



**CKK Estate (1973) Limited v Attorney General & 4 others; George (Suing as an Administrator of the Estate of Ernest Ngugi Karuga) & another (Intended Interested Party) (Environment & Land Petition 16 of 2022) [2023] KEELC 21529 (KLR) (9 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21529 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND PETITION 16 OF 2022  
JG KEMEL, J  
NOVEMBER 9, 2023**

**BETWEEN**

**CKK ESTATE (1973) LIMITED ..... PETITIONER**

**AND**

**THE ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF SURVEY ..... 2<sup>ND</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> RESPONDENT**

**DAVID GICHIA KINYITA ..... 4<sup>TH</sup> RESPONDENT**

**KIFARU PROPERTIES LIMITED ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**JANE NJERI GEORGE (SUING AS AN ADMINISTRATOR OF THE ESTATE OF ERNEST NGUGI KARUGA) ..... INTENDED INTERESTED PARTY**

**JOHN MIRINGU KARUGA ..... INTENDED INTERESTED PARTY**

**RULING**

1. This Ruling is in respect of the Petitioner’s Notice of Motion dated 20/12/2022, Proposed Interested Parties’ Notice of Motion dated 28/2/2023 and Petitioner’s Preliminary Objection dated 23/4/2023. They are determined in order of time of filing as follows.

**Notice of Motion dated 20/12/2022**

2. The Petitioner filed its Notice of Motion dated 20/12/2022 seeking the following Orders:-
  - a. Spent.



- b. Spent.
  - c. This Honorable Court be pleased to restrain the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Respondent from processing deed plans, conveyances, transfers, leases or any dealings whatsoever touching the Petitioner's LR No. 134/8 or any portion of it described as LR No. 134/14, 13 and 12 or any other description until further orders of this Honourable Court.
  - d. This Honorable Court be pleased to order the 3<sup>rd</sup> Respondent to keep under lock and key or in a strong room the registers in respect of the Petitioner's LR No. 134/8 and LR No. 245/4.
  - e. This Honorable Court be pleased to order the 2<sup>nd</sup> Respondent to keep under lock and key or in strong room the registers in respect of the Petitioner's LR No. 134/8 and LR No. 245/4 and not to process any deed plans without written request from the Petitioner.
  - f. The 2<sup>nd</sup> to 5<sup>th</sup> Respondents be restrained whether the by themselves, their servants or agents from dealing with or interfering with the Petitioner's enjoyment of the said LR No. 134/8 and LR. No. 245/4 pending the hearing and determination of this Petition.
  - g. The 4<sup>th</sup> and 5<sup>th</sup> Respondents be restrained by themselves, their servants, agents from entering LR No. 134/8 and LR. No. 245/4 until further orders of this Honorable Court.
  - h. The 4<sup>th</sup> and 5<sup>th</sup> Respondents be restrained by themselves, their servants, agents from entering LR No. 134/8 and LR. No. 245/4 pending the hearing and determination of this Petition.
  - i. Costs be provided for.
3. The Application is supported by the grounds annexed thereto and the Supporting Affidavit of Samuel Karuga Koinange sworn on 20/12/2022.
  4. The deponent has also relied on the Petition and his Affidavit of even date in support of the Application.
  5. In the main the deponent avers that the Petitioner is the registered owner of parcels L.R. No. 245/4 and 134/8 (hereinafter referred to as the suit land) having acquired them in 1973 and has been in occupation carrying out tea and coffee farming to date.
  6. That in 2014 the files in respect of the suit land as maintained by the 3<sup>rd</sup> Respondent went missing prompting the Petitioner to initiate the reconstruction process. The process culminated in the publication of the Gazette Notice No. 5750 dated 7/8/2015 and a further search of the suit land in 2018, confirmed that the suit land belonged to the Petitioner.
  7. It was the deponent's averment that at no time has the Petitioner subdivided the land since it bought the land in 1973, nor entered into a binding agreement of sale in favour of anybody nor executed any instruments of transfer of title in favour of the 3<sup>rd</sup> Respondent.
  8. That the 1<sup>st</sup> to 3<sup>rd</sup> Respondents colluded with the 4<sup>th</sup> Respondent to register a formal conveyance to the 4<sup>th</sup> Respondent; issued him with a search in respect to parcel 134/8; falsely alleging that the 4<sup>th</sup> Respondent is the owner of the Petitioner's L.R No. 134/8; that the 2<sup>nd</sup> Respondent prepared survey documents purporting to subdivide parcel No.134/8 into 134/4, 134/13 and 134/12.
  9. He urged the Court to restrain the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from dealing with the Petitioner's land in furtherance of criminal activities in favour of the 4<sup>th</sup> Respondent.
  10. Further that the 4<sup>th</sup> Respondent sued the Directors of the Petitioner in Kiambu SPMCC No. 75 of 2022 seeking orders to stop the Petitioner from interfering with the alleged parcels of land.



