity as the creditor to the estate and holder of the power to act on behalf of the beneficiaries of the estate of Rolf Robert Meier
  - k. That this Honourable Court grants any other reliefs that may deem just and fair to grant under the circumstances
  - l. That costs of this application be provided for
4. The application is premised upon the grounds, testimonial facts and the averments made out under the 25 Paragraphed supporting affidavit of Colin Stuart dated 30<sup>th</sup> January 2025. He averred as follows that:-
- a. He was the Applicant herein and thus conversant with the facts of the matter and competent to swear this affidavit.



- b. The suit properties being Kwale/Diani Beach Block/683; 684; and 397 (Hereinafter referred to as “The Suit Properties”) all belonged to his late friend Rolf Robert Meier (Hereinafter known as “The Deceased”) and were registered in his names when the deceased passed on intestate in June 2013.
- c. The 1<sup>st</sup> Defendant was well known to him as the Applicant was once a tenant in one of the suit properties being Kwale/Ukunda/397 a commercial building where he successfully ran a butchery business. He knew him as the caretaker of Dido Bazaar located on one of the suit properties – Kwale Diani/Beach Block no. 397.
- d. When the deceased passed away intestate, the 1<sup>st</sup> Respondent successfully instituted a succession cause and purported to be the only beneficiary of the deceased estate and illegally obtained a Grant of Letters of Administration but the same was eventually revoked.
- e. The 1<sup>st</sup> Respondent appealed against the said decision at the Court of Appeal but the appeal never took off for as the Notice of Appeal was never served in time and the application to strike out the appeal was allowed.
- f. Prior to filing of the succession cause, the 1<sup>st</sup> Respondent had taken occupation of the suit properties and was collecting rent. That the applicant was evicted from his business after the 1<sup>st</sup> Respondent tampered with the flow of water to his butchery and also faulted the electricity lines which amounted to constructive eviction.
- g. The Applicant was given consent to pursue the assets of the estate of the deceased by the rest of the beneficiaries. While trying to access the suit properties physically he learnt that the 2<sup>nd</sup> Respondent was busy collecting rent from the premises and efforts to give notice for them to cease such collection have proved futile.
- h. Due to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent constructive eviction through diversion of electricity and water from the Deponent’s butchery business within Dido Bazaar situated on suit properties No. 683 and 684 and which he run through his company known as Sea Turtle Limited and forced to leave out of frustration he experienced and thus lost his business.
- i. He incurred heavy losses he resolved to assist the estate of the deceased and getting rid of the 1<sup>st</sup> Respondent from the Estate.
- j. He was able to obtain the Power to Act on behalf of the beneficiaries of the Estate of the Deceased.
- k. In the process the Deponent also learnt that the 2<sup>nd</sup> Respondent having been an employee of the deceased had gained physical access and control of the suit property known number 397, He was collecting rent without remitting it to the Estate of the Deceased.
- l. He had tried on several occasions to gain entry to the suit properties and even issued eviction notices to the Respondents for them to leave the properties but in vain. He even reported the matter and recorded statements at Diani police station.
- m. Criminal cases were instituted against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. They all had ill intentions and motive to attain the 12 years threshold and requirement for claim of the suit properties allegedly having been on it continuously and uninterruptedly.



- n. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents never had any locus standi or any lawful authority to occupy, manage or control the suit properties whereas the deponent had the Power to Act for the Estate of the Deceased.
- o. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents had also been served with the relevant notices to vacate the suit properties that they are in occupation of but had failed to heed to the said notices.
- p. The Public Trustee's office had failed to abide by the order issued to it by the family Court and take control of the properties belonging to the Estate of the Deceased on behalf of the beneficiaries leading to the current situation of numerous intermeddling of the Estate.
- q. He prayed that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be restrained from possession and control of the suit properties while the 3<sup>rd</sup> and 4<sup>th</sup> Respondents be allowed to stay on the suit properties once they will have negotiated fresh tenancy agreements with the Applicant and commenced payment of the rent.
- r. Thus, the Applicant prayed that the orders sought be granted pending the hearing and determination of the application and suit.

### **III. The further affidavit by the Plaintiff/Applicant**

5. With the leave of Court, the Applicant filed a 25 Paragraphed Further Affidavit sworn by Colin Stuart and dated 22<sup>nd</sup> May, 2025 in further support of the Notice of Motion application and main suit. He averred as follows that:-
  - a. Further to his previously sworn affidavit in support of the notice of motion application, he wanted to give a detailed chronology on how he obtained ownership of the three suit properties.
  - b. The suit properties were originally owned and registered in the name of Rolf Robert Meier[deceased] who died intestate in year 2013. His immediate family did not take over succession of the estate but instead the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who were employees to the deceased took possession of the property and obtained a grant of administration over the estate of the deceased.
  - c. The deceased beneficiaries discovered the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's actions and moved the High Court in Mombasa HC Succession Cause No 359 of 2014 challenging the illegal grant which was then revoked by the court.
  - d. For clarity sake, the beneficiaries of the estate include Nick Odongo and his siblings/relatives- namely Lilian Adhiambo Odongo, Judith Atieno Odongo, Grace Akinyi Odongo, Nelly Anyango Puntheller, David Odhiambo Odongo, and Evans Otieno Odongo-as noted in the court proceedings and documents.
  - e. Despite the revocation of the Respondents' grant and the appointment of Nick Odongo as administrator, the estate remained largely unadministered in the ensuing period. The Court had expected the Public Trustee's office (or the appointed administrator) to take control of the estate assets (including the suit properties) for the benefit of the beneficiaries. However, due to inaction on the part of the Public Trustee and other administrative hurdles, no effective steps were taken to secure the suit properties from the intermeddling Respondents.
  - f. Consequently, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents continued in possession of the properties and continued to collect all rental income therefrom, to the detriment of the estate.



