



**Serenade Properties Limited v Nthiwa & 3 others (Sued as Administrators of the Estate of the late John Nthiwa Nzioka (deceased)) (Environment & Land Case 5 of 2020) [2022] KEELC 3910 (KLR) (6 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3910 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 5 OF 2020**

**A NYUKURI, J**

**JULY 6, 2022**

**BETWEEN**

**SERENADE PROPERTIES LIMITED ..... APPLICANT**

**AND**

**MARYANNAH NDUNGE N'THIWA ..... 1<sup>ST</sup> RESPONDENT**

**MERIAN MUKUI N'THIWA ..... 2<sup>ND</sup> RESPONDENT**

**THE COUNTY LAND REGISTRAR, MACHAKOS ..... 3<sup>RD</sup> RESPONDENT**

**GEOFFREY MUOKI N'THIWA (SUED AS ADMINISTRATORS OF THE ESTATE OF THE LATE JOHN N'THIWA NZIOKA (DECEASED)) ..... 4<sup>TH</sup> RESPONDENT**

**SUED AS ADMINISTRATORS OF THE ESTATE OF THE LATE JOHN N'THIWA NZIOKA (DECEASED)**

**RULING**

1. Vide an application dated January 27, 2020, the plaintiff/applicant sought for the following orders;
  - (a) Spent
  - (b) Spent
  - (c) That upon hearing interpartes, an order be issued restraining the defendants, their agents, employees and/or servants from selling, transferring, disposing off and/or interfering in any other manner whatsoever with the parcel of land to wit Donyo Sabuk/Koma Rock Block 1/67744 (originally Donyo Sabuk/Komarock Block 1/584) pending hearing and determination of the suit herein.
  - (d) That the costs of this application be provided for.



2. The application is premised on the supporting affidavit sworn by Faith Wanjiru Muthui, director of the plaintiff company. The applicant avers that they are the bonafide purchaser for value without any notice of defect on title of land parcel Donyo Sabuk/Koma Rock Block 1/67744 (originally Donyo Sabuk/Koma Rock Block 1/584) (hereinafter referred to as the suit property).
3. They further stated that the suit property was a resultant subdivision of parcel Donyo Sabuk/Koma Rock Block 1/584 which is subject to succession proceedings pending in Succession Cause No 151 of 2014, Machakos – In the matter of the Estate of John Nthiwa (deceased); that the defendants have filed summons in the said succession cause seeking *inter alia* orders of cancellation of the plaintiff's title of the suit property; that the plaintiff has a valid title protected under the provisions of section 93 (1) of the Law of Succession Act cap 160, section 26 of the Land Registration Act, 2012 and under article 40 of the Constitution of Kenya, 2010; that unless this court intervenes, the applicant's rights to own property under article 40 of the Constitution shall be violated; that by dint of article 162 (2) (b) of the Constitution, section 26 of the Land Registration Act, the succession court lacks jurisdiction to hear and determine the validity or otherwise of a sale agreement, subdivision, transfer and or ownership or title to land; that the balance of convenience favour grant or the orders sought and that no prejudice shall be occasioned to the defendants if the orders sought are granted.
4. The applicant also stated that they purchased the suit property from one Annastacia Mbinya Nthiwa now deceased on May 23, 2016 and paid a total of Kshs 50 million as considerations; that the original title Donyo Sabuk/Koma Rock Block 1/584 measuring 41.38 Ha was originally registered in the name of John Nthiwa Nzioka (deceased); that Annastacia Mbinya Nthiwa the administrator of the estate of the late John Nthiwa Nzioka, obtained grant of letters of administration in respect of the estate of the late John Nthiwa Nzioka on the year 2014 and thereafter in May 2016 sold the land to the applicant.
5. Further that the late Annastacia Mbinya Nthiwa obtained consent from the Land Control Board to subdivide the land parcel Donyo Sabuk/Koma Rock Block 1/584 into two parcels measuring 20.24 Ha and 21.14 Ha respectively; that on September 14, 2016 the late Annastacia Mbinya Nthiwa obtained consent to transfer the suit property to the plaintiff and thereafter on September 20, 2016, the plaintiff was issued with title deed in respect of the suit property; that the fact that Annastacia Mbinya Nthiwa sold the suit land to the plaintiff is not disputed; that in December 2016, Annastacia filed summons in Succession Cause No 151 of 2014 seeking for cancellation of the plaintiff's title purporting not to have been aware of the subdivision of the mother title and the transfer of the suit property to the plaintiff; that in 2018, the late Annastacia placed a restriction on the suit property.
6. The plaintiff also averred that Annastacia Mbinya Nthiwa died before the matter was determined and was substituted by the defendants herein.
7. In response, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed a notice of preliminary objection dated February 25, 2020, seeking to have both the application dated January 27, 2020 and the suit to be struck out on the following grounds;
  - (a) Issues raised in both the application and the suit are directly and substantially in issue in Machakos High Court Succession Cause No 151 of 2014 in the matter of the Estate of John Nthiwa Nzioka (deceased).
  - (b) The plaintiff and its directors were on February 6, 2017 ordered by the High Court to appear before it and give evidence regarding an alleged forged confirmed grant pursuant to which the plaintiff acquired title to the suit property herein. This evidence is yet to be given.
  - (c) The suit herein is filed in contravention of section 6 of the Civil Procedure Act.