11. The Application is opposed.
12. On the 21/7/2023 the 3<sup>rd</sup> Respondent through Ms Karen Nyakundi filed its Replying Affidavit. She described herself as the Land Registrar based at the Ministry of Lands Public Works Housing & Urban Development duly authorized and competent to swear the Affidavit on behalf of the 3<sup>rd</sup> Respondent.
13. She averred that the Land Registrar acted in the matter pursuant to powers conferred to it by Section 14 of the [Land Registration Act](#).
14. She stated that in a hearing for the reconstruction of the register for LR No. 134/8 on 9/1/2023 the panel established that the indenture of conveyance held by the 4<sup>th</sup> Respondent was not authentic and did not emanate from the Land Registry. That upon inquiry, the panel established that the documents presented by the Advocate of the Petitioner were authentic and formed part of the registry records. However neither the folio in respect of the parcel nor the last conveyance could be traced in the parcel file.
15. That in light of the said revelations the panel recommended that the documents of the 4<sup>th</sup> Respondent be expunged from the record and the Petitioner was directed to make an Application for reconstruction of the Register under Section 33(5) of [Land Registration Act](#) and 2017 Land Registration Regulations.
16. The 5<sup>th</sup> Respondent opposed the Application vide its Replying Affidavit filed on 15/5/2023 and sworn on 11/5/2023 by Anthony Wachira Njoroge who described himself as a Director of the 5<sup>th</sup> Respondent.
17. That prayers 6, 7 and 8 of the Petitioner's Application are calculated to beat the very cause of justice the Petitioner is seeking to protect; that the Application does not meet the threshold of grant of conservatory orders set out by the Supreme Court in the case of Gatirau Peter Munya Vs. Dickson Mwenda Kithinji & 2 Others S.C No. 5 of 2014.
18. Inter alia, that the Petitioner is not in possession of the suit property and therefore has not demonstrated the prejudice it is likely to suffer if the prayers are not granted. In any event the Petitioner only mentioned the likelihood of suffering irreparable damage but did not explain what the damage was. That the orders granted in the interim are adequate for the preservation of the suit pending hearing and determination. That granting prayers 6, 7 and 8 will render the Petition nugatory as it will have determined the Petition in finality. That there is no public interest in the matter at all seeing that the land is owned by the 4<sup>th</sup> Respondent, a private person.
19. In a rejoinder, on 30/5/2023 the Petitioner through S. K. Koinange filed a Further Affidavit where he deponed that he is a Director / Shareholder of the Petitioner.
20. In response to the Replying Affidavit of Antony Wachira Njoroge sworn on 11/5/2023, the deponent stated as follows: the Affidavit of Wachira is false; the 3<sup>rd</sup> Respondent has cancelled the purported documents formerly held by the 4<sup>th</sup> Respondent who purportedly sold the suit land to the 5<sup>th</sup> Respondent; he has not explained the nature of due diligence carried out by the 5<sup>th</sup> Respondent before purporting to purchase the property in possession of the Petitioner; that the 2<sup>nd</sup> – 4<sup>th</sup> Respondents were in cahoots to take away the Petitioner's land.
21. Further the deponent stated that the Petitioner has been in possession of the land for 50 years. Moreover, that the possession by the 4<sup>th</sup> Respondent has not been explained.