- g. Given the stalemate and the ongoing intermeddling by the 1<sup>st</sup> and 2<sup>nd</sup>, the beneficiaries of the estate sought the deponent's assistance. He was a close friend and business associate of the late Rolf Meier, and he had already been financing the family's legal efforts to reclaim the estate.
- h. On or about the year 2018, the beneficiaries executed a formal Power of Attorney/"Power to Act" and a Family Consent in his favour, thereby authorizing him to act on behalf of the estate and the beneficiaries in matters concerning the suit properties. In essence, the family consented to him taking all necessary measures-including legal action - to preserve and recover the suit properties, and also acknowledged his financial interest as a creditor of the estate - for the funds the Deponent had expended on the succession and preservation efforts.
- i. Armed with this authority from the beneficiaries and in light of the continued failure of the Public Trustee or any official administrator to secure the properties, the Deponent undertook to have the suit properties transmitted and registered in his name in trust for the estate. The purpose of this was to formally vest legal title in a trustworthy hand.
- j. To effectuate the above plan, an application for transmission of the titles was made to the Land Registrar, Kwale District. The family appointed administrator (Nick Odongo) and all primary beneficiaries gave their written consents to this course of action, recognizing the Deponent as the family's appointed agent/trustee for the suit properties. The Land Registrar examined the succession court records and the consents, and then invoked the procedure under the Land Registration Act, 2012 for registration of an interest by transmission.
- k. Specifically, the Land Registrar, Kwale prepared a formal notice of the intended registration by transmission and forwarded it to the Government Printer for publication in the Kenya Gazette, as required. The Land Registrar's letter to the Government Printer (Nairobi) requesting publication of the notice was dated on or about 31<sup>st</sup> July 2024.
- l. Following the above, Gazette Notice No. 11767 dated 13<sup>th</sup> September 2024 was published in the Kenya Gazette, Volume CXXVI, No. 186 (the issue dated 13<sup>th</sup> September 2024, notifying the public of the intended registration of instruments of transfer by transmission in respect of the suit properties. The Gazette Notice expressly named the Deceased as the registered proprietor of "all those pieces of land known as Diani Beach Block 684 and 683 and Kwale/Ukunda/397" and noted that a Grant of Letters of Administration for his estate had been issued to Nick Stephen Omondi Odongo on behalf of the listed beneficiaries. The Notice further stated that after 30 days from its date, and provided no objection was received, the Land Registrar intended to register the properties in the name of Colin Stuart, who "was appointed to act on behalf of the administrators and beneficiaries in the matter of the estate of Rolf Robert Meier (deceased) under Succession Cause No.359 of 2014 and 273 of 2013, and in the matter of the estate of Emily Achieng Odongo (deceased) under Succession Cause No.372 of 2014.
- m. Thus, the Gazette Notice gave formal public notice of the Deponent's proposed registration as proprietor by transmission, in trust for Mr. Meier's estate.
- n. The purpose of the Gazette Notice was, among other things, to dispense with the production of the original title deeds for the suit properties and to invite any objections from interested parties within the stipulated period (30 days).
- o. No objection or caveat was lodged by any person in response to Gazette Notice No. 11767 within the 30-day period or thereafter. In particular, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents never filed



any objection to the deponent's intended registration trustee. Accordingly, upon expiry of the notice period (on or about 13<sup>th</sup> October 2024 the Land Registrar proceeded with the registration process as planned. The necessary statutory forms (including the appropriate transmission and transfer forms under the Land Registration (General) Regulations, 2017 - e.g., Form LRA-39 and Form LRA-where applicable) were executed and presented at the registry. The registration was done by way of transmission, meaning it was a vesting of the deceased's interest in a personal representative/trustee rather than a transfer for value.

- p. As a result of the foregoing, the Deponent became the registered proprietor of the suit properties (in his capacity as trustee for the estate of the Deceased). Specifically, on 8<sup>th</sup> January 2025, the Land Registrar, Kwale issued new Certificates of Lease for Kwale/Diani Beach Block/683 and Kwale/Diani Beach Block/684 in the Deponent's name. Each certificate of lease, dated 08<sup>th</sup> October, 2025 and signed/sealed by the Land Registrar, reflected "Colin Stuart" as the registered lessee/proprietor, with an endorsement that he held the title in trust for the estate of Rolf Robert Meier (deceased) and his beneficiaries
- q. Similarly, on 10<sup>th</sup> January 2025, the Land Registrar, Kwale issued a new Certificate of Title (freehold title) for Kwale/Ukunda/397 in my name. The Certificate of Title, dated 10<sup>th</sup> January, 2025, shows "Colin Stuart" as the registered proprietor of Kwale/Ukunda/397, again noting that he held the title in trust for the estate of the late Rolf Meier.
- r. With the issuance of the above titles, the legal ownership of the suit properties was now vested in him as the registered proprietor, albeit in trust. As his registration as owner was for the benefit of the estate and the rightful heirs of the Deceased, and not for the Deponent's sole benefit. He was just a trustee and personal representative. The above-described transmission and registration was lawful and valid. It was carried out pursuant to the Judgment and proceedings in Succession Cause No. 359 of 2014 (which confirmed the beneficiaries and administrator), the consent of all beneficiaries, and the statutory process under the [Land Registration Act](#), 2012. No aspect of the process had been challenged to date. Therefore, as matters stood, he was the lawfully registered proprietor of Kwale/Diani Beach Block/683, 684 and Kwale/Ukunda/397, holding such title in trust for the estate of the deceased.
- s. His name appeared on each title as the owner, and the previous ownership by the Deceased had been transmitted accordingly.
- t. The court was urged to allow the application for the estate of the deceased to be preserved from intermeddling pending the determination on ownership as raised in the suit.

