



REPUBLIC OF KENYA



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**Kianjoya Enterprises Limited v Thuo & 3 others (Land Case E014 of 2025)
[2025] KEELC 5651 (KLR) (Environment and Land) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5651 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
LAND CASE E014 OF 2025
MC OUNDO, J
JULY 31, 2025**

BETWEEN

KIANJOYA ENTERPRISES LIMITED PLAINTIFF

AND

JUDY NJERI THUO 1ST DEFENDANT

SAMUEL MACHARIA KIMANI 2ND DEFENDANT

JOHN NGANGA GITHII 3RD DEFENDANT

LAND REGISTRAR, NAIVASHA 4TH DEFENDANT

RULING

1. Coming up for determination is a Notice of Motion Application dated 19th March, 2025 brought pursuant to the provisions of Section 63 of the *Civil Procedure Act* Cap 21 Laws of Kenya, Section 3 and 18 of the *Environment and Land Court Act* Cap 8 Laws of Kenya and Order 40 rules 1 and 4 of the Civil Procedure Rules 2010 wherein the Plaintiff/Applicant has sought for interim orders of injunction against the Respondents, their agents, assigns and/or employees restraining them from dealing with properties known as Miti Mingi Mbaruk Block 8/1400, 8/1401, 8/1402, 8/1403, 8/1404, 8/1405, 8/1406, 8/1407, 8/1408, 8/1409, 8/1410, 8/1411, 8/1412 and 8/1413 pending the hearing and determination of the suit. That costs be provided.
2. The said application was supported by the grounds therein as well as the Supporting Affidavit of equal date sworn by James Maina Wanjigi, the Plaintiff/Applicant's Director who deponed that sometime in the year 1996 the Plaintiff acquired suit properties over Land Reference Number 4630/7, 4630/8, 4630/9 and Land Reference 8851/2 wherein the same had been subdivided into various portions and a new Registry Index Map sheet 118/3/9 created.



3. Therein after, while some of the properties were registered in the name of Nine Sisters Ltd a family-owned company affiliated with the Applicant, comprised of the same Directors and shareholders as the Applicant, other properties were registered in the names of the persons who had already purchased the properties from the Applicant. That however and inadvertently, some of the properties were never registered either in the name of the Applicant or its affiliate company Nine Sisters Ltd although registers were opened but the titles not issued.
4. That the properties that had not been registered in the Applicant's name or in the name of Nine Sisters Ltd were inter-alia Miti Mingi Mbaruk Block 8/1401, 8/1402, 8/1403, 8/1404, 8/1405, 8/1406, 8/1407, 8/1408, 8/1409, 8/1410, 8/1410, 8/1411,8/1412 and 8/1413, the suit properties herein all measuring approximately 0.25 acres each. That notwithstanding the non-registration of the said parcels in the Applicant's name, they were still utilizing the properties save for a short stint in the year 2018 when the 1st, 2nd, 3rd and 4th Respondents had tried to invade on the same by erecting illegal structures/perimeter fence.
5. That a report was made to Mwariki Police Station on the illegal invasion of the suit properties vide O.B No. 21/2/11/2018. They then conducted a search on the said suit properties and were shocked to learn that various parcels of lands had been registered in the name of the Respondents as the first registered persons as far back as the year 1996 at a time when the whole property had been allotted to them by the Government/Republic of Kenya.
6. That from the said official searches, the suit proprietorship of the suit properties had been Miti Mingi Mbaruk Block 8/1400-1405 registered in the name of Samuel Macharia Kimani. Parcel No. Block 8/1400 had double entries with the second entry being in the name of Nine Sisters Ltd (the Plaintiff's affiliated company)
7. Parcels of land No. Miti Mingi Block 8/1406- 1407 were registered to Judy Njeri Thuo while Miti Mingi Mbaruk Block 8/1408-4013 had be registered to John Nganga Githii while Miti Mingi Mbaruk Block 8/1410 had been registered to both John Nganga Githii and Samuel Macharia Kimani.
8. That Respondents had fraudulently had themselves registered as proprietors of the suit properties as their registration could not be traced either by way of allotment letters and/or by way of transfer of the parcels into their names in the year 1996 when the duly certified area list of 31st August 2005 still showed the Applicant as the owner although no titles had been issued.
9. A letter dated the 21st December, 2018 addressed to their then advocates from the Naivasha Land Registrar, indicated that the parcels number 1400, 1410, 1411 and 1413 had duplicate green cards where no explain had been advanced. That subsequently, they had registered cautions over the suit properties and ELC Suit No. 59/2019 was instituted in Nakuru to have the titles issued to the Respondents herein cancelled. However, for some reasons unknown to them, the suit was dismissed for want of prosecution vide a ruling dated the 15th March, 2022.
10. That subsequently, they had instructed Counsel to file a fresh suit being Naivasha ELC E006/24. That before filing the suit, the Chairman (now deceased) had health complications and had been unable to follow up on the suits, emerging issues and how Counsel had been carrying out their instructions. That accordingly, their Advocate had filed most of the documents and pleadings without express instructions thereby making the said suit untenable for which they had been forced to have the same withdrawn on the 23rd March, 2025.
11. That they had discovered the fraudulent activities of the Respondents herein in the month of November, 2018, hence notwithstanding the fact that they had allegedly been registered as proprietors