22. In a Further Affidavit deponed by S. K. Koinange in response to the Replying Affidavit of David Gichia Kinyiita sworn on 23/3/2023, he termed the Affidavit false. That the said 4<sup>th</sup> Respondent has not disclosed that the 3<sup>rd</sup> Respondent had informed him that the purported conveyance has been cancelled.
23. The deponent stated that the Petitioner has never subdivided the land or parted with possession since it acquired it in 1973. That the purported subdivision by the 4<sup>th</sup> Respondent and the transfers are illegal null and void.
24. That the suit land was in the hands of his grandfather (through the Petitioner) Charles Karuga Koinange until his death in 2004. That in 1994 his grandfather transferred 14,999 shares in the Petitioner's Company to his father Dr. Wilfred Koinange. That since 1994 the land has been in possession of Dr. Wilfred Karuga Koinange and his wife Rosemary Koinange as major shareholders of the Petitioner's Company.
25. The deponent described the activities that have been carried out in the farm as construction of residential houses; coffee factory; tea and coffee growing; dam construction; installation of electricity; water pump and other related activities on the extensive farm.
26. On 24/4/2023 directions were taken to canvass the Application by way of written submissions.
27. Supporting its Motion, the Petitioner through the firm of Kamau Kuria & Co. Advocates filed submissions dated 5/6/2023.
28. The facts of the case and supporting annexures were reiterated. That the Petitioner has demonstrated a case for grant of conservatory orders as prayed in the motion as well as temporary injunction as highlighted in the case of Giella Vs. Cassman Brown 1973 EA 358. That this has been achieved through the searches availed by the Petitioner in relation to the suit land. That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have not explained how the 4<sup>th</sup> Respondent was registered as the owner of LR 134/8. That the effect of gazette notice dated 26/1/2023 restores the register of 1973 which affirms the Petitioner's ownership of the suit land.
29. On behalf of the Attorney General, Faith Njeri Senior State Counsel filed undated submissions in opposition to the Petitioner's Application. A singular issue was drawn for determination which was whether the Court should grant conservatory orders.
30. The issue was answered in the negative with reference to the Petitioner's Supporting Affidavit that did not contain any annexures to show violation of rights. That no prima facie case has been established by the Petitioner and as such the Application ought to be dismissed with costs.
31. On behalf of the 5<sup>th</sup> Respondent, Alphonse Barrack Advocate filed submissions dated 6/6/2023.
32. The 5<sup>th</sup> Respondent submitted that the Petitioner has not met the threshold for grant of conservatory orders as stated in the case of Peter Munya (supra). That no particulars of any irreparable harm if at all was given by the Petitioner. That even where a prima facie case is shown, the Applicant has to demonstrate that they will suffer irreparable harm which cannot be compensated by way of damages. The Court was urged to dismiss the Application with costs.

#### **The Interested Parties' Notice of Motion dated 28/2/2023**

33. On 2/3/2023 the proposed Interested Parties filed the Notice of Motion dated 28/2/2023 seeking in the main orders of joinder.



34. The Application is supported by the grounds on the face of it and the Supporting Affidavit of Jane Njeri George, the 1<sup>st</sup> Applicant who deponed that she is the administrator of the estate of her late (husband) Ernest Ngugi Karuga. That the 2<sup>nd</sup> Applicant and her late husband are sons of the late Charles Karuga Koinange who purchased the lands in 1973. That he passed away in 2004. The estate of Charles Karuga Koinange is subject of the ongoing Probate Nbi HCC P & A 998/2006.
35. That the property was transferred to the Petitioner in 1973, a Company that the deceased held 99% shareholding.
36. In addition, that the estate of the deceased has been partially distributed save for the suit lands. These properties are subject of a dispute by the estate of Dr. Wilfred Karuga Koinange who have claimed that Charles Koinange transferred his shares in the Company to Dr. Wilfred Karuga Koinange vide a will dated 16/6/93, a will that was invalidated by the Court vide CA 126 of 2016.
37. That the ownership of the deceased shares in the Petitioner's Company is subject of HCCC P & A 998 of 2006 which is awaiting determination by the Court.
38. That as beneficiaries of the estate of Charles Karuga Koinange, they stand to be affected or prejudiced by the outcome of the subject suit hence the need to be enjoined as Interested Parties.
39. The Applicants disclosed that they support the Petition so that the Petitioner's assets are preserved and safeguarded. They aver that Samuel Karuga Koinange is conflicted and therefore will not adequately protect their interests in the assets unless they are enjoined. They urged the Court to grant the Application in the interest of justice.
40. That the shares in CKK were reverted to the estate of Charles Karuga Koinange. That the said shares were transferred by Dr. Wilfred Karuga fraudulently.
41. The Application is opposed. The Petitioner opposed this Application vide its Preliminary Objection dated 23/4/2023.
42. Conversely the 4<sup>th</sup> Respondent in its Replying Affidavit sworn on 23/3/2023 avowed that the Petitioner is a body corporate that came to Court purportedly to safeguard the interest of the proposed Interested Party.
43. That for the Interested Parties to succeed in the Application they must show that they have an interest in the matter and that they ought to show how their interests would be affected by any orders of the Court in their absence. It is contended that as it stands there is no nexus between the Applicants and the Petitioner save as proxies of the Petitioner. That in addition the Applicants have not demonstrated any prejudice that they would suffer if the Application is not allowed.
44. The 5<sup>th</sup> Respondent filed its Replying Affidavit sworn by Antony Wachira Njoroge on 11/5/2023. It was averred that a Company is a separate entity with its own corporate personality capable of suing and being sued in its own name. That the proper Petitioner in an action in respect to a wrong against the Company is prima facie the Company itself and the Interested Party cannot maintain an action in respect to the matter.
45. On the issue of being a potential beneficiary, the 5<sup>th</sup> Respondent stated that no determination has been reached in the pending Succ. Cause No. P & A 998 of 2006 with respect to whether or not the Applicants are indeed beneficiaries. That their interest if any are yet to mature and in so far as they seek joinder they have no demonstrable interest to protect at this stage.