8. In addition, the 1<sup>st</sup> defendant swore a replying affidavit dated February 25, 2020 in opposition to the application. The 2<sup>nd</sup> defendant also swore a replying affidavit dated September 15, 2020. The two affidavits are a copy and paste version of each other, copied word for word. The 1<sup>st</sup> and 2<sup>nd</sup> defendants deposed that the suit property was a subdivision of parcel Donyo Sabuk/Koma Rock Block 1/584 which was registered in the name of John Nthiwa Nzioka; that her mother Annastacia Mbinya Nthiwa was granted letters of administration intestate in respect of the late John Nthiwa on April 30, 2014; that the deceased's person's property cannot be sold or transferred unless grant of letters of administration have been confirmed and that if sale or transfer happens it amounts to intermeddling with a deceased person's estate; that up to now the High Court has never confirmed the grant nor made any orders for distribution of the deceased's estate; that it was strange that the deceased's property was transferred to Annastacia who is allegedly illiterate and that the transmission and sub-division of parcel Donyo Sabuk/Koma Rock Block 1/584 was based on a forged confirmed grant.
9. It was the 1<sup>st</sup> defendant's assertion that it is upon the realization that the plaintiff obtained title on a forged confirmed grant that the late Annastacia Mbinya filed the application dated December 19, 2016 in the High Court succession cause, whereof the plaintiff's title has been restricted pending investigations into allegations of fraud; that on February 6, 2017, the High Court ordered the petitioner, beneficiaries and the directors of the plaintiff to attend court on April 5, 2012 to testify in relation to the alleged forged confirmation; that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants have filed an application dated February 19, 2020 in the High Court succession cause seeking cancellation of the titles arising from the subdivision of Title Donyo Sabuk/Komarock Block 1/584; that this suit is meant to circumvent the High Court orders of February 6, 2017; that the High Court has jurisdiction to determine matters in respect of the estate of deceased persons and that the validity of the plaintiff's title is challenged.
10. She further deposed that the suit property form part of the estate of John Nthiwa, who did not sell nor transfer the same to the plaintiff and does not touch on the estate of Annastacia Mbinya Nthiwa; that all the transfer instruments including Land Control Board's consent are forgeries; that it is strange that the suit property was transferred to the plaintiff before payment of the full purchase price and that the purchase price was paid to strangers and third parties; that Annastacia Mbinya was illiterate hence all documents purported to have been signed by her were forgeries.
11. In addition, she deposed that the plaintiff has never occupied the suit property and that any attempt to interfere with the same shall be resisted by the deceased's administrators until the legality of the sale and transfer of the suit property is determined.
12. On March 10, 2021, the 2<sup>nd</sup> defendant filed a further replying affidavit sworn on March 8, 2020. She stated that on February 23, 2021, the High Court made a finding that the certificate of confirmation upon which the parcel No Donyo Sabuk/Komarock Block 1/584 was subdivided to result among other titles to the plaintiff's title, did not originate from the High Court and subsequently the High Court revoked and reverted to the deceased all the titles issued pursuant to the said forged certificate of certificate of confirmation.
13. She also deposed that in regard to the suit property herein, the ELC should deal with the matter for tidiness of legal proceedings. It was the 2<sup>nd</sup> defendant's position that as the suit property was transferred to the plaintiff on the basis of a forged confirmed grant, therefore the title held by the Plaintiff is illegal and invalid and can only be cancelled as the suit property belongs to the estate of the late John Nthiwa. She also observed that the applicant has not demonstrated a *prima facie* case with a probability of success as they have failed to show that they hold a valid title.



