REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 327 OF 2016

ESTATE OF JIM KIPTUM CHOGE (SUING THROUGH THE ADMINISTRATORS)

EVA CHEPKURUI CHEROGONY & 3 OTHERS.....PLAINTIFF

VERSUS

PROF PHILIP KIPKEMBOI RONO.....1ST DEFENDANT

CALVIN CHEPCHUMBA MASE.....2ND DEFENDANT

KENYA INSTITUTE OF BUSINESS AND TECHNOLOGY....3RD DEFENDANT

I & M BANK.....4TH DEFENDANT

UASIN GISHU COUNTY LAND REGISTRAR.....5TH DEFENDANT

HON. ATTORNEY GENERAL.....6TH DEFENDANT

PRINCIPAL SECRETARY-STATE DEPARTMENT OF HOUSING & URBAN

DEVELOPMENT.....PROPOSED 7TH DEFENDANT

AND

ANTIQUE AUCTIONEERS.....PROPOSED INTERESTED PARTIES

RULING

This ruling is in respect of an application by way of a notice of motion dated 10th December 2019 by the 5th and 6th defendant/applicants seeking for the following orders:

a. That this Honourable Court be pleased to enjoin **ANTIQUE AUCTIONEERS** as an interested party and **PRINCIPAL SECRETARY STATE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT** as the 7TH defendants herein.

b. That this Honourable court be pleased to issue an injunction restraining the 4th defendant and the interested party through their agents, employees or servants from selling offering for sale the suit property known as Eldoret Municipality block 7/277 through public auction or from alienating, disposing of entering into, encroaching or trespassing , or in any way wasting, damaging or preventing or interfering with applicants or their tenants peaceful ,quiet and uninterrupted possession and use of the suit property pending the hearing and determination of this application inter parties.

c. That this Honourable court be pleased to issue an injunction restraining the 4th defendant and the interested party through their agents employees or servants from selling or offering to sell the suit property known as Eldoret Municipality block 7/277 through public auction or from alienating, disposing of entering into, encroaching or trespassing or in any way wasting, damaging or preventing or interfering with applicants or their tenants peaceful ,quiet and uninterrupted possession and use of the suit property pending hearing and determination of this suit.

d. Costs of this application.

Counsel agreed to canvas the application vide written submissions. Counsel for the 1st 2nd and 3rd defendants indicated to the court that the defendants were not participating in the application.

5TH & 6TH DEFENDANT/APPLICANT'S SUBMISSIONS

Counsel for the 5th and 6th defendants gave brief facts of the case that the plaintiffs have alleged that land known as Eldoret Municipality Block 7/277 belonged to the estate of Jim Choge through a company known as Solongo Enterprises Limited. That the plaintiffs have further alleged that the 1st ,2nd and 3rd defendants entered into an illegal transaction thereby fraudulently transferring the said piece of land to themselves.

Counsel submitted that with the pending case in court, the 4th defendant who is a party to the case and against the doctrine of *lis pendens* purported to put up for sale the disputed parcel and surprisingly that the plaintiffs and the 1st ,2nd and 3rd defendants did not contest the sale. That when this information was made public, the proposed 7th defendant approached the AG's office and gave instructions to stop the sale as the land in question is public land with Government houses namely ELDO/HOU/HG/8 reserved for the Ministry since 1958.

Mr. Wabwire Counsel for the 5th and 6th defendants submitted that the application before court was necessitated by the unlawful action by the 4th defendant who purported to dispose of the disputed parcel of land yet knowing very well that the ownership is yet to be determined.

Counsel therefore submitted that the current application raises the following issues for determination:

a. Whether the enjoinment of the proposed 7th defendant in the suit prejudices any right of the parties in the suit.

b. Whether the 4th defendant's actions to sell the suit property is against the doctrine of *lis pendens.*

c. Whether the applicant has met the threshold for grant of a temporary injunction pending the final disposal of the suit.