46. Relying on the Supreme Court decision in Francis Muruatetu & Anor Vs. Republic & 5 Others (2016) eKLR the 5<sup>th</sup> Respondent averred that the Interested Parties have not demonstrated any stake in the case nor that their participation or presence in the proceedings is necessary. That neither have they demonstrated that they have a claim of their own that requires to be tried alongside the claims of the Petitioner and the Respondents.
47. The deponent states that the Applicants are neither Directors nor shareholders of the Petitioner Company and in their own admission referenced in the Notice of Motion dated 28/2/2023, they are merely potential beneficiaries of some of the assets and shares in the Petitioner's Company. That their joinder will not serve any purpose as their interest is not identifiable in any way as they are neither Directors nor shareholders of the Petitioner's Company.
48. Lastly, that they have not demonstrated any prejudice that they would suffer in the case of non-joinder. In any event the Interested Parties have claimed that they support the Petition. That this Court is not seized with the facts of the Interested Parties pending succession suit and the reference to the said succession suit is but misguided.
49. It is noted that the 2<sup>nd</sup> proposed Interested Party withdrew his participation in the Motion through his Notice of Withdrawal dated 10/7/2023 under Order 25 Rule 1 of the Civil Procedure Rules.
50. The 1<sup>st</sup> proposed Interested Party did not prosecute this Application by way of filing submissions despite directions by the Court.

#### **The Preliminary Objection dated 23/4/2023**

51. On the 23/4/2023 the Petitioner filed a Preliminary Objection with respect to the Notice of Motion dated 28/2/2023 on the ground that the Notice of Motion should be struck out with costs because it offends the rule in Salomon & Co. Ltd Vs. Salomon [1897] A.C. 22.
52. On the 24/4/2023, parties took directions on the hearing of Notice of Motion dated 20/12/2023. Ms. Njuguna for the 1<sup>st</sup> – 3<sup>rd</sup> Respondents informed the Court that it supported the Petitioner's Notice of Motion dated 20/12/2023. They also did not oppose the Motion of Interested Parties dated 28/2/2023.

#### **The analysis and determination**

53. The key issues for determination are as follows;
  - a. Whether the Preliminary Objection filed against the Application for joinder is merited.
  - b. If the answer to (a) is in the negative, whether the Application for joinder is merited.
  - c. Whether the Application dated the 20/12/22 is merited.
  - d. Who meets the costs of the Applications?
54. Before delving into the issues for determination the Court will lay the background and the context to the dispute before the Court.
55. The Petitioner is a Limited Liability Company incorporated in 1973.
56. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are Government departments responsible for surveying and registration of land while the 3<sup>rd</sup> Respondent is the Chief Government Legal Advisor created under *the Constitution* of Kenya, 2010.



57. The 4<sup>th</sup> and 5<sup>th</sup> Respondents are private citizens with claims over the suit lands.
58. The Interested Parties are related to the shareholders and Directors of the Petitioner.
59. The suit land, the subject of this Petition was registered in the name of the Petitioner in 1973. The Petitioner purchased the suit land from its former owners who were allocated the land by the colonial government under the Crown Lands Ordinance, 1902.
60. The suit land is subject of the dispute between the Petitioner and the 4<sup>th</sup> Respondent each claiming the land as a whole or in part.

### **The Preliminary Objection dated 23/4/2023**

61. On the first issue, in order for a matter to be taken by the Court as a Preliminary Objection it must be guided by the definition of a Preliminary Objection as acknowledged in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696.