#### **IV. The responses by the 1<sup>st</sup> Defendant/Respondent**

- 6. While opposing the application, the 1<sup>st</sup> Respondent filed a 15 Paragraphed Replying Affidavit sworn by Japheth Phidelis Lumereini Mwalimo, the 1<sup>st</sup> Defendant/Respondent herein on 19<sup>th</sup> May 2025. He averred as follows that:-
  - a. The Applicant never had any locus standi in instituting the suit as he had not demonstrated any legally recognised authority to act on behalf of the beneficiaries of the estate of the Deceased.
  - b. The alleged Power to Act on behalf of the beneficiaries had not been registered or filed in Court rendering the Plaintiff as a mere busy body and intermeddler with no legal right to bring this action.



- c. He was left in management and control of the estate of the Deceased and had continued to be in charge with the blessing of the sole surviving beneficiary Gabriela Hoppler Meier.
  - d. The Applicant was a mere tenant in the estate and was currently in rent arrears.
7. The entire Estate was entrusted to him by the Deceased to administer and oversee including the collection of rent from tenants which responsibility he faithfully discharged both during the lifetime of the deceased and thereafter.
  8. The only sole surviving beneficiary, Gabriela Hoppler Meier, was in the process of filing a succession cause before the family Court.
  9. The application before the Court was fatally defective, unmeritorious and an abuse of the due process.
  10. The Plaintiff failed to demonstrate any “prima facie” case to warrant the injunctive orders; that he would suffer any irreparable harm.
  11. The balance of convenience was in favour of allowing the management of the Estate by the defendants until the time as the Family Court shall issue appropriate directions.
  12. The three (3) suit properties formed part of the estate of the deceased and were subject of an active succession process and hence this court had no jurisdiction on the same.
  13. The claim by the Plaintiff of having financed the Succession Cause never vested in him any legal right over the estate or the subject properties It was averred that the application was therefore defective and an abuse of the court process. The applicant prayed that the suit and application be dismissed.

#### **V. A Supplementary affidavit by the Plaintiff/Applicant**

14. In response to replying affidavit to the application as sworn by the 1<sup>st</sup> Respondent, the Plaintiff/Applicant filed a supplementary affidavit sworn on 26<sup>th</sup> May 2025. He averred that contrary to the averments raised by the 1<sup>st</sup> Respondent that he did not have locus standi, he was the registered proprietor of Kwale/Ukunda/397, Kwale/Diani Beach Block/683 and Kwale/Diani Beach Block/684 by transmission and holding the titles in trust for the estate of the Deceased and his beneficiaries.
15. It was evidenced by the gazette notice no 11767 published on 13<sup>th</sup> September 2024 and the certificate of lease issued in January 2025.
16. The allegations of intermeddling were denied and the applicant stated that he was acting with the authority of the estate beneficiaries and the judgement in succession cause no 359 of 2014 which revoked the respondents fraudulent grant.
17. Further that the allegation that Gabriela Hoppler Meier was a sole beneficiary was false as she had renounced her benefit to the estate of her late father. The other two beneficiaries Grace Akinyi Onyango and Nelly Anyango Puntheller had been recognised by the court which ordered that the estate be distributed to them but the public trustee was yet to do the distribution.
18. On jurisdiction it was averred that this court has the requisite jurisdiction to deal with the matter as the same related to occupation and title of the land. That the suit was thus properly before court.

#### **VI. Submissions**

19. On 5<sup>th</sup> March 2025 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 30<sup>th</sup> January 2025 be disposed of by way of written submissions. Unfortunately, it was only the Plaintiff/Applicant who complied. This position was confirmed by the



Counsel for the Defendant. Pursuant to that, the Honourable Court reserved a date for delivering of the Ruling on 28<sup>th</sup> May 2025.