14. The 4<sup>th</sup> defendant did not file any response.
15. This ruling is in respect of the preliminary objection dated February 25, 2020 and the notice of motion dated January 27, 2020. Both were canvassed by way of written submissions. The plaintiff/applicant filed their submissions on June 9, 2021 together with their supplementary submissions on November 16, 2021. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed their submissions on November 2, 2021. No submissions were filed by the 4<sup>th</sup> defendant.

### Submissions

16. Counsel for the plaintiff submitted that the preliminary objection dated February 25, 2020 was spent in view of the decision of the High Court in Succession Cause No 151 of 2015 in its ruling of February 23, 2021, where the High Court held that the ELC has jurisdiction to determine matters revolving around interest in land and the issue as to whether the manner in which the plaintiff herein acquired interest in the suit land ought to be determined by the ELC. Counsel contended that the decision of the High Court dated February 23, 2021, had not been set aside, reviewed or appealed against and therefore the preliminary objection which was anchored on section 6 of the *Civil Procedure Act* must fail. Reliance was placed on the cases of *Mukisa Biscuit Manufacturing Co Limited v West End Distributors Limited* [1969] 1 EA 696 and *Republic v Registrar of Societies–Kenya & 2 others Ex parte Moses Kirima & 2 others* [2017] eKLR.
17. It's was counsel's view that the preliminary objection had not met the threshold of the elements set out in section 6 of the *Civil Procedure Act* and therefore the same ought to be dismissed.
18. Counsel also submitted that the plaintiff had demonstrated a prima facie case with a probability of success. It was counsel's position that the grant issued to Annastacia Mbinya Nthiwa on July 24, 2014, granted her capacity to sell and or transfer the suit property; that there was an agreement for sale of land dated May 23, 2016 between the plaintiff and Annastacia Mbinya for 50 Acres; that there was evidence of payment by Equity Bank RTGS into the bank account of Annastacia Mbinya; there was an application for consent to transfer and consent from the Land Control Board; that there were mutation forms signed and a copy of the title of the suit property in the name of Annastacia Mbinya Nthiwa; a copy of the official search, a copy of the duly registered transfer from Annastacia to the plaintiff which is valid under section 93 of the *Law of Succession Act* and a copy of the title.
19. It was further submitted for the plaintiff/applicant that the defendants herein were signatories to the said agreement which they now seek to annul and they have not offered to refund the purchase price as they do not dispute the money was paid to them. Counsel referred to the cases of *George Orango Orago v George Liewa Jagalo & 3 others* [2010] eKLR, *Hutchings Biemer Limited v Barclays Bank of Kenya Limited & another*, Nairobi Court of Appeal Civil Application No 312 of 2005 and *Mrao Ltd v First American Bank Limited* [2003] KLR for the proposition that the plaintiff had demonstrated that they had a *prima facie* case with a probability of success.
20. Counsel contended that damages shall not be an adequate remedy as the plaintiff had demonstrated as having paid a consideration of Kshs 50,000,000/-, taken possession of the suit property and has since developed the parcel of land in issue and the defendants have not demonstrated that they are persons of means capable of refunding the purchase price in the event the plaintiff's suit is dismissed. Counsel referred to the case of *Kenya Pipeline Company Limited v Stanley Munga Githunguri* [2015] eKLR for the proposition that land matters are emotive and may not ordinarily be compensated by way of damages.