"... A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."

62. In the case of Oraro Vs. Mbaja [2005] 1 KLR 141 Ojwang, J (as he then was) expressed himself as follows; -

"... A "Preliminary Objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence ..."

63. The Supreme Court recently considered the usefulness of a Preliminary Objection in the case of Independent Electoral & Boundaries Commission Vs. Jane Cheperenger & 2 Others [2015] eKLR;

“(21) .... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection - against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement....”

64. The effect of the case law cited above means for one to succeed in putting up a preliminary objection, it must meet the following criteria; it must be a pure point of law; it must be pleaded by one party and admitted by the other; it must be a matter of law which is capable of disposing the suit; must not be blurred by factual details calling for evidence; must not call upon the Court to exercise discretion.
65. In this case the proposed Interested Parties have sought joinder to the suit on account that they are beneficiaries to the estate of Charles Karuga Koinange and secondly that they are apprehensive that the Samuel Koinange the Director of the Company is conflicted and will not be able to protect their



interest adequately. It was further alleged by the proposed Interested Parties that there is a residual dispute on the ownership of the shares of the Petitioner some of which is claimed to have been acquired by Dr Wilfred Karuga Koinange from Charles Karuga Koinange through fraud. That said the proposed Interested Parties admittedly are not opposed to the Petition hence the quest to be enjoined so that their interests may be shepherded.

66. The Preliminary Objection is premised on whether or not the proposed Interested Parties have the locus standi to be enjoined to the suit. That being the case the Court finds that the Preliminary Objection is a pure point of law because it raises issues of locus which go to the root of the suit.
67. The next issue is whether the Preliminary Objection is merited.
68. The Court finds guidance in the decision of the Court in *Salomon & Co. Ltd Vs. Salomon* [1897] A.C. 22 where the Court stated that a Company is a separate legal person from its shareholders.
69. In the case of *Foss Vs. Harbottle* (1843), the Court further held that it is only the Company that can file suit against wrongs brought against the Company.
70. It is commonly acknowledged that the Company is a Limited Liability Company. The proposed Interested Parties claims to be a potential beneficiary in the estate of Charles Karuga Koinange. It is also not in dispute that the said Charles Karuga Koinange is not a shareholder of the Petitioner having transferred his shares to the late Dr Wilfred Koinange in 1974. Evidently the suit land and or shares in the Petitioner Company are not listed as assets in the estate of Charles Karuga Koinange.
71. Order 1 Rule 10 (2) of the Civil Procedure Rules empowers the Court to enjoin a party to proceedings as follows;

“Substitution and addition of parties [Order 1, rule 10.]

- (2) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

72. In the case of *Francis Muruatetu* (supra) at para.37 the Supreme Court stated as follows on the issue of joinder;

“One must move the Court by way of a formal Application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

- a. The personal interest or stake that the party has in the matter must be set out in the Application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- b. The prejudice to be suffered by the intended Interested Party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
- c. Lastly, a party must, in its Application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those



submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”

73. In this case the Court finds that the 1<sup>st</sup> proposed Interested Party is neither a shareholder nor a Director of the Petitioner; even if she was, she would not be entitled to joinder because she has not demonstrated any interest or stake in the suit; not shown any prejudice that she stands to suffer if the orders of joinder are declined; the property of a Company belongs to the Company and it is only the Company that can bring a suit to redress wrongs against it not a shareholder or Director. I say so because they are in support of the Petition and in all respects, it matters not if they are enjoined or not.
74. In the end the Preliminary Objection is merited. It is upheld.
75. The 1<sup>st</sup> Proposed Interested Party is condemned to pay costs of the Preliminary Objection in favour of the Petitioner and the 4<sup>th</sup> and 5<sup>th</sup> Respondents.

#### **The Proposed Interested Parties’ Notice of Motion dated 28/2/2022**

76. The Preliminary Objection having been upheld, the Proposed Interested Parties Notice of Motion dated the 28/2/2023 is overtaken by events and is marked as spent.
77. I make no orders as to costs.

#### **Petitioner’s Notice of Motion dated 20/12/2022**

78. The prayers sought in the Notice of Motion are expressed to be brought under Rules 4, 23 & 24 of *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 also known as ‘the Mutunga Rules.’ Rule 23 thereof provides;

“Conservatory or interim orders.

23.

- (1) Despite any provision to the contrary, a Judge before whom a Petition under rule 4 is presented shall hear and determine an Application for conservatory or interim order.”