#### **A. The Written Submissions by the Plaintiff/Applicant**

20. The Plaintiff/Applicant through the Law firm of Messrs. Joram Wang'ombe & Associates Advocates filed their written Submissions dated 26<sup>th</sup> May, 2025. Mr. Wang'ombe Advocate recounted by holding that the submissions were made on behalf of the Plaintiff/Applicant, Colin Stuart. It was in support of his Notice of Motion application dated 30<sup>th</sup> January 2025 and the main suit. The Applicant sought for the orders as aforesaid. The submissions also rebutted the Replying Affidavit sworn by the 1<sup>st</sup> Respondent, Japeth Phidelis Lumereini Mwalimo, and reaffirmed the Applicant's lawful registration and standing as trustee of the estate of the late Rolf Meier – the deceased.
21. The Learned Counsel respectfully submitted that the Replying Affidavit contained misleading and inaccurate assertions that never defeated the strong legal and factual foundation of the Plaintiff's Application and suit.
22. He provided a brief background of the matter as follows. The suit properties were owned by the Deceased who died intestate in the year 2013. Shortly after his death, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, who had been the deceased's employees/caretakers, illegally took possession of the properties. They installed the 3<sup>rd</sup> and 4<sup>th</sup> Respondents who were among other tenants and squatters on the properties under their behest. They had since been collecting all rental income for their own benefit. In the year 2014, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents even procured a Grant of Letters of Administration over the deceased's estate through fraud. The said fraudulent Grant was later on revoked by the High Court in "Mombasa H.C. Succession Cause No. 359 of 2014" when the deceased's family intervened, restoring the estate to the rightful heirs. However, to date the estate had remained largely unadministered (due in part to inaction by the Public Trustee and administrative delays). As a result, the Respondents continued to occupy and profiteer from the properties without any colour of right.
23. Initially, the Applicant came into this matter as a lawful creditor and authorized agent of the estate's beneficiaries. He financed the deceased's family's succession proceedings. In the year 2018, he was given a Power of Attorney ("Power to Act") by the beneficiaries - effectively authorizing him to act on their behalf in preserving the estate assets and pursuing recovery of his advances. The Applicant also personally ran a butchery business on part of the suit land on Parcel No. 397. This was until the year 2016, when the 1<sup>st</sup> Respondent forcibly evicted him and shut down that business through harassment and intimidation. Thus, the Applicant had both a personal stake as a creditor who invested in the estate's cause and as one who was dispossessed of a business. He had the express backing of the beneficiaries (including a step-child of the deceased, Nick Odongo, who was informally chosen as administrator). The beneficiaries ceded authority to the Applicant to act in order to preserve the estate's assets and ensure the Respondents did not squander them.
24. Following the conclusion of the succession and land registration processes, the Applicant was now the registered proprietor of the suit properties, holding title in trust for the estate and the beneficiaries of the deceased. In particular, after the requisite family consents, a court Judgment in Succession Cause 359 of 2014, and the publication of the Gazette Notice No. 11767 of 13<sup>th</sup> September 2024, on 8<sup>th</sup> and 10<sup>th</sup> January 2025, the Kwale Land Registry issued new titles for the suit properties in the Applicant's name. The Applicant's title was expressly as trustee for the estate of the Deceased. It meant, he held the legal interest on behalf of the estate. This development as evidenced in the Applicant's Further Affidavit and annexures - greatly strengthened his legal standing and rights over the property, beyond



- merely being a creditor or interested party. He was now, for all intents and purposes, the personal representative/trustee controlling the suit land, tasked with safeguarding it for the beneficiaries.
25. By a Notice of Motion application dated 30<sup>th</sup> January 2025 the Applicant sought for the above stated orders. Essentially, the Applicant asked this Court to freeze the Respondents' unlawful activities on the land, redirect the income to the rightful estate, and ultimately facilitate the eviction of the Respondents so that the estate could be properly administered.
  26. The Learned Counsel averred that the submissions addressed the key issues arising for determination. That the Applicant met the legal threshold to be granted the injunctive and preservative orders sought. Further, it demonstrated that the Respondents' conduct amounted to illegal intermeddling with a deceased's estate and unlawful occupation of land, warranting the Court's intervention. It also highlighted the legal implications of the Applicant's recent registration as trustee of the suit land. The Learned Counsel submitted under the following three (3) legal issues for Court's determination. These were:-
    27. Firstly, on whether the Applicant had the issue of "the Locus Standi" (Legal capacity) to sue on behalf of the Estate. The Counsel informed Court that it was a fundamental principle of succession law that the estate of a deceased person can generally only be represented in legal proceedings by a person legally authorized to do so (typically an executor or administrator with a grant of representation). A suit filed by a person who has no authority or locus standi in respect of a deceased's estate is liable to be struck out as incompetent. This principle was pronounced in cases such as "Trouistik Union International & Another v Jane Mbeyu & Another (1993) KLR 230, "Julian Adoyo Ongonga v Francis Kiberenge Abano, Migori Civil Appeal No. 119 of 2015, "Isaya Masira Momanyi v Daniel Omwoyo [2017] eKLR, among others) and "Alfred Njau v City Council of Nairobi (1983) KLR 625", the Court of Appeal underscored that locus standi was the right to appear or be heard in court, and that proceedings instituted by a person without locus was a nullity.
    28. The Counsel averred that at the time of filing this suit (January 2025), the Applicant acknowledged that he had not been a court-appointed administrator of estate of the deceased. Instead, his standing was based on two key factors: (a) he was a creditor of the estate (a party with a financial claim against the estate, having funded the estate's litigation and upkeep) and (b) he was expressly authorized by the estate's beneficiaries (through a Power of Attorney and consents) to act in the interest of the estate. The law recognizes that creditors and beneficiaries have an interest in the proper administration of an estate. Indeed, the provision of Section 45 of the *Law of Succession Act* (Cap. 160) criminalizes the intermeddling with a deceased's property by any person, implying that those interested in the estate (including beneficiaries or even creditors) were entitled to move the court to restrain such intermeddling.
    29. The Counsel posited that courts have held that any person with a legitimate interest in a deceased's estate may approach the court for protective orders, even if they had not yet obtained a Grant, especially where the estate was in danger. In the case of "Re Estate of Benson Maingi Mulwa (Deceased) [2021] eKLR", Odunga J. observed:

"In my view, since intermeddling can be committed even by administrators, any person interested in the estate of a deceased person as a beneficiary or otherwise is properly entitled to move the court and seek orders intended to preserve the estate. It is therefore not mandatory that such an application be made by the administrators..."
    30. This meant that the Applicant's act of coming to court to safeguard the estate assets was not barred solely because he lacked a formal grant at that moment - the law allows a concerned party to seek interim



preservation of an estate to prevent waste. Furthermore, as was pointed out in the case of “Re Estate of Veronica Njoki Wakagoto (Deceased)[2013] eKLR, the court had inherent powers under Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules to issue any necessary orders to preserve the estate pending the appointment of an administrator. In fact, the High Court could even act “suo motu” to protect estate property from intermeddlers.