of the suit properties between the year 1996 and 1998, the suit herein was not time barred by dint of Section 26 of the Limitations of Actions Act Cap 22 Laws of Kenya.

12. That from the foregoing, it was evident that they had established a prima facie case to warrant the honorable court to grant them the prayers of interim reliefs pending the hearing and determination of the suit herein because they stood to suffer irreparable harm and loss should the Respondents herein be allowed to deal with the properties before the hearing and determination of the suit. That the balance of convenience lay with the court granting the interim injunctive orders as sought as the Respondents herein would not suffer any prejudice should the restrictions be placed on the suit properties. That the application herein had been made bona fides and in the interests of justice and without undue delays.
13. In response and in opposition to the Plaintiff/Applicant's Application, the 1st, and 3rd Defendants/ Respondents filed a Notice of Preliminary Objection and a Replying Affidavit sworn by John Nganga Githii, the 3rd Respondent, both dated 14th April 2025 wherein, they sought to have the Applicant's Application struck out pursuant to Order 2 Rule 15 (1) (d) of the Civil Procedure Rules and/or dismissed in limine with costs on the grounds that both the Suit and Application were a paragon of abuse of the process of the Court and were fatally defective and a non-starter having been commenced against a deceased person, Samuel Macharia Kimani, the 2nd Defendant/Respondent herein.
14. That the Plaintiff's Advocates having acted in various proceedings involving the same parties herein, it was a common fact that the 2nd Defendant/ Respondent had passed on the 29th June, 2024. This thus rendered the instant proceedings a nullity ab-initio as alongside the 2nd and 3rd Defendants/ Respondents, he was one of the registered proprietors of the suit properties being Miti Mingi Mbaruk Block 8/1400, 8/1401, 8/1402, 8/1403, 8/1404, 8/1405, 8/1406, 8/1407, 8/1408, 8/1409, 8/1410, 8/1411, 8/1412, and 8/1413 all measuring approximately 0.25 acres.
15. That all these parcels of land had been government land wherein on or before 10th July, 1996 they had been issued with the Certificates of Title as first registration. The said title could thus not be challenged and thus they had enjoyed quiet possession prior to institution of the various suits being Nakuru ELC No. 59 of 2019 and Nakuru ELC No. E025 of 2023 (Subsequently Naivasha ELC E006 of 2024).
16. That the Plaintiff/Applicant's claim of ownership was founded on fraud, illegal registration and issuance of title documents that had been in conflict with theirs. That since it had been over 20 years since the registration of titles in their names wherein the Plaintiff/ Applicant had not challenged their titles, he was barred from doing so now.
17. That the Plaintiff/Applicant had not made out a prima facie case to merit the sought orders, neither would it suffer irreparable loss as contemplated in *Giella Vs. Cassman Brown*. That the Plaintiff/ Applicant had previously instituted legal proceedings based on the same factual matrix, raising similar or closely related legal issues, calling on similar documentary evidence and indeed, claiming similar reliefs, via Nakuru ELC No. 59 of 2019: *Kianjoya Enterprises Limited v Samuel Macharia Kimani & 4 Others* against himself and the 1st and 2nd Respondents which suit had been dismissed on 15th March, 2022, for want of prosecution.
18. That on 24th November, 2022, the court had upheld the dismissal of the suit, that rather than appealing the decision in the Court of Appeal, the Plaintiff/Applicant had filed a similar suit being Nakuru ELC No. E025 of 2023: *Kianjoya Enterprises Limited & Another Vs. Samuel Macharia Kimani & 4 Others* (Subsequently Naivasha ELC E006 of 2024) which suit had been withdrawn with no orders as to costs.
19. That before the ink could dry, on the 19th March, 2025, the Applicant filed the instant proceedings seeking similar orders as in the prior suits which suit was an embodiment of abuse of the process of