79. The nature of conservatory orders was aptly discussed by the Supreme Court in Civil Application No. 5 of 2014 Gatirau Peter Munya Vs. Dickson Mwenda Kithinji & 2 Others (2014) eKLR, as follows: -

“(86) “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the Applicant’s case for orders of stay.”

80. Likewise the Court of Appeal in *Invesco Assurance Co. Ltd Vs. MW (Minor suing thro’ next friend and mother (HW))* [2016] eKLR defined a conservatory order as follows: -

“5. A conservatory order is a judicial remedy granted by the Court by way of an undertaking that no action of any kind is taken to preserve the subject until



the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.”

81. The Application as drafted under prayers 6, 7 and 8 seeks restraining orders. According to Black’s Law Dictionary 10<sup>th</sup> edition at page 1508 a restraining order is defined as a Court order entered to prevent the dissipation or loss of property.
82. Applying the above definition, the Court takes the view that they refer to temporary injunctive orders as enshrined in Order 40 Rule 1 of the Civil Procedure Rules.
83. As such the germane issue for determination is whether the Petitioner has satisfied the criteria for grant of temporary injunction as prayed. I note that in its prayers the substantive prayers are for restraining orders against the Respondents though in the grounds of the Application, the Petitioner went ahead to submit on conservatory orders.
84. The legal underpinning for temporary injunction is anchored in Order 40 Civil Procedure Rules that;
- “ Cases in which temporary injunction may be granted [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.”
85. It is trite that the granting of injunctive reliefs is a discretionary exercise predicated upon proof of three sequential limbs to wit: that the claimant has established a prima facie case with a probability of success; once established, the claimant ought to prove that an award of damages would be insufficient to alleviate any damage caused and finally, when in doubt, the Court would decide the Application on a balance of convenience. See the celebrated cases of *Giella Vs. Cassman Brown & Co. Ltd* [1973] EA 358 and *Nguruman Ltd v. Jan Bonde Nielsen & 2 Others* [2014] eKLR.
86. Has the Petitioner demonstrated a prima facie case to grant the orders sought? The Court of Appeal in *Mrao Ltd Vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 123, defined a prima facie case as:
- “ A Prima facie case in a civil Application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
87. In *Nguruman* case (supra) the Court of Appeal went on to further state that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it the person applying



for an injunction has a right, which has been or is threatened with violation. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the Applicant's case is more likely than not to ultimately succeed.

88. The Petitioner averred that it has suffered anguish emanating from the commissions of the Respondents in dealing with the suit land. The 3<sup>rd</sup> Respondent in its Replying Affidavit admitted that the documentation and registration of the 4<sup>th</sup> Respondent in respect of the suit land was marred by irregularities and falsehoods as evidenced by annexure EO1 - copy of Ruling dated 23/1/2023. This led to recommendations as enumerated in para. 12 of the Replying Affidavit including cancellation of registrations in favor of the 4<sup>th</sup> and 5<sup>th</sup> Respondents and recommendations to Director of Criminal Investigations to take appropriate actions. The totality of these findings in my view reveal that the Petitioner has established a prima facie case for this Court to deliberate.
89. Secondly the Petitioner ought to prove that an award of damages would be insufficient to alleviate any damage caused. By virtue of the cancellation of irregular entries on the suit land by the land's office, it is not in doubt that the Petitioner has suffered damage.
90. Last but not least the when in doubt, the Court would decide the Application on a balance of convenience. There is no doubt as to where the balance of convenience lies in this case; preservation of suit property pending the hearing and determination of the Petition.
91. In the end the Application succeeds to the extent of granting prayers 6, 7 and 8.
92. The costs of the Application shall be payable by the 4<sup>th</sup> and 5<sup>th</sup> Respondents in favour of the Petitioner.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 9<sup>TH</sup> DAY OF NOVEMBER, 2023  
VIA MICROSOFT TEAMS.\*\*

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;

Kamau Kuria for Petitioner/Applicant

Ms. Kembo HB Allan Kamau for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Ms. Wakhuyunya HB Okumu for 4<sup>th</sup> Respondent

Barak for 5<sup>th</sup> Respondent

1<sup>st</sup> Applicant/Interested Party – Absent

2<sup>nd</sup> Applicant/Interested Party - Withdrawn

Court Assistants – Phyllis/Lilian

**ELC PET. NO. 16.2022-THIKA 8R of 8**