31. In the present case, the Applicant had more than a purely self-appointed interest. He had the blessing of the beneficiaries (including the person identified by the Family as their preferred administrator, Nick Odongo) to take action. Courts in Kenya had held that a beneficiary may apply to preserve estate property. For instance, in the case of “Re Estate of M’Ngarithi M’Miriti [2017] eKLR, the court elucidated that acts of taking possession of or leasing out estate property without authority amount to intermeddling, and that the court has wide powers to issue appropriate orders against any person to protect the estate. The Applicant, though a creditor, was essentially acting hand-in-hand with the beneficiaries, thus falling well within the category of “any person interested in the estate” who can seek protective relief.
32. He acknowledged that ordinarily a limited grant ad litem is the prudent course for a person wishing to sue on behalf of an estate. In some cases, suits filed without any Grant had been struck out (see, e.g., Daniel Njuguna Mbugua v Peter Kiarie Njuguna & 2 Others [2021]eKLR,” where lack of locus led to striking out). However, in the unique circumstances here - where the estate was under siege by intermeddlers and formal administration had stalled - denying the estate an avenue to seek this Court's aid would have caused irreparable harm. In fact, the family did obtain a full Grant for Nick Odongo and the Applicant was operating with the consent of that family appointed administrator. Thus, any technical objection to locus at the inception of this suit could have been overcome by enlisting Nick Odongo as a Co - Plaintiff or obtaining a quick ad litem grant.
33. The Counsel argued that the Applicant as the legal and absolute proprietor to the suit properties, he sought legal strength from the provisions of Sections 24, 25 and 26 of the Land Registration Act, No. 3 of 2012. Further, that the Applicant's ownership was acquired by transmission, a lawful process sanctioned by both the Succession Act and the Land Registration Act, and was gazetted for transparency and were all done with notice and consent of all relevant parties. Therefore, the Applicant now stood before this Court not just as an interested party, but as the holder of the very property rights in dispute. He has standing in his own right to seek protection of his property. Moreover, the Applicant's status as trustee for the estate meant he effectively steps into the shoes of an administrator pro tem. In sum, the Applicant had locus standi on multiple, reinforcing grounds: (1) as the registered owner of the suit land; (2) as a trustee and de facto personal representative of the estate; (3) as an estate creditor who has a financial stake in ensuring the estate assets are available to satisfy debts; and (4) as an agent/attorney of the beneficiaries (a role now overtaken by his trustee status. The Respondents, who were strangers to the title, could not credibly object to his locus when they themselves had no lawful status vis-à-vis the estate. Equity aids the vigilant, not the trespasser.
34. Secondly, whether the Respondents were unlawfully occupying the Suit Properties and Intermeddling with the Deceased's Estate. The Counsel contended that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, by taking possession of the suit land, collecting rents for themselves, and installing the 3<sup>rd</sup> and 4<sup>th</sup> Respondents on the properties were engaged in intermeddling with a deceased person's property contrary to the Law of Succession Act, Cap. 160. They were in unlawful occupation of land contrary to the law. Consequently, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents were also in unlawful occupation and subject to injunctive orders.
35. Thirdly, whether the Applicant had met the threshold for being granted a temporary Injunction orders. The Learned Counsel contend that the Applicant satisfied the requirements for a temporary



injunction under Order 40 of the Civil Procedure Rules, 2010. He had fulfilled all the requirements as set out in the classic test of the case of:- “Giella v Cassman Brown & Co. Limited [1973] E.A.358”.

36. However, the substance was that the estate (through its beneficiaries and admin) was behind the Applicant's actions. We submit that the Court should lean towards substantive justice (Article 159(2) (d) of *the Constitution*) and note that the suit was fundamentally for estate preservation, not a dispute between private third parties.
37. As of January 2025, the Applicant held legal title to the suit properties as the registered proprietor (in trust for the estate). Under the *Land Registration Act*, 2012, registration vests in the Applicant the absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto. The provision of Section 45(1) of the *Law of Succession Act* (Cap.160) provides:-
- “Except so far as expressly authorized by this Act or by any other written law, or by a grant of representation, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person”.
38. Any person who contravenes this provision is guilty of an offence (punishable by fine or imprisonment) and is also civilly liable for any loss caused. The term “free property” means the property which the deceased was legally competent to freely dispose during his lifetime and in respect of which his interest has not been terminated by his death. The suit properties unquestionably fell into that category, having been solely owned by the deceased at death.
39. The Learned Counsel held that the conduct of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents fitted within the definition of intermeddling as understood in law. Without any lawful authority, they “took possession” of the deceased's properties immediately upon his death and “disposed of” rights in the properties by installing tenants and collecting rents for themselves acts which were forbidden by law. To buttress on this point the Counsel referred Court to the case of:- “Re Estate of M'Ngarithi M'Miriti [2017] eKLR, the court stated that intermeddling included “taking possession, or occupation of, disposing of, leasing out, or receiving income from estate property without authority”, and generally any act that dissipates or puts at risk the free property of the deceased. Similarly, in the case of:- “Virginia Edith Wambui Otieno v Joash Ochieng Ougo [1987] KLR”, the court warned against any person dealing with a deceased's property before obtaining proper authority.
40. The Courts in Kenya considered Intermeddling as being a very serious matter. Musyoka J. in “Re Estate of Veronica Njoki Wakagoto (Deceased)[2013] eKLR explained: “The effect of Section 45 is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorized to do so by the law. Such authority emanates from a grant of representation, and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.”
41. In the present case, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had no Grant of representation at any material time. Their fraudulent Grant issued in the year 2014 was nullified ab initio. Thus, they never had any lawful capacity to handle the estate assets.
42. Despite of this, from the year 2013 to date for over 11 years, they had remained in possession of the properties, to the exclusion of the deceased's family. They had collected rental income from various structures or businesses on the land all those years. They had not accounted for a single cent to the estate. In fact, the available evidence showed that they had treated the properties as their own cash-cow, enriching themselves while the deceased's beneficiaries got nothing. They even went further to transfer or appropriate other assets of the deceased. They also evicted the Applicant from running a legitimate business on the land with the family's permission by force, which demonstrates the lengths of illegality



they went to. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are trespassers vis-à-vis the suit land. Trespass is defined as any unjustified intrusion by one person onto land in possession of another. The Respondents had brazenly flouted court orders and legal provisions. They were interlopers enriching themselves on the estate. Equity frowns upon such unjust enrichment. They also resorted to harassment and intimidation using violence and breach of peace if matters are left unchecked.