- the Court as decreed under Order 2 Rule 15 (1) (d) of the Civil Procedure Rules for which the court should frown upon as the Plaintiff/ Applicant is guilty of wastage of time and resources of both the Respondents and the court. That the Plaintiff/Applicant's Application be dismissed.
20. The 4th Respondent entered Appearance but did not file any response.
 21. Directions were issued for the disposal of the Application by way of written submissions wherein the Plaintiff/Applicant vide its submissions dated 16th May 2025 framed its issues for determination as follows:
 - i. Whether the notice of preliminary objection herein is merited?
 - ii. Whether injunctive and/or restrictive orders sought herein should be granted?
 - iii. Whether doctrine of Lis pendens should be applied herein?
 22. On the first issue for determination as to whether the notice of preliminary objection herein was merited the Applicant placed reliance on the decisions in the cases of Mukisa Biscuits Manufacturing Ltd v West End Distributors (1969) EA 696 and Hassan Nyanje Charo v Khatib Mwashetani & 3 others, [2014] eKLR to submit that it was settled that a preliminary objection could only be raised on a pure point of law and not on facts. That the assertions in the Respondent's preliminary objection were not points of law but factual questions for which to determine whether the suit/application had constituted an abuse of the court process, the court ought to examine the facts on whether or not the instant matter had ever been subjected to full trial.
 23. That the two suits alluded to had been dismissed for want of prosecution and withdrawn without costs, respectively, hence they had not been prosecuted in a full trial.
 24. That to determine whether the suit/application had been commenced against deceased person was a factual question which must be proved by production of death certificate which in this case was not filed. That subsequently, the said allegation could not stand since in any case, if it was proved that the 2nd Respondent was deceased, the Applicant/Plaintiff would be at liberty to amend its pleadings with leave of court at the appropriate time. Reliance was placed on the case of Ochieng & 19 others v Owaga & 6 others (Civil Case 13 of 2020) [2022] KEHC 16960 (KLR) (29 December 2022) (Ruling). It thus submitted that the preliminary objection should be dismissed and the Applicant/Plaintiff be allowed to prosecute its case to full trial.
 25. As to whether injunctive and/or restrictive orders sought herein should be granted, it placed reliance on the provisions of Order 40 Rule 1 of the Civil Procedure Rules to submit that the Applicant/Plaintiff had invoked the said provisions to secure and/or protect interests in the suit properties against adverse actions/intentions of the Respondents in disposing and/or dealing in same. Further reliance was placed in the decided case of Giella v Cassman Brown (1973) EA 358 on the triple requirements for the grant of temporary injunction.
 26. As to whether the Applicant had established a prima facie case with likelihood of success, it placed reliance in the court of Appeal's decision in Mrao Limited v First American Bank of Kenya Limited (2003) eKLR on what constitutes a prima facie case to submit that the court ought to scrutinize the facts herein to establish whether the Applicant had a legal right which has been or was likely to be infringed by the Respondents.
 27. That despite some of the suit properties not having been registered to the Applicant upon its acquisition and subdivision in the year 1996, on 31st August 2005, the Registrar's certified area list had established that the Applicant was still the legal owner of the same wherein it had continued to