On the first issue as to whether the enjoinment of the proposed 7th defendant in the suit prejudices any right of the parties in the suit, counsel submitted that the proposed 7th defendant has demonstrated through the documentations filed and more particularly the building register marked DMNI, that the disputed parcel of land has a Government house namely ELDO/HOU/HG/8. That the house was put up by the proposed 7th defendant way back in 1958 and that civil servants are in occupation under the management of the proposed 7th defendant todate.

Mr. Wabwire Counsel for the 5th and 6th defendants submitted that the 1st, 2nd and 3rd defendants may be holding title to the said parcel but that is why this suit is in court to prove how they acquired the same. This makes the proposed 7th defendant a necessary party to this suit.

Counsel further submitted that it is clear that neither the plaintiffs nor the 1st 2nd and 3rd defendants are in possession of the suit property but the proposed 7th defendant has been and is still in possession of the suit property and that being the case, it is evident that the dispute between the parties is in respect to ownership regardless of who has the title. Counsel stated that the proposed 7th defendant is seeking to be enjoined as a party through the Attorney General hence it is a misconception by the 4th defendant that the proposed 7th defendant had no legal capacity to sue or be sued.

On the second issue as to whether the 4th defendant's actions to sell the suit property is against the doctrine of *lis pendens*, counsel submitted that according to Black's Law Dictionary, 9th Edition, *lis pendens* is defined as the jurisdiction, power or control acquired by a court over property while a legal action is pending.

Counsel submitted that the suit property being **Eldoret Municipality Block 7/277** is what is pending before this court for determination and that the 4th defendant herein is a party to that suit therefore its action to sell the property without leave and or permission of the court is in bad faith and meant to prejudice the other parties to the suit and more so the 5th,6th and proposed 7th defendants.

The doctrine of *lis pendens* is a common law principle that was enacted into statute by section 52 Indian Transfer of Property Act (ITPA)- (now repealed.) While addressing the purpose of the principle of lis pendens, **Turner L. J, in Bellamy vs Sabine [1857] I De J 566** held as follows:-

> "It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings."

Counsel also relied on the case of **Malindi HCCC No. 63 of 2013,; Abdalla Omar Nabhan Vs The Executor of the Estate of Saad Bin Abdalla Bin Abuod & Another**, where the court held that the purpose of the principle of *lis pendens* is to preserve the suit property until the suit is finally determined or until the court issues orders and gives terms on how the suit property should be dealt with. The doctrine of *lis pendens* is founded on public policy and equity.

Counsel cited the case of **Bernadette Wangare Muriu vs National Social Security Fund Board of Trustees & 2 Others [2012] eKLR** where Nambuye J (as she then was)

> The necessity of the doctrine of lis pendens in the adjudication of land matters pending before the court cannot be gainsaid, particularly for its expediency, as well as the orderly and efficacious disposal of justice. Having said that, with the repeal of section 52 of the ITPA by the Land Registration Act (LRA) Number 3 of 2013, the question arises as to whether the doctrine remains applicable to the circumstances of the present case. We consider that its applicability must be considered in the light of Section 107 (l) of the LRA which provides the saving and transitional provisions of this Act.

Mr. Wabwire therefore submitted that the actions by the 4th defendants to put up for sale the disputed property are in violation of the doctrine of lis pendens, unlawful hence making it a necessity that an injunction issued on the 19th day of December 2019 be confirmed pending hearing and determination of the suit.

On the third issue as to whether the applicant has met the threshold for grant of a temporary injunction pending the final disposal of the suit, counsel submitted that the applicant has demonstrated that the property that the 4th defendant intends to sell is still in dispute in regards to the ownership. That from the pleadings before court, three different parties are claiming ownership of the said property and it's a matter that is within the knowledge of the 4th defendant. Counsel therefore submitted that the applicant has meet all the conditions as set out in the Giella V Cassman Brown & Company Ltd 1973 EA 358 case which requires the applicant to show the following:

> "First, the applicant must show that he has 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 adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience."