43. The Counsel submitted that the Applicant has demonstrated a clear “prima facie’ case of intermeddling and trespass against the Respondents, which entitles him to the relief sought. The principles for granting a temporary injunction are well settled in Kenyan law, deriving from the landmark case of “Giella v Cassman Brown & Co. Ltd [Supra]”. These principles have been consistently reaffirmed, including by the Court of Appeal in the case of: “Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR. In summary, the applicant must demonstrate: (a) a prima facie case with a probability of success; (b) that he stands to suffer irreparable injury which would not adequately be compensated by an award of damages if the injunction is not granted; and (c) if the court is in doubt, that the balance of convenience tilted in his favour. These are often called the “three pillars” of injunctions The Nguruman decision emphasized that the three conditions are to be applied as separate, sequential hurdles, and that if a prima facie case is not established, the inquiry ends there (the court should not grant an injunction). It also held that if damages are an adequate remedy, an injunction should not issue. The Applicant has overwhelmingly satisfied the test. The Counsel posited that a “prima facie case” was defined by the Court of Appeal in “MRAO Limited v First American Bank of Kenya Ltd [2003] KLR 125”
44. The Applicant was the registered owner (trustee) of the suit land. He had the right to possession and use of the land as enshrined in statute and *the Constitution* under Article 40. The Respondents had infringed this right by usurping possession and preventing the Applicant (and the estate beneficiaries) from accessing or benefiting from the land. The Respondents had not tabled any lawful contrary claim to the land. For instance, they were not saying that they bought the land nor claim inheritance.
45. The Counsel submitted on the second limb. The issue of irreparable injury. This required the Applicant to show that if an injunction is not granted, he was likely to suffer harm that could not be adequately compensated by damages. In the present case, the harm to the Applicant and the estate was grave and ongoing. The suit properties were income-generating coastal properties (including beach-block plots). Real property was generally considered unique. The estate had already lost use of these lands for over a decade. If the Respondents continued in possession, the estate continued to lose irreplaceable time and opportunity. While rental income could be computed, the opportunity to use the land for the estate’s benefit.
46. In conclusion on this limb, the balance of evidence tilted in favour of the Applicant in that damages would not be an adequate remedy and that injunctive relief is necessary to forestall irreparable injury to the Applicant and the estate.
47. The Counsel averred that in the event the Court had any doubt on the above two factors the balance of convenience heavily favoured maintaining the status quo in favour of the Applicant (estate) and preventing the Respondents from further acts. The Applicant’s Counsel further submitted on deposit of collected rent by asking that the Respondents be compelled to deposit all past rent collected since 2013 into court. He urged the Court to allow the application as prayed.

## VII. Analysis and Determination

48. I have carefully read and considered the pleadings herein, being the Notice of Motion application dated 30<sup>th</sup> January 2025 by the Plaintiff/Applicant, the replies by the Defendants/Respondents, the written



submissions and the plethora of authorities cited herein by the parties and the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.

49. In order to arrive at an informed, reasonable, fair and Equitable decision, the Honorable Court has three (4) framed issues for determination as follows:-
- a. Whether the Notice of Motion application dated 30<sup>th</sup> January, 2025 is incompetent for having been filed before the Applicant obtained a Grant of Letters of Administration in respect to the estate of the deceased.
  - b. Whether the Notice of Motion application dated 30<sup>th</sup> January, 2025 meets threshold required for granting orders of temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.
  - c. Whether the parties are entitled to the reliefs sought.
  - d. Who will bear the Costs of Notice of Motion application dated 26<sup>th</sup> June, 2023.

**ISSUE No. A). Whether the application dated 30<sup>th</sup> January, 2025 is incompetent for having been filed before the Applicant obtained a grant of letters of administration in respect to the estate of the deceased.**

50. Under this Sub – heading the Honourable Court will critically examine the legal issues of the legal capacity (“Locus Standi”) of the parties instituting the case. It is not in dispute that the suit properties herein belonged to the deceased. Further, it is also not in undoubted that after his demise, a succession cause was filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents but the same was later on revoked by the court. Pursuant to the directions of the High Court, Nick Stephens Odongo the step son to the deceased was made an administrator to the estate.
51. From the documents annexed to the Applicant’s affidavits, the beneficiaries to the estate of the deceased consented to making the Applicant a trustee of the estate of the deceased on their behalf. These enabled him to have the propertied transferred to his names in trust for the rest of the beneficiaries. The question therefore is whether or not it can be said that the Applicant has no locus to institute the suit on behalf of the deceased estate as a trustee.
52. The provision of Section 45 of the Succession Act provides as follows;
- “(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
- (2) Any person who contravenes the provisions of this section shall—
- (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
  - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”



53. Still on matter of legal representation in a Estate of a deceased person, Further Section 82 provides as follows;

“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.”

54. In the case of “Law Society of Kenya v Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000”, the Court held that: “Locus Standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue in Court of Law”.