21. On the issue as to whether the balance of convenience tilted in favour of granting the injunction, the plaintiff's counsel submitted that granting the injunction will preserve the substratum of these proceedings pending determination of this suit, as the plaintiff had met the threshold of establishment of a *prima facie* case and that the injury that will be suffered if the injunction is not granted may not be compensated by way of damages. It was further counsel's contention that the plaintiff was in quiet possession, occupation and enjoyment of the suit property since 2016 and that the 1<sup>st</sup> to 3<sup>rd</sup> defendants had not demonstrated any prejudice that they were likely to suffer if an interlocutory injunction is granted pending hearing of the suit. Besides, counsel stated that the plaintiff was a bonafide purchaser for value without notice of defects as construed under Section 93 of the [Law of Succession Act](#).
22. It was contended that section 26 of the [Land Registration Act](#) conferred an indefeasible title on the plaintiff and that the Applicant's right to own property under article 40 of the [Constitution](#) of Kenya is protected but that the same is under threat of violation. Counsel referred to the case of [Joseph NK Arap Ng'ok v Moijo Ole Keiwua and 4 others](#) [1997] eKLR for the proposition that a title holder is protected by law and their title can only be challenged on grounds of fraud or misrepresentation to which the owners are proved to be a party.
23. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants' counsel submitted that the issues in this suit as well as the issues raised in the application dated January 27, 2020, raise the issue of whether the Plaintiff is a bonafide purchaser for value of the suit property. Counsel pointed out that the suit property was as a result of the subdivision of land parcel Donyo Sabuk/KomaRock Block 1/584 on the basis of a forged confirmed grant.
24. Counsel relied on the case of [Re Estate of John Nthiwa Nzioka \(deceased\)](#) [2021] eKLR for the proposition that no immovable property shall be sold before confirmation of grant and that any such sale is a nullity.
25. It was further submitted that the validity of the confirmed grant that led to the transfer of the suit property can only be determined in the succession cause and that the plaintiff is yet to attend court and give evidence in the succession court as directed on February 6, 2017.
26. Counsel relied on section 6 of the [Civil Procedure Act](#) to argue that by allowing the application dated January 27, 2020, this court will be sitting on appeal of the orders of the succession court demanding explanation of how the grant transferring the suit property to the plaintiff was obtained. Counsel cited the case of [Salome Wambui Njau \(Suing as Administratrix of the Estate of Peter Kiguru Njuguna \(Deceased\) v Caroline Wangui Kiguru](#) ELC [2013] eKLR, where it was held that in succession matters touching on land, the ELC and the High Court appear to have concurrent jurisdiction, but it would depend on the circumstances of each case for a court to determine which court is best suited to hear and determine the dispute.
27. It was the position of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants that the substratum of this suit was whether the suit property belongs to the plaintiff and that since it is a forged confirmed grant that gave ownership of the suit property to the plaintiff, then the application ought not be allowed. Counsel relied on the cases of [Giella v Cassman Brown](#) [1973] EA 358 and [Mrao v first American Bank of Kenya Ltd & 2 others](#) [2003] eKLR 125 on the conditions for grant of injunctions.
28. Counsel also argued that to obtain injunctive orders, an applicant must come to court with clean hands. For this proposition, counsel relied on the case of [Kyangaro v Kenya Commercial Bank Ltd & another](#) [2004] 1 KLR. It was counsel's contention that the plaintiff must first comply with previous orders before trying to enforce their rights in respect of the suit property.



29. In a rejoinder, the plaintiff's counsel submitted that by virtue of the ruling by the High Court on February 23, 2021, to the effect that the said court lacked jurisdiction to determine the dispute touching on the suit property, the orders of February 6, 2017, became superfluous. Counsel was of the view that demanding the plaintiff's compliance with those orders is trying to confer jurisdiction of ELC on the probate court. Reliance was placed on the case of *Equity Bank Ltd v Bruce Mutie Mutuku t/a Diani Tour & Travel* [2016] eKLR for the proposition that parties cannot, even by consent confer jurisdiction on a court where such jurisdiction does not exist.