- allow its employees to occupy the suit properties until the year 2018 when the Respondents herein had invaded the same on allegation that they had been its registered owners since the year 1996, which coincidentally was the same day that the Applicant had acquired the said suit properties.
28. That in the foregoing, the Applicant's right of ownership over the suit properties was threatened and/or likely to be infringed by the Respondents and it was thus apparent that the Applicant had established a prima facie case for the court to grant injunction sought herein.
 29. As to whether the Applicant would suffer irreparable injury incapable of compensation by damages if temporary injunction was not granted, it placed reliance in the decided case of Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR to submit that having legally acquired the suit property from the year 1996, wherein the Respondents had invaded the same, that the suit properties were at risk of being disposed of by the Respondents using the illegally and/or irregularly acquired titles wherein the Applicant would suffer irreparable loss as it may never recover the same.
 30. As to whether the balance of convenience lay in favour of the Applicant, reliance was placed on the decided case of Chebii Kipkoech v Barnabas Tuitoek Bargarioria & Another (2019) eKLR to submit that the Applicant being the legal owner of the suit properties herein, in the event that injunction was not granted and the court allowed the main suit herein, the Applicant/Plaintiff would suffer great inconvenience. That accordingly the balance of convenience tilted in its favour.
 31. On the third issue for determination as to whether the doctrine of Lis pendens was applicable, reliance was placed on the Court of Appeal's decision in the case of Ruthi Kinyua v Patrick Thuita Gachure & another [2015] eKLR, to submit that since the suit properties herein were claimed by both parties herein, that should the Respondents dispose them in the pendency of the main suit, the same would defeat justice. That the court ought to apply the doctrine of lis pendens to preserve the suit properties pending the hearing and determination of the main suit.
 32. That the injunctive orders herein would thus serve as restrictive measure to prevent the Respondents from disposing of the suit properties pending the determination of the suit herein.
 33. In opposition to the application seeking injunctive orders, and in support of their Preliminary Objection dated 14th April, 2025, the 1st and 3rd Respondents summarized the factual background of the matter and framed their issues for determination as follows:
 - i. Whether the suit should be struck for abuse of court process?
 - ii. Whether the suit and application are fatally defective for having been instituted against a deceased person?
 - iii. Whether the injunctive reliefs sought by the Applicant should be allowed?
 34. On the first issue for determination as to whether the suit should be struck for abuse of court process, the Respondents submitted that it was well settled that abuse of court process was generally applied to proceedings that were wanting in bona-fides, frivolous and oppressive. They placed reliance on the definition of abuse from the Black Law Dictionary, Sixth Edition Black, Henry Campbell, Black Law Dictionary Sixth Edition, Continental Edition 1891- 1991 P 990 P 10-11 and the decisions in the cases of Muchanga Investments Limited Vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] eKLR and Satya Bhama Gandhi Vs. Director of Public Prosecutions & 3 others [2018] KEHC 6100 (KLR) to reiterate that it was an uncontroverted fact that this was the third time that the Applicant had instituted proceedings against the Respondents over the same factual matrix, raising similar or closely related legal issues, calling on similar documentary evidence and indeed, claiming similar reliefs.