On the first issue as to whether the applicant herein has established a prima facie case with probability of success, Counsel submitted that the applicant has met this threshold. That the role of a Court faced with an interlocutory application for injunction is not really to make final findings but to weigh the relative strength of the parties' cases and cited the case of **Mbuthia Vs Jimba Credit Corporation Ltd (1988) KLR**, where the court stated as follows: -

> "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 parties' cases,"

Counsel submitted that even though the 1st ,2nd and 3rd defendants have title to the suit property being Eldoret Municipality Block 7/277, the said title is being challenged and that is an issue that will only be determined between the plaintiffs and 3rd defendant and the 5th ,6th and the proposed 7th defendants during the hearing of the main suit.

On the second issue as to whether the applicants will suffer irreparable injury if the order of injunction is not issued counsel submitted that should the 4th defendant dispose of the suit property which is public land, the proposed 7th defendant and the public at large will suffer immerse loss. In any case the grant of an order of injunction will not prejudice any party pending the determination of the suit.

On the issue of probability of success, counsel submitted that the applicants herein have demonstrated that they have been in occupation since 1958, which fact the 4th defendant has acknowledged hence an order of injunction in the circumstances is necessary to preserve the subject property awaiting the determination of the court.

On the issue raised by the 4th defendant in its replying affidavit that annexed defence and counterclaim not forming part of the record or being filed without leave, counsel submitted that the draft defence and counterclaim is an annexure filed pursuant to instruction from the proposed 7th defendant, who is not a party yet. Further that in the pending suit the 4th defendant has not filed a defence and if filed has not served any to the 5th and 6th defendant neither has it raised any cross claim against the 5th and 6th defendants.

Counsel submitted on the issue that the orders will be prejudicial to the 4th defendant as a banking institution that the 4th defendant has decided to act as a complainant against the 5th defendant by hiding or failing to acknowledge that it totally failed to perform due diligence on the property before charging. That if it had inspected the property before charging it then it would have discovered that the property had a government house fully occupied by civil servants.

Mr.Wabwire also submitted that the firm of Gumbo & Associates Advocates are improperly on record in this matter on behalf of the 4th defendant hence the replying affidavit too is irregularly on record and should be struck out. That it is clear from the court record that when this suit was filed the firm of Gumbo & Associates Advocates filed a memorandum of appearance dated 15th February 2017 on behalf of 1st ,2nd and 3rd defendants only. That the applicant has not been served with appearance from the said firm in respect to the 4th defendant. Civil Procedure Act stipulates the procedure on how an Advocate or firm of Advocates can appear in a matter. Counsel submitted that the undated replying affidavit thereto sworn by Vincent Barchok Ngochoch is a strange document in court and should be struck out forthwith. This makes the application for injunction by the 4th defendant unopposed.

Counsel urged the court to take judicial notice of existence of another suit being Environment and Land court case No. 20 of 2019 where the parties are the against another government house Eldoret Municipality Block 7/303. Counsel therefore urged the court to allow the application as prayed with costs.

4TH DEFENDANT'S SUBMISSIONS

Counsel for the 4th defendant filed submissions and listed the following issues for determination

a. Whether the Applicant has satisfied the conditions for the grant of the orders for the joinder of the proposed 7th defendant and the interested party?

b. Whether the Applicant has met the threshold for the grant of temporary injunctive orders;

c. Who should bear the Costs of the Application?

On the first issue as to whether the applicant has satisfied the conditions for joinder of additional parties to this suit, counsel submitted that parties are bound by their pleadings and they can amend the same at any stage before judgment or at any point in the proceedings when ordered by the court to do so. Further that parties cannot deviate completely from their initial pleadings and raise new issues that are prejudicial and unjust to the opposing parties.

Counsel cited the case of **EASTERN BAKERY** v. **CASTELINO** [1958] E.A. 461, where Sir Kenneth O"Conner, President of the then Court of Appeal for Eastern Africa, said at p. 462 –

> "It will be sufficient … to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side and that there is no injustice if the other side can be compensated by costs."