### Analysis and Determination

30. I have considered the preliminary objection, the application, the responses as well as parties' submissions. In my considered view, the issues that arise for determination are as follows:
- (a) Whether the preliminary objection raised is a valid preliminary objection.
  - (b) Whether the preliminary objection is merited.
  - (c) Whether the plaintiff/applicant has met the threshold for grant of temporary injunction.
31. A preliminary objection was described by Law JA, in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 as follows;

“So far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

In the same case, Newbold P stated as follows;

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuse issues. This improper practice should stop.”

32. Similarly, in the case of *Hassan Ali Jobo & another v Suleiman Said Shabal & 2 others* SCK Petition No 10 of 2013 [2014] eKLR, the Supreme Court stated as follows;

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implications out of pleadings and which if argued as a preliminary point may dispose of the suit.”

33. It is therefore clear that a preliminary objection should be anchored on legal questions arising from pleadings, where facts on that question are not contested. The emphasis is that it must be a pure point of law, and therefore a mix of factual and legal questions ought not be determined as a preliminary objection. Since a preliminary objection may dispose off a suit in its entirety, without affording parties a chance to have their day in court, this jurisdiction is exercised with circumspection as the duty of the court is to hear parties on merit, otherwise there is a risk of abuse of the court process which this court ought to vigilantly guard against.



34. The preliminary objection raised by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants is that the issues raised in both the application dated January 27, 2020 and the suit are directly and substantially in issue in Machakos High Court Succession Cause No 151 of 2014, *In the matter of the estate of John Nthiwa Nzioka (Deceased)*. Another ground is that on February 6, 2017, the directors of the plaintiff were ordered by the High Court to appear before it as to give evidence regarding a forged confirmed grant which is the basis of the plaintiff's title. Lastly, that the suit filed is in contravention of section 6 of the *Civil Procedure Act*.
35. The question that this court must answer is whether the three questions raised by the 1<sup>st</sup> to 3<sup>rd</sup> defendants are pure points of law. Counsel has referred to the issues in Machakos High Court Succession Cause No 151 of 2014. Is this court capable of ascertaining the issues in that case merely by considering the pleadings? My answer would be no. To begin with, as at the time of filing the preliminary objection on February 26, 2020, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants had not filed their defence. There was nothing therefore to show that what they had raised was a pure point of law based on undisputed facts.
36. Besides, I note that the 1<sup>st</sup> to 3<sup>rd</sup> defendants filed their statement of defence and counterclaim on November 4, 2020, which was replied to by the plaintiff. A cursory look at the plaint, defence and counterclaim as well as reply to defence, does not demonstrate that the issues in High Court Succession Cause No 151 of 2014 are the same issues as in this case. Besides, the question of whether this suit is in violation of section 6 of the *Civil Procedure Act* is not raised in the 1<sup>st</sup> to 3<sup>rd</sup> defendants' defence. What is raised as per paragraph 34 of the defence is that the matters raised herein are matters which this court has no jurisdiction to determine.
37. I must point out that the issue as to whether the issues in Machakos High Court Succession Cause No 151 of 2014 are directly or substantially in issue as the issues in this case, can only be determined after interrogating the pleadings in Machakos High Court Succession Cause No. 151 of 2014 vis a vis the issues raised in this matter. And those pleadings in Machakos Succession Cause No 151 of 2014 can only be conveyed to this court through an application with an affidavit showing the evidence of the existence of that suit. Therefore, a question as to whether a suit is subjudice or not as provided for in section 6 of the *Civil Procedure Act*, is not a matter that should be raised by way of a preliminary objection. It should be raised by way of application so as to provide evidence. For those reasons, I find that the 1<sup>st</sup> and 3<sup>rd</sup> grounds of the preliminary objection are not valid preliminary objections.
38. On the issue as to whether the plaintiff's directors were on February 6, 2017 ordered to appear before the High Court, my view is that the same is a factual matter which does not raise a pure point of law and therefore does not raise a valid preliminary objection. Since the entire preliminary objection dated February 25, 2020 is not a valid or proper preliminary objection, it will be needless to consider whether the preliminary objection was merited.
39. As regards the application, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants raised an objection on jurisdiction of this court, alleging that it is the High Court sitting as the probate court that has jurisdiction to determine this suit. Article 162 (2) (b) of the *Constitution* of Kenya clothes this court with jurisdiction to hear and determine disputes relating to the environment and the use and occupation of, and title to land.
40. Section 13 of the *Environment and Land Court Act* No 19 of 2011, provides for the jurisdiction of this court as follows;
- (1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 162 (2) (b) of the *Constitution* and institute provisions of this Act or any other law applicable in Kenya relating to environment and land.



