



REPUBLIC OF KENYA



**Nyakio & another v Oguwa & 5 others (Environment & Land Case E121 of 2024) [2025] KEELC 4914 (KLR) (25 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4914 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE E121 OF 2024**

**JM ONYANGO, J**

**JUNE 25, 2025**

**BETWEEN**

**JOSEPH THOTHO NYAKIO ..... 1<sup>ST</sup> PLAINTIFF**

**SERAH WANJIRU THOTHO ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**BENARD ADHIAMBO OGUWA ..... 1<sup>ST</sup> DEFENDANT**

**MAGARITA GROUP LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**EQUITY BANK LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**KABETE LAND CONTROL BOARD ..... 4<sup>TH</sup> DEFENDANT**

**KABETE LAND CONTROL BOARD REGISTRAR ..... 5<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. The Applicants approached this Honourable Court vide a Notice of Motion Application dated 15<sup>th</sup> July 2024. Through this Application, the Applicants seek inter alia an interlocutory injunction to restrain the 3<sup>rd</sup> Respondent from proceeding with the intended sale of the parcel of land known as Title No. Kabete/ Karura/697 (hereinafter ‘the suit property’); an act purportedly undertaken in exercise of its statutory power of sale.
2. The Application is anchored upon the grounds set forth on the face of it and is further buttressed by a Supporting Affidavit jointly sworn by Joseph Thotho Nyakio and Serah Wanjiru Thotho on even date.
3. The Applicants aver that they are the lawful and rightful owners of the suit property which they have possessed continuously since 19<sup>th</sup> November 1982 and continue to use the land to cultivate and lease out portions of it to tenants as a means of sustenance.



4. The Applicants contend that the suit property was fraudulently, illegally and unprocedurally transferred to the 2<sup>nd</sup> Respondent at the behest of the 1<sup>st</sup> Respondent.
5. It is the Applicants position that at no time did they lodge a transfer deed at the 5<sup>th</sup> Respondent's offices yet the 5<sup>th</sup> Respondent proceeded to issue a title deed of the suit property in favour of the 2<sup>nd</sup> Respondent.
6. The Applicants further assert that the suit land being agricultural in nature could not have been lawfully transferred without the prior grant of consent from the Land Control Board; consent which, to their knowledge, was neither sought nor obtained in accordance with the law.
7. Additionally, the Applicants aver that the purported transfer was effected without the requisite spousal consent of the 2<sup>nd</sup> Applicant as contemplated under the law.
8. The Applicants claim that on 29<sup>th</sup> March 2023, the 2<sup>nd</sup> Respondent took out a loan facility of Ksh. 23,100,000/- and used the suit property as collateral and a charge was subsequently registered against the suit property.
9. It is the Applicants position that upon following up on the issue of the charge on the suit property, they discovered that the 2<sup>nd</sup> Respondent had defaulted in repaying the loan facility and consequently the 3<sup>rd</sup> Respondent issued statutory notices to sell the suit property on 7<sup>th</sup> December 2023 and later 24<sup>th</sup> April 2024.
10. The Applicants aver that on 3<sup>rd</sup> July 2024 the 3<sup>rd</sup> Respondent instructed Keysian Auctioneers to issue a 45-days-notice to the 2<sup>nd</sup> Respondent to sell the suit property either through private treaty or by public auction.
11. The Applicants are apprehensive that if the injunctive orders sought herein are not issued then suit property which they claim to be their family land is at risk of being disposed of by the 3<sup>rd</sup> Respondent.
12. The Application was vehemently opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents through the Replying Affidavit of Benard Adhiambo Oguwa sworn on 24<sup>th</sup> January 2025. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents essentially claim that the 1<sup>st</sup> Respondent purchased the suit property for valuable consideration of Ksh. 36,000,000/- and the suit property was transferred with the full knowledge and consent of the Applicants.
13. Similarly, the 3<sup>rd</sup> Respondent opposed the application through Replying Affidavit of Samuel Wamaitha sworn on 25<sup>th</sup> March 2025. The 3<sup>rd</sup> Respondent averred that they advanced the 2<sup>nd</sup> Respondent a loan facility of Ksh. 29,648,000/- against the collateral security over the suit property. It is the 3<sup>rd</sup> Respondent's position that the 2<sup>nd</sup> Respondent has abandoned servicing the loan thus necessitating their intentions to exercise their statutory power of sale. The 3<sup>rd</sup> Respondent's aver that granting the orders sought by the Applicant would effectively deprive them of their statutory right to sell the charged suit property.
14. The application was canvassed by way of written submissions, with each party setting forth their arguments for the Court's consideration.
15. Having given due consideration to the Application, the Replying Affidavits filed in opposition, and the written submissions of the parties, I have distilled a singular issue for determination: whether the Applicants have satisfied the legal threshold for the grant of an injunctive relief.



## Analysis and Determination

16. Before I turn to the legal prism through which the Application must be examined, it bears highlighting that an order of temporary injunction is an equitable remedy that is granted not as a matter of course, but upon a clear and compelling demonstration that the circumstances merit such intervention.
17. It is against this backdrop that I must now assess whether the Applicants have discharged the burden required to justify the grant of the relief sought.
18. The authority of this Court to grant a temporary injunction finds its statutory footing in Order 40(1) of the Civil Procedure Rules which provides:

“ [Order 40. rule 1] Cases in which temporary injunction may be granted.