Counsel further submitted that the 5th and 6th Defendant initially through their statement of Defence filed in this court on the 28th March, 2018 confirmed that the property was legally and procedurally sold to the 1st, 2nd and 3rd Defendants. The purport of the current motion is geared to introduce a new party to come into these proceedings for purposes of asserting a position which is diametrically opposed to the position earlier taken by the Attorney General.

Mr. Kipkosgei counsel for the 4th defendant submitted that the proposed course adopted by the Attorney General is bound to convolute the issues in this matter. It is not clear how the Attorney General seeks to advance the case that the suit property was unlawfully acquired. Further that the Applicants only ground to have the proposed 7th Defendant be enjoined in the proceedings is that the suit property Eldoret Municipality Block 7/ 277 is a public utility reserved sometime in 1958 but they have not attached any evidentiary documents to support their claim.

Counsel cited Order 1 Rule 10 (4) of the Civil Procedure Rules, 2020 provides that;

> Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.

Mr. Kipkosgei submitted that the only avenue open to the 5th and 6th defendants to articulate the question of validity of the title held by the 1st, 2nd and 3rd defendants is to file an independent suit for that purpose. Counsel urged the court to disallow the application for joinder.

Counsel relied on the case of **Laisa Mpoye & 2 others vs Kajiado Central Milk Project "The Board" & 5 others [2012] eKLR** where Odunga J cited the case of **Kingori vs Chege & 3 others [2002] eKLR** in which Nambuye J (as she then was) stated that the relevant tests of determining whether or not to join a party in proceedings were as follows:-

i. He must be a necessary party.

ii. He must be a proper party.

iii. In the case of the defendant, there must be a relief flowing from that Defendant to the Plaintiff.

iv. The ultimate order or decree cannot be enforced without his presence in the matter.

v. His presence is necessary to enable the court effectively and completely adjudicate upon and settle all questions involved in the suit**.**

Counsel submitted that the ultimate decree or order if granted in favour of any party herein can still be enforced without the presence of the proposed 7th defendant.

On the issue on grant of temporary injunction, counsel submitted that the applicant has not met the threshold for grant of the orders. Counsel relied on the case of ***Hoffman La Roche & Co. Industry vs. Secretary of State for Trade and Industry [1975] AC 295 at 355 (H.L)*** described irreparable damage to be;

> ''The object of [an interim injunction] is to prevent a litigant who must necessarily suffer the law's delay, from losing from that delay the fruit of his litigation; this is called 'irreparable damage,…''

Counsel further relied on the case of **Simon Kipngetich Bett vs. Richard C. Kandie [2012]** where Munyao Sila J while addressing what would amount to an irreparable harm rendered himself thus:

> ''To me, the assessment of irreparable harm has to be done on case by case basis. The court must assess whether the subject matter of the case will be so wasted as to make the final determination, if in favour of the Applicant a nullity. In my view, if the subject matter of the suit is capable of substantially being maintained in no worse a state at the conclusion of the suit as it is at the time of the Application for injunction, then there is no irreparable harm (Emphasis by Respondents) **Such harm must also be harm that cannot adequately compensated by an award of damages. In other words it is the sort of harm which will render victory in the suit empty and devoid of any substance**...''

It was therefore counsel's submission that there is no irreparable damage that could visit the Applicants herein as the 1st, 2nd and 3rd Defendants voluntarily charged the suit property well knowing of the consequences involved in case of default.

On the issue of balance of convenience counsel submitted that the 4th Defendant/Respondent stands a higher risk of injustice if the orders sought by the Applicants are to be granted and the balance of convenience tilts towards this Honourable Court denying the injunctive orders. Counsel relied on the case of **Films Rover International [1986] EALL ER,** where the court observed that in granting injunctive orders, the court should take whichever course that appears to carry the lower risk of injustice if it should turn out to have been wrong. The same position was affirmed in **Suleiman vs. Amboseli Resort Ltd (2004) e KLR 589** where the court stated that *a fundamental principle is that the court should take whichever course that appears to carry the lower risk of injustice if it should turn out to have been "wrong"*.