55. Further, in the case of “Alfred Njau and Others v City Council of Nairobi (1982) KAR 229”, the Court stated that: “the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.
56. Similarly, in the case of:- “Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama [2014] eKLR the Court of Appeal held that-
- “...a litigant is clothed with locus standi upon obtaining a limited or full letters of administration in cases of intestate succession...”
57. The term “legal representative” is defined in section 2 of the Civil Procedure Act, Cap. 21 as-
- “a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.”
58. According to the the proceedings and determination of the court in Mombasa HC Succession Cause No....., it confirms that an administrator to the estate of the deceased was identified by the court. The consent presented before court confirms that the administrator and the rest of the beneficiaries to the estate of the deceased were in agreement that the Applicant would be the trustee to the estate and he would further take over the administration of the estate. Legally speaking, the Power of Attorney donated to him speaks to it. Therefore, this court opines that based on this evidence and further the Power of Attorney and consent by the beneficiaries, which I term crucial, the Applicant is well vested with the requisite “locus standi “to institute this suit on behalf of the Estate of the deceased and the beneficiaries thereof.

**ISSUE No. B). Whether the Notice of Motion application dated 30<sup>th</sup> January, 2025 meets threshold required for granting orders of temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.**

59. Under this sub – heading, the Honourable Court will extrapolate whether the Applicant was entitled to be granted the interim orders of temporary injunction in order to preserve the suit property. The Honourable Court takes cognisance of the fact that apart from other issues already dealt with above being the one on “the Locus standi” and intermeddling of the Estate of the deceased, the other exclusive substratum which was extensively pleaded from the filed application by the Applicant was the one on granting interim temporary injunctive orders. Thus, it behoves logic and fairness that the Court spends a bit of time comprehensively addressing it. The legal provisions that govern the granting of injunctions is founded under the provision of Order 40 Rule 1 of the Civil Procedure Rules 2010. It provides as follows: -

Order 40, Rule 1

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

- a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b) that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the



wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

60. Fundamentally, the principles applicable in an application for an injunction were laid out in the celebrated “Classicus locus” case of “Giella v Cassman Brown & Co. Limited (Supra)” where it was stated: -

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

61. The three conditions set out in the above case, need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. Graphically, the Court of Appeal was more spot on with regards to the said conditions to be considered while considering these issues in the case of “Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR”: where it held as follows:-

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Limited v Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the Respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between”.

62. In a nutshell, these are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. (See Kenya Commercial Finance Co. Limited v Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction. The court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the Respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the Applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between”.



63. In the case of “Mbuthia v Jimba credit Corporation Ltd 988 KLR 1”, the court held that;
- “In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the party’s cases.”
64. Similarly, in the case of “Edwin Kamau Muniu v Barclays Bank of Kenya Limited” the Court held that:-
- “In an interlocutory application to determine the very issues which will be canvassed at the trial with finality. All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria.”
65. In dealing with the first condition of “prima facie case”, the Honorable Court was guided by the definition melted down in the famous case “MRAO Limited v First American Bank of Kenya Limited (Supra)” inter alia: -;
- “So, what is a prima facie case, I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself would conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”
66. On the second limb to be considered - whether the Applicant might suffer irreparable injury which cannot be adequately compensated by an award of monetary damages. The Applicants must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. The judicial decision of “Pius Kipchirchir Kogo v Frank Kimeli Tenai (2018) eKLR” provides an explanation for what is meant by irreparable injury and it states:-
- “Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”
67. Furthermore, in Halsbury’s Laws of England [Halsbury’s Laws of England, Third Edition, Volume 21, paragraph 739, page 352.] it is stated that: -
- “It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question” In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. But what exactly is “irreparable harm”? Robert Sharpe, in “Injunctions and Specific Performance,” [ Robert Sharpe, Injunctions and



Specific Performance, looseleaf, (Aura, On: Cananda Law Book, 1992), P 2-27] states that "irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."

68. On this aspect the Court of Appeal in "Nguruman Limited (supra)" held that:-

"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."

69. Thirdly, on the third limb to be considered. The Applicants have to demonstrate that the balance of convenience tilts in their favour. In the case of "Pius Kipchirchir Kogo v Frank Kimeli Tenai (Supra)" which defined the concept of balance of convenience as:

"The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".

70. Additionally, in the case of "Paul Gitonga Wanjau v Gathuthis Tea Factor Company Limited & 2 others (2016) eKLR", the court dealing with the issue of balance of convenience expressed itself thus:-

"Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies."