35. That the Nakuru ELC No. 59 of 2019: Kianjoya Enterprises Limited Vs. Samuel Macharia Kimani & 4 others, the Applicant's suit against the Respondents had been dismissed for want of prosecution in the year 2022, wherein their bid to reinstate the same had been dismissed.
36. That the Nakuru ELC No. E025 of 2023: Kianjoya Enterprises Limited & another Vs. Samuel Macharia Kimani & 4 others, (subsequently Naivasha ELC No. E006 of 2024) was withdrawn with no orders as to costs wherein the Applicant herein filed the instant suit seeking similar orders as the two previous suits so as to sanitize and circumvent the shortcomings of the previous proceedings. They placed reliance on the decided case of Geoffrey Kipyegon Moi Vs. Linet Minagi Mshamba & another [2022] eKLR where the court had cited the case of Stephen Somek Takweny & Anor vs David Mbutia Githare & 2 Others Nairobi (Milimani HCC No. 363 of 2009) to submit that the instant proceedings had offended the principle of finality in litigation and judicial economy for which the court should exercise its discretion to strike out the same pursuant to the provisions of Order 2 Rule 15 (1) (d)
37. On the second issue for determination as to whether the suit and application were fatally defective for having been instituted against a deceased person, they submitted that it was a general principle of law that suits and actions must be prosecuted by and against living parties and that proceedings filed against a dead person rendered the same non-suited ab initio and incurable by substitution. Reliance was placed in the decided case of Naikuni Vs. Naikuni & 7 others; Manyuele (Applicant) [2025] KEELC 3064 (KLR).
38. On the third issue for determination as to whether the injunctive orders sought by the Applicant should be allowed, they placed reliance on the provisions of Order 40 Rule 1 (a) and (b) of the Civil Procedure Rules to submit that it was a requirement that an Applicant invoking the said provisions had to satisfy the conditions in the decided case of Giella v Cassman Brown (supra).
39. While placing reliance on the case in Mrao Limited's Case (supra) they submitted that since they had demonstrated that they were holders of the title deeds to the suit properties and further, that their registrations were first after the crown for which they had been in possession for the last 20 years, the Applicant had not demonstrated a prima facie case to merit the sought orders.
40. As to whether the Applicant had demonstrated irreparable injury if a temporary injunction was not granted, they placed reliance on the definition of 'irreparable injury' from the Halsbury's Laws of England, 3rd Edition, Volume 21, Paragraph 739, page 352 and the Court of Appeal's decision in Nguruman Limited vs Bonde Nielsen & 2 Others (2014) eKLR to submit that the Applicant's assertion that they intended to dispose of the suit property was speculative and had not been backed by any evidence as provided for under the provisions of Sections 107 and 109 of the *Evidence Act*. That in any cause, were there an injury to occur, the same could be adequately remedied by pecuniary damages given that the value of the suit properties could be sufficiently quantified with reasonable accuracy through valuation. That the Applicant had also not met the second limb in Giella's case (supra) for which the injunctive reliefs should not be granted on this ground.
41. On whether the Applicant had shown that the balance of convenience tilted in its favour, submissions were to the effect that, the Applicant having failed to establish a prima facie case with a high probability of success, where irreparable harm was reparable by way of damages, pursuant to the holding in the case of INN v NK [2020] eKLR, the balance of convenience heavily tilted in favour of the Respondents, the Applicant not having met the mandatory prerequisites for grant of temporary injunctions.
42. That the Applicant's Notice of Motion dated 19th March, 2025 lacked merit and should therefore be dismissed forthwith with costs to the Respondents.



Determination.