On the issue whether the Principal Secretary, State department of Housing be enjoined in these proceedings, counsel submitted that Section 5 of the Office Attorney General Act provides for the functions of the Attorney General as follows:

> "in addition to the functions of the Attorney-General under Article 156 of the Constitution, the Attorney-General shall be responsible for—
>
> a. Advising Government Ministries, Departments, Constitutional Commissions and State Corporations on legislative and other legal matters;
>
> b. Representing the national Government in all civil and constitutional matters in accordance with the Government Proceedings Act (Cap.40);
>
> c. Representing the Government in matters before foreign courts and tribunals;

That the Office of the Attorney General is already a party to this suit therefore the proposed addition of the 7th defendant is of no value as they will still rely on the legal services of the same office of the Attorney General in championing their interest. Further that Section 12 of the Government Proceedings Act provides that;

Parties to proceedings

> (1) Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney-General, as the case may be.
>
> (2) No proceedings instituted in accordance with this Part of this Act by or against the Attorney-General shall abate or be affected by any change in the person holding the office of Attorney-General

It was counsel's submission that in respect to the proceedings against the government requires that all civil proceedings against the government must be initiated in the name of the Attorney General. Even if the court were to allow this application, the proposed 7th Defendant would still bring their claim to this court through the same office of the Attorney General. Finally, counsel urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

This is an application for joinder of the proposed 7th defendant and a proposed interested party by the 5th and 6th defendants. The applicant is also seeking for an order of injunction against the 4th defendant and its agents from selling the suit property in a public auction or otherwise until this suit is heard and determined.

This matter was brought under certificate of urgency when the court granted interim orders of injunction pending the hearing of the application inter partes.

The 1st 2nd and 3rd defendant indicated to the court that they did not wish to participate in the application. The matter was therefore between the 4th, 5th and 6th defendants.

The issues for determination are as to whether the applicant has met the threshold of joinder of parties and whether the principles of grant of temporary injunctions have been established.

The principles and rules governing proceedings on joinder and misjoinder are clearly explained under Order 1 Rule 8, 9 and 10 of the Civil Procedure Rules. The salient features of order 1 are that a party or claimant may be permitted as a plaintiff or defendant in the same proceedings from any claims the plaintiff has against the defendant. In the same claim a party is seeking to be enjoined as a plaintiff or defendant may be sued in the same proceedings. That upon application two or more persons may be allowed by the court to join the already filed suit by the plaintiff or the defendant where they assert that any claim to the relief as set out arises from the same transaction or occurrence.

Further a party seeking to be enjoined in a suit must prove that he/she has an identifiable stake or legal interest or duty in the proceedings. Rule 2 of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 defines an interested party as follows:-

> "interested party" means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation;"

Rule 7 (2) provides that a court may on its own motion join any interested party to the proceedings before it. The broad principles which should govern disposal of an application for enjoinment are that the court can, either on an application made by any interested party or on its own motion direct any person as party to be enjoined in the proceedings.

It is important to note that an applicant in joinder proceedings must demonstrate that his/her presence is necessary to enable the court to adjudicate effectively and completely the issues in the proceedings he/she seeks to join as an interested party.

The court's power to exercise discretion on joinder of an interested party was enunciated in the Supreme Court of Kenya case of **Francis Karioki Muruatetu Ltd & another V Republic & 5 Others in Petition No. 15/16 of 2016 eKLR** where the court identified the following elements to be considered in granting the application to include the following:

> **(**1) 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.
>
> (2) 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.
>
> (3) 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.