71. Additionally, in the decision of “Amir Suleiman v Amboseli Resort Limited [2004] eKLR” where the Learned Judge offered further elaboration on what is meant by “balance of convenience” and stated; -
- “The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”
72. Now applying the above principles to the instant case. To begin with, its to establish whether the Plaintiff/Applicant has a “Prima facie case”. From the pleadings, undoubtedly the Plaintiffs/ Applicants is that the trustee in charge of the estate of the deceased and which consists of the three properties herein referred to as the suit properties. The evidence on record, and which the Respondents do not also dispute, indicates that the suit properties formed part of the estate of the deceased but the issue in contention was the Applicants stake on the said suit properties. The Applicant maintains that as a trustee he was in charge of the properties and that they were being of benefit to the Respondents who he stated were not beneficiaries to the estate of the deceased. Being premature, at this juncture the court will not delve into establishing who the beneficiaries to the estate are, but it is noted that this is a main issue in contention.
73. At the same time, the Applicant claims to be the legal and absolute proprietor of the suit property. Although, this fact has not been controverted as yet, but being a weighty issue, the Court is of the view that will need to be proved during the hearing. However, for the time being in force and from the case presented by the Plaintiff/Applicant it is safe to state that a prima facie case has indeed been established.
74. Regarding the second limb. It has been held that the Applicant is apprehensive that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are already in the intermeddling, interfering, illegally occupying and using the said property to unjustifiably enriching themselves. He cited instances where the 3<sup>rd</sup> and 4<sup>th</sup> Defendants/ Respondents were paying rent to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents and stated that the said actions were detrimental to the real beneficiaries of the estate. It has been alleged that the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendants/Respondents are likely to dispose of the property and also that they are benefitting from the rent collection. The applicant also alluded to mismanagement of the estate resources and stated that the buildings were dilapidating in state. From the facts adduced and the annexures attached herein, it rather clear, the Applicant would not be able to be compensated through damages. Therefore, the Applicant has fully satisfied the second condition – of irreparable injury has been proven as laid down in “Giella’s case”.
75. Finally, as stated above, the balance of convenience lies with the Plaintiffs/ Applicants in this case. Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the claim of the Applicants and it will be in the interest of both the Applicants and the Respondents that the suit property is preserved until the hearing and determination of the suit. Therefore, with regard to the balance of convenience and bearing in mind the several properties at stake herein and the value of the properties listed, this court is satisfied that it tilts in favour of the Applicant who should be given the chance to prosecute his case.
76. Hence in summary and based on the reasoning in the case of:- “Robert Mugo wa Karanja v Ecobank (Kenya) Limited & Another [2019] eKLR” where the court in deciding on an injunction application stated;
- “circumstances for consideration before granting a temporary injunction under Order 40 Rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit



is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts...”

77. I am convinced that if orders of temporary injunction are not granted in this suit, the property in dispute might be in danger of being dealt in the manner set out in the application and apprehended by the Plaintiffs/Applicants. In view of the foregoing, I strongly find that the Plaintiffs/Applicants have met the criteria for grant of orders of temporary injunction.

**ISSUE No. C). Whether the parties are entitled to the reliefs sought.**

78. Under this sub – heading, the Honourable Court has already elaborately made findings on the need to preserve the suit property belonging to the Estate of the Deceased. In essence, it is of the great view that in the given circumstances, the suit property ought to be preserved awaiting the full trial. Thus, the reliefs sought are justifiably valid and ought to be granted.
79. From the pleadings filed, I have been made aware that two of the suit properties herein are in occupation of tenants. These are Land reference numbers Kwale/Ukunda/397 and Kwale/Diani Beach Block/683 and 684. The applicant states that he is apprehensive that the continued payment of rent to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents has continued to generate loss to the estate of the deceased and wants it to be stopped. further that rent previously remitted to the said parties from June 2013 to date be remitted back to the court and later released to the applicant and beneficiaries of the estate of the deceased.
80. Arising from this, the Honourable Court is of the view that there will be the need for proper accounts to be undertaken in order for a decision to be made on the back rent alluded to. For that reason, I will make no orders on that money. That will need separate litigation.

**ISSUE No. D). Who will bear the costs of the application.**

81. It is trite that costs is at the discretion of the Court. Costs mean the award that a party is awarded at the conclusion of any legal action or proceedings in litigation. The provision of Section 27 of the *Civil Procedure Act*, Cap. 21 holds that costs follow an event. By event it means there suit or outcome of the legal action.
82. The nature of the instant application, evidently the Plaintiff/Applicant has been able to prove its case and thus are entitled to being awarded costs. However, the Honourable Court opines that the said costs to be in the cause

**VIII. Conclusion & Disposition**

83. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to the principles of Preponderance of probabilities and the balance of convenience. Clearly, the Applicant has a case against the Defendants/ Respondents.
84. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following: -
- a. That the Notice of Motion application dated 30<sup>th</sup> January, 2025 be and is hereby found to have merit and thus allowed.
  - b. That this Honourable Court does hereby issue a temporary injunction orders against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents pending the hearing and determination of the suit to restrain



them from continued control, possession and collection of rental income from the Kwale/ Diani Beach Block/683, Kwale/ Diani Beach Block/684 and Kwale/Ukunda/397[ the suit properties]

- c. That this Honourable Court does hereby issue a temporary injunction orders against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants/Respondents to restrain them from remitting rent from the suit properties to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents pending the hearing and determination of this application and suit.
- d. That the Honourable Court be and is hereby pleased to issue a temporary injunction orders restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents from alienating, wasting or dealing with the suit properties in any manner whatsoever pending the hearing and determination of this application and suit.
- e. That there be an order directing that the rent from the tenants in the suit property known as land Reference Numbers Kwale/Ukunda/397 and Kwale/Diani Beach Block/683 & 684 shall be collected by a reputable and registered real estate agent, appointed by the parties' and such agent shall deposit the collected rent in court, less its statutory commission, every month pending the hearing and determination of the suit.
- f. That the said real estate agent to be appointed by the parties within the next 21 days of this Ruling, and if the parties do not agree on a real estate agent within the said 15 days, this court to make the said appointment.
- g. That for expediency sake, there be a mention on 16<sup>th</sup> October, 2025 for two – fold purposes:-
  - i. Of ascertaining full compliance of these directions; and
  - ii. For conducting a Pre – Trial Conference pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010.
- h. That there be a full hearing of the matter fixed by consensus of the parties on 20<sup>th</sup> January, 2026, preferably through physical means.
  - i. That costs of the application to be in the cause.

85. It Is Ordered Accordingly.

**RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS 9<sup>TH</sup> DAY OF JULY 2025**

**HON. MR. JUSTICE L.L NAIKUNI**

**ENVIRONMENT & LAND COURT KWALE**

Ruling delivered in the presence of: -

Mr. Daniel Disii, the Court Assistant.

Mr. Wang'ombe Advocate for the Plaintiff/Applicant.

Mr. Munyala Advocate for the Defendant/Respondent.