43. I have considered the application for injunction relief therein by way of Notice of Motion Application dated 19th March, 2025, the response, the submissions, the authorities cited and the applicable law. Briefly, the Applicant brings his application for injunction relief against the Respondent for reason that sometime in the year 1996, it having acquired Land Reference Number 4630/7, 4630/8, 4630/9 and Land Reference 8851/2, the same had been subdivided into various portions wherein a new Registry Index Map sheet 118/3/9 was created. That while properties were registered to it and others to its affiliate company “Nine Sisters Ltd”, some of the properties however and inadvertently were not registered to either its name or that of its affiliate company “Nine Sisters Ltd”. That although registers were opened but the titles not issued. That subsequently the unregistered properties, forming the subject suit herein were fraudulently registered to the 1st, 2nd and 3rd Respondents herein. That notwithstanding the non-registration, they had still been utilizing the properties save for a short stint in the year 2018 when the 1st, 2nd, and 3rd Respondents tried to invade into the same by erecting an illegal structure/perimeter fence.
44. In response to the Application, the 1st and 3rd Respondents through both a Replying Affidavit and a Notice of Preliminary Objection dated 14th April 2025 deponed that the current proceedings were commenced against a deceased person, Samuel Macharia Kimani, the 2nd Defendant/Respondent herein and secondly that these proceedings were instituted based on the same factual matrix, raising similar or closely related legal issues, calling on similar documentary evidence and indeed, claiming similar reliefs, as had been in previous proceedings in Nakuru ELC No. 59 of 2019: Kianjoya Enterprises Limited v Samuel Macharia Kimani & 4 Others against himself and the 1st and 2nd Respondents in which the suit had been dismissed on 15th March, 2022, for want of prosecution and in the proceedings in Nakuru ELC No. E025 of 2023: Kianjoya Enterprises Limited & Another vs. Samuel Macharia Kimani & 4 Others (Subsequently Naivasha ELC E006 of 2024) which suit had been withdrawn with no orders as to costs.
45. It is trite that where a preliminary objection is raised that seeks to dispose of the matter preliminarily, the same ought to be heard in the first instance and therefore the issues arising for my determination are as follows:
- i. In the Application on a preliminary objection;
 - a. Whether the Applicant’s Application and suit are Res judicata Nakuru ELC No. 59 of 2019 and Nakuru ELC No. E025 of 2023 (Subsequently Naivasha ELC E006 of 2024) if not;
 - b. Whether the Application and suit are fatally defective having been commenced against a deceased person if not;
 - ii. Whether the Applicant has established a prima facie case to warrant orders of injunction against the Respondents.
46. A Preliminary Objection according to the decided case by the Court of Appeal in the case of Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Limited (1969) EA. 696 was stated to be thus: -

“So far as I am aware, 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. Examples are an objection to 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.”

47. It is therefore evident that a Preliminary Objection consists of pure points of law and it is also capable of bringing the matter to an end preliminarily.

48. The substantive law on res judicata which terminology the 1st and 3rd Respondents have conveniently avoided to refer to, is found in Section 7 of the Civil Procedure Act Cap 21 which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”

49. The Supreme Court in the case of John Florence Maritime Services Ltd & Another v Cabinet Secretary Transport and Infrastructure & 3 Others, Petition 17 of 2015 (2021) KESC 39 KLR (Civ) 6 August 2021 (Judgement) at paragraph 59 held as follows:

“For res judicata to be invoked in a civil matter the following elements must be demonstrated:

- a) There is a former Judgment or order which was final;
- b) The Judgment or order was on merit;
- c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
- d) There must be between the first and the second action identical parties, subject matter and cause of action.”

50. Thus, in order therefore to decide as to whether this case is res judicata, a court of law should always look at the decision claimed to have been settled, the issues in question and the entire pleadings of the previous case and the instant case to ascertain;

- i. What issues were really determined in the previous case;
- ii. Whether they are the same in the subsequent case and were covered by the decision of the earlier case.
- iii. Whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.

51. I have gained sight of the copy of the order dated the 14th December 2022 in Nakuru ELC No. 59 of 2019 annexed as “JNG 005” and note that the matter had been dismissed for want of prosecution, wherein the Applicant’s bid to have it reinstated vide an application dated 21st March 2022 was also dismissed in a ruling of 24th November 2022 herein annexed as “JNG 006”.

52. In regard to Nakuru ELC No. E025 of 2023 (Subsequently Naivasha ELC E006 of 2024) vide an order of 19th March 2025 herein annexed as “JNG 009,” the suit had been withdrawn with no orders to cost.