- (2) In exercise of its jurisdiction under article 162 (2) (b) of the Constitution, the court shall have power to hear and determine disputes:-
- (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
  - (b) relating to compulsory acquisition of land;
  - (c) relating to land administration and management;
  - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
  - (e) any other dispute relating to environment and land.
41. The defendants in their response to the application contended that it is the High Court that has jurisdiction to hear and determine all matters touching on and arising from estates of deceased persons that are pending before it, regardless of the nature of the assets comprised in the estate. Counsel for the 1<sup>st</sup> to 3<sup>rd</sup> defendants contended that the suit property is part of the estate of the late John Nthiwa Nzioka and therefore it is the High Court that ought to determine this dispute. However, in the same vein, the 1<sup>st</sup> to 3<sup>rd</sup> defendants attached an order from the High Court dated February 23, 2021, stating that the dispute as to ownership of the suit property ought to be determined before this court. The plaintiff on his part argued that the order of February 23, 2021, from the High Court clearly stated that this court has jurisdiction to hear and determine this matter and that the same has not been set aside or appealed against.
42. Jurisdiction is everything, it is the power of the court to hear and determine a matter, and if the court has no jurisdiction to decide a dispute, it must down its tools as anything a court does, and any proceedings or orders made by a court, without jurisdiction is a nullity. See the cases of Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd [1989] and Macfoy v United Africa Co Ltd [1961] 3 ALL ER 1169.
43. Jurisdiction can only flow from the Constitution or statute or both. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & another [2012] eKLR, the Supreme Court held as follows;
- “A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”
44. Similarly In the Matter of the Interim Independent Electoral Commission Constitutional Application No 2 of 2011, the Supreme Court held as follows;
- “Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law”.



45. It is therefore clear from court decisions that a court can only exercise the jurisdiction conferred on it either by the Constitution or statute or both. It ought not expand or go beyond its jurisdiction or cloth itself with jurisdiction it does not have in law. While this court appreciates the decision of the High Court made on February 23, 2021, this court is still obligated to determine whether it has jurisdiction to determine this matter, because it can only exercise the jurisdiction provided for it in the Constitution or statute or both.
46. The plaintiff's claim herein is about whether or not they acquired the suit property lawfully. Whether the suit property was property of a deceased person or not as at the time of its acquisition, is a matter to be determined at full trial; but that does not negate the fact that the plaintiff's claim is in regard to ownership or interest in land, which squarely falls within the jurisdiction of this court as provided for under article 162 (2) (b) of the Constitution as well as section 13 of the Environment and Land Court Act.
47. A claim for ownership of land as against the estate of a deceased person, does not take away the jurisdiction of this court, merely because an estate of a deceased person is involved. It is not about who is litigating or in which capacity is a party litigating, but the subject matter of the litigation or dispute. I am fortified in my view by the reasoning in the case of Re Estate of Stone Katbuli Muinde (Deceased) [2016] eKLR, the court stated as follows;
- “Such claims to ownership of alleged estate property as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates court, or at the civil or commercial divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit, in favour of the claimant, then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.”
48. I therefore find that the subject matter of this dispute being ownership of the suit property as between the plaintiff and the estate of John Nthiwa Nzioka (deceased) is a matter within the jurisdiction of this court.
49. Having determined the preliminary objection and the question of jurisdiction, I will now turn to the application. Order 40 rule 1 of the Civil Procedure Rules provide for temporary injunctions as follows;
- “(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 or 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.”
50. Essentially, temporary injunctions are granted where the subject matter of the suit, in this circumstance, the suit property, is in danger of being wasted, damaged, alienated, sold or be removed to delay or obstruct any decree that may be passed in favour of the plaintiff.