In the present suit the prosed 7th defendant is the Principal Secretary State Department of Housing Development whose claim is that the suit property has houses belonging to the government which are occupied by Civil servants. The applicant attached documents showing that the land was reserved for the government housing in 1958. This in an interest which should be adjudicated and it would be in the interest of justice to hear their side of the story with documentation to prove ownership. This is not something that is remote. Leaving them out might result in miscarriage of justice or hearing a separate suit which will be a duplication and a waste of judicial time and resources. This also goes to the proposed interested party Antique Auctioneers who had been instructed by the 4th defendant. Their presence is necessary to explain what instructions were given to them and the level on implementation of the instructions.

Further in the case of **Mai Mahiu Kijabe/Longonot Co. Ltd V Ayub Mugo Njoroge & 5 Others Civil Suit No. 1672 of 2001 eKLR** laid down the following principle as regards joinder under order 1 Rule 8.:

> "It is a cardinal rule procedural that any party who stands to be directly affected by any orders that may be in any such and whose participation is necessary in a suit for effective adjudication of the matters in issue ought to be made a party in the suit or at least be notified about the existence of the suit."

The court does not buy the line of submissions of the 4th defendant's counsel that joinder of the proposed 7th defendant is unnecessary as the Attorney General already on record. It is true that the Attorney General is the legal advisor to government but it should be noted that there are different government institutions that have to be advised and represented. These government institutions must be identified and must give instructions to the AG in order to be properly and adequately represented. In this particular case it is the State Department of Housing and Urban Development. That is why the 5th Defendant has also been sued as the Uasin Gishu Land Registrar and the Attorney General. I find that the proposed parties have established that they have a legal interest and identifiable stake hence should be joined in this suit.

The court further noted that the 4th defendant has not filed any defence to this case. It is clear from the court record that when this suit was filed the firm of Gumbo & Associates Advocates filed a memorandum of appearance dated 15th February 2017 on behalf of 1st, 2nd and 3rd defendants only. MS. Kenei and Associates Advocates LLP later filed a notice of change of Advocates dated 27th January 2020. There is neither a memorandum of appearance nor a notice of appointment and defence filed by Gumbo and Associates nor by the 4th defendant. What is the legal status of the replying affidavit filed by the 4th defendant and the submissions by Gumbo and Associates Advocates? The answer is that they are not properly on record.

On the second issue as to whether the applicant has met the threshold for grant of temporary injunctions laid down in the Giella Casman Brown & Company Limited (1973) E A 358, where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction: -

"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 adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

The law on granting interlocutory injunction is set out under order 40(1) (a) and (b) of the Civil Procedure Rules 2010 which provides: -

"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 [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;

(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."

The applicant stated that the suit land has government houses which are occupied by Civil servants and the issue in this case is the determination of the ownership of the suit land. If the suit land is sold before the determination of the ownership, this will interfere with the substratum of the case. This in effect shows that the applicant has a prima facie case with a probability of success. In the case of Kenleb **Cons Ltd vs New Gatitu Service Station Ltd & another, (1990) eKLR** the court held that:

"To succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction."

From the affidavits and the documents attached I find that the applicant has met that threshold of a prima facie case.

On the issue as to whether the applicant will suffer irreparable harm, from the record and the documents produced, it is evident that the applicant is likely to suffer irreparable harm if the injunction is not granted

On the issue on balance of convenience the court expressed itself in the case of Paul **Gitonga Wanjau vs. Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR,** as follows: -

"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 injury 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 on convenience lies. "

The applicant has demonstrated a prima facie case with a probability of success and that if the orders sought are not granted then it will suffer irreparable harm. This in effect calls for a status quo to be maintained which is to preserve the substratum of the case until the ownership dispute is determined. The balance of convenience in this case lies in favour of the applicant.

I therefore find that the application dated 18th December 2019 has merit and is hereby allowed as prayed. The interested party and the 7th defendant to file any response to the claim if need be within the next 14 days.

DATED and **DELIVERED** at **ELDORET** this **26th** DAY OF **MAY, 2020**

M. A. ODENY

JUDGE