53. A look at the decisions in the previous suits herein, it is clear that apart from similarity of some of the parties as well as the subject suit properties with the current matter, doubtless to state that the matters were not heard and a determination made on merit on the issues therein raised. The dismissal for want



of prosecution does not conclude the matter but generally leaves the Plaintiff at liberty to file a fresh suit on the same cause of action.

54. On the issues as to whether the Application and suit are fatally defective having been commenced against a deceased person, indeed it is trite that a suit is null and void from the outset as against that deceased person and that it is not a mere irregularity, but a fundamental defect that cannot be cured. However, the Court of Appeal in *Kingangi v John & 2 others* [2023] KECA 315 (KLR) cited with approval the Indian case of *Pratap Chand Mehta v Chrisna Devi Meuta* AIR 1988 Delhi 267 where the court, observed as follows:

“..... if a suit is filed against a dead person, then it is a nullity and we cannot join any legal representative; you cannot even join any other party, because, it is just as if no suit had been filed. On the other hand, if a suit has been filed against a number of persons one of whom happens to be dead when the proceedings were instituted, then the proceedings are not null and void but the court has to strike out the name of the party who has been wrongly joined. If the case has been instituted against a dead person and that person happened to be the only person then the proceedings are a nullity and even order 1 rule 10 or order 6 rule 17 cannot be availed of to bring about amendment.”

55. Having said this, I now hold and find that the preliminary objection herein dated the 14th April 2025 lacks merit and the same is herein dismissed.

56. On the second issue for determination as to whether the Applicant herein has established a prima facie case to warrant orders of injunction against the Respondents, there is no dispute that the 1st, 2nd and 3rd Respondents herein hold titles to the suit parcels of land known as Miti Mingi Mbaruk Block 8/1400, 8/1401, 8/1402, 8/1403, 8/1404, 8/1405, 8/1406, 8/1407, 8/1408, 8/1409, 8/1410, 8/1411, 8/1412 and 8/1413 which titles were issued under the repealed Registration of *Land Act* now governed with the *Land Registration Act*.

57. The rights of a proprietor are set out in Section 25 and Section 26 of the *Land Registration Act*, wherein Section 26(1) of the Act provides that the certificate of title is to be taken as conclusive evidence of proprietorship with an exception of the provisions in Section 26(1)(a) and (b) which provide as follows:-

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that subject to challenge, except

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party, or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.

58. Both the *Land Registration Act* at Section 26 (1) that provides for the indefeasibility of title and Article 40(6) of *the Constitution* envisage that where a registered title is impugned on the grounds set out in the provisions that due process would be followed to have such title revoked, cancelled and/or annulled. The courts have in a series of cases in the recent past held that due process has to be followed before a registered title can be revoked on the grounds of having been fraudulently or irregularly issued.



59. The 1st to 3rd Respondents having demonstrated that they were the registered owners of the suit properties herein wherein they had been issued with a title, prima facie their titles are indefeasible and the burden shifts to the Applicant to show or demonstrate that the same are challengeable within the provisions of the law.
60. Quite clearly it is not possible to make a final determination at this interlocutory stage on the validity of the Respondents' title but the mere proof that they hold duly registered certificates which on the face of it were properly acquired, is sufficient to lead the court to hold that the Applicant has not established a prima facie case.
61. Having found as such, I need not consider the other two conditions for the grant of temporary injunction as established in the *Giella –vs- cassman Brown Ltd* case (supra) as the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a prima facie case had been established. The Court of Appeal in the case of *Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society* (2001) IEA 86 cited by *Gitumbi, J* with approval in the case of *Joseph Wambua Mulusya –vs- David Kitu & Another* (2014) eKLR observed as follows: -
- “The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.
62. Consequently, I also dismiss the Applicant's application dated 19th March, 2025. Both costs to the Application and the Preliminary Objection shall abide the outcome of the case. Parties to comply with the provisions of Order 11 of the Civil Procedure Rules within the next 21 days for the hearing of the main suit herein.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 31ST DAY OF JULY 2025.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