51. Principles for grant of temporary injunctions are well settled. In the case of *Giella v Cassman Brown* [1973] EA 358, the court set out principles for grant of temporary injunction, namely; that the applicant must demonstrate a *prima facie* case with a probability of success, that if the injunction is not granted, the injury suffered by the applicant may not be adequately compensated by an award of damages and that if the court is in doubt, it should decide the application on a balance of convenience.
52. A *prima facie* case was described in the case of *Mrao v First American Bank of Kenya Limited & 2 others* [2003] KLR as follows;
- “ a *prima facie* case in a civil application included but is not confined to a genuine and arguable case.” It is a case 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 later.
53. In this case, the plaintiff/applicant has produced a grant dated July 24, 2014, issued to Annastacia Mbinya Nthiwa, the agreement dated May 23, 2016, between the plaintiff and the late Annastacia Mbinya; a consent to transfer from the Land Control Board, a title of the suit property in the name of Annastacia Mbinya, an official search, a transfer document from Annastacia Mbinya and a title deed in the name of the plaintiff. The plaintiff maintains that they followed the right legal procedures in acquiring title to the suit land and that they are bonafide innocent purchasers for value without notice. On the other hand, the 1<sup>st</sup> to 3<sup>rd</sup> defendants contend that the suit property was transferred to the plaintiffs by virtue of a forged confirmed grant, and therefore the same is a nullity.
54. I must point out that at this stage I need not go into the finer details of the suit, as my duty is to determine whether the plaintiff has met the threshold for grant of injunction. This is meant to avoid making conclusive findings on matters that need further interrogation at trial, so as not to embarrass the fair trial of this matter. With that in mind, I note that it is not disputed that the confirmed grant the basis of the transfer of the suit property to the plaintiff did not originate from the High Court in Succession Cause No 151 of 2014, as was found by that court vide its orders of February 23, 2021, which orders have apparently not been appealed against. What is disputed is whether the plaintiff is an innocent purchaser for value without notice of defect in title. The plaintiff’s assertion that the defendants were party to the agreement in dispute has not so far been disputed. The 1<sup>st</sup> to 3<sup>rd</sup> defendant’s main complaint is that the title of the suit property is a nullity as its root is not clean. The plaintiff has indicated that they spent close to Kshs 50 Million in the purchase of the suit property and that should they succeed or lose in this suit, they are not able to ascertain whether the 1<sup>st</sup> to 3<sup>rd</sup> defendants shall be able to refund the purchase price. Again, I have not seen any denial that the late Annastacia did receive money from the plaintiff.
55. Having noted that the plaintiff’s claim turns on whether or not the plaintiff is an innocent purchaser for value without notice to defect in title, I am satisfied that the plaintiff has demonstrated a *prima facie* case with a probability of success.
56. On whether the plaintiff stands to suffer irreparable injury should the injunction sought not be granted, the plaintiff is obligated to show that an award of damages shall not be adequate compensation (See *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2008] eKLR). In the instant matter, the plaintiff argued that they are not certain of the 1<sup>st</sup> to 3<sup>rd</sup> defendants ability to refund the Kshs 50 million paid as consideration. That assertion was not substantively challenged and I am therefore satisfied that the plaintiff stands to suffer irreparable loss and injury if the injunction is not granted. I also note that the plaintiff has been the registered proprietor of the suit property since 2016. That, in my view, tilts the balance of convenience in favour of granting a temporary injunction.



57. In the premises, I make the following orders;

- (a) The preliminary objection dated February 25, 2020 is not a valid preliminary objection and the same is hereby struck out.
- (b) That this court has jurisdiction to hear and determine this matter.
- (c) An order be and is hereby issued restraining the defendants, their agents, employees and or servants from selling, transferring, disposing off and/or interfering in any other manner whatsoever with the parcel of land known as Donyo Sabuk/Koma Rock/Block 1/67744 (originally Donyo Sabuk/Koma Rock/Block 1 /584) pending hearing and determination of this suit.
- (d) Costs of the application are awarded to the plaintiff/applicant.

58. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 6<sup>TH</sup> DAY OF JULY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A NYUKURI**

**JUDGE**

**In the presence of;**

**Ms Kwamboka holding brief for Mr Nzei for defendant/respondent**

**Ms Ngure for the plaintiff**

**Ms Josephine Misigo – court assistant**