  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.”
19. This provision serves as a protective mechanism, designed to preserve the status quo and safeguard the subject matter of the suit from irreparable harm while the judicial process runs its course.
20. The principles governing the grant of temporary injunctions are now firmly entrenched in our jurisprudence. A party seeking such relief must satisfy a threefold test, as laid down in the seminal case of *Giella v Cassman Brown & Co. Ltd* [1973] E.A. 358.
21. The Applicant must, firstly, establish a prima facie case with a probability of success. Secondly, it must be shown that if the injunction is not granted, the Applicant stands to suffer irreparable harm; harm that cannot be adequately remedied by an award of damages. Thirdly, where the Court is left in doubt, it must determine the matter on a consideration of the balance of convenience, weighing which party stands to suffer greater prejudice from the grant or refusal of the orders sought.
22. In the present case, the ownership of the suit property lies at the heart of the dispute. It is Applicants’ position that they have been the owners of the suit property from 19<sup>th</sup> November 1982 until it was illegally transferred to the 2<sup>nd</sup> Respondent. The Applicants further contend that no sale agreement has been adduced by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to corroborate the alleged sale and transfer of the suit property to the 2<sup>nd</sup> Respondent.
23. Conversely, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents contend that the Applicants have fallen short of discharging the burden of proving any fraud or irregularity in the transfer of the suit property. They take particular



issue with what they perceive as a fundamental inconsistency in the Applicants' narrative. They point out that while the Applicants, in their initial pleadings, appear to admit to having furnished the 1<sup>st</sup> Respondent with completion documents, they later retreat from that position in their Supplementary Affidavit, thereby casting doubt on the coherence and credibility of their case.

24. Firstly, I must determine whether the Applicants have established a prima facie case. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR the Court of Appeal defined a prima facie case in the following terms:

“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 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.”

25. In the instant case, it is evident that the ownership of the suit property is seriously contested and raises weighty questions of law and fact that cannot be resolved at this interlocutory stage. At this stage, the Court is not called upon to make definitive findings or to test the credibility of competing narratives. The court's duty is merely to determine whether the Applicants have crossed the threshold warranting preservation of the subject matter pending final adjudication.
26. The Applicants contend that the suit property constitutes ancestral and family land, forming the foundation of their livelihood and identity. In response, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents claim that the suit property was sold for a consideration of Ksh. 36,000,000/- and subsequently transferred to the 2<sup>nd</sup> Respondent with the full knowledge and consent of the Applicants. They admit to having defaulted on a loan secured against the suit property, which has prompted the 3<sup>rd</sup> Respondent's move to exercise its statutory power of sale. The Respondents argue that the injunctive orders sought would unduly hinder the 3<sup>rd</sup> Respondent from enforcing its rights as chargee.
27. What emerges from the foregoing is that the core question of ownership is fiercely contested and rests on complex facts and legal issues. These cannot be definitively resolved at this juncture, nor should they be. Such matters are properly reserved for full ventilation at the trial.
28. Accordingly, having considered the material before me I am satisfied that the Applicants have established a prima facie case.
29. Turning to the second limb of the test, the Applicants contend that they face the imminent threat of dispossession from what they describe as family land, which they have occupied and cultivated for decades. They assert that the transfer to the 2<sup>nd</sup> Respondent was fraudulent, unlawful, and procedurally flawed. Unless the Respondents are restrained, they argue, the threatened alienation will strip them not only of their means of livelihood but also of their longstanding connection to the land.
30. In the Applicants view, the risk of the 3<sup>rd</sup> Respondent selling the suit property is neither remote nor speculative. It is immediate, tangible, and places the suit property in peril before the Court has had the opportunity to determine the validity of the contested transfer.
31. In response, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submit that the Applicants have no recognisable proprietary interest in the suit property and, as such, cannot cloak themselves in the protection of equitable relief. They maintain that the suit property is lawfully registered in the name of the 2<sup>nd</sup> Respondent. They further concede that they have fallen into default on the loan facility secured by the suit property and submit that the 3<sup>rd</sup> Respondent, as chargee, is within its right to invoke and exercise the statutory power of sale.



32. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submit that in their view, the intended sale is neither capricious nor unlawful, but a legitimate consequence of default, sanctioned by both contract and statute. They argue that any claim by the Applicants amounts to no more than a backdoor attempt to undermine the registered title, devoid of legal or equitable foundation.
33. In *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, the Court of Appeal addressed the condition of irreparable injury as follows:
- “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.”
34. Flowing from the wisdom of the Court of Appeal, I find that the injury alleged in the instant Application is neither fanciful nor remote. I am satisfied that the Applicants have crossed the requisite threshold. They have demonstrated that the threatened sale portends not merely financial loss, but the extinguishment of a long-standing connection to the land, a loss which no quantum of damages can truly redress.
35. The Applicants allege the suit land is not merely soil underfoot, but the source of their livelihood. To permit its sale by the 3<sup>rd</sup> Respondent in the face of a disputed and allegedly fraudulent transfer would risk extinguishing rights that no monetary award could restore.
36. Where the substratum of the dispute is the very title itself, equity cannot idly stand by. The threat is real, the harm irreparable, and the law must act to preserve the status quo until the truth is laid bare at trial.
37. The upshot is the Application dated 15<sup>th</sup> July 2024 is allowed.
38. The costs shall be in the cause.

**DATED, SIGNED AND DELIVERED, AT THIKA THIS 25<sup>TH</sup> DAY OF JUNE 2025**

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**J. M. ONYANGO**

**JUDGE**

In the presence of:

1. Mr. Bibu for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants
2. Miss Gichui for Mr. Njuguna for the Plaintiff
3. Miss Nyawira for the 4<sup>th</sup> and 6<sup>th</sup> Defendants
4. No appearance for the 3<sup>rd</sup> Defendants.

Court Assistant: Hinga

