

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ELC CASE NO E077 OF 2024

AGNES CHEPKELAT AND PETER MUTAI (Suing as
the legal administrators of the Estate of

MICHAEL

KIPKOSKEI

CHEPKELAT)

.....**PLAINTIFF/APPLICANTS**

VERSUS

WILLIAM WANJOHI MUREITHI.....1ST DEFENDANT/RESPONDENT

EVANS BABU.....2ND DEFENDANT/RESPONDENT

JANE CHEPKORIR KIBIEMTO.....3RD DEFENDANT/RESPONDENT

**LAND REGISTRAR-NAKURU COUNTY.....4TH
DEFENDANT/RESPONDENT**

PRISCA NYABOKE MATUNDA.....5TH DEFENDANT/RESPONDENT

STEPHEN MTABISA M’KAWALE.....6TH DEFENDANT/RESPONDENT

MARY WANGUI MUTUA.....7TH DEFENDANT/RESPONDENT

COSMAS KIPNGETICH CHELULE.....8TH DEFENDANT/RESPONDENT

NATIONAL BANK OF KENYA.....9TH DEFENDANT/RESPONDENT

RULING

1. This ruling is in respect of the Plaintiff/Applicant’s Notice Motion Application dated 14th November, 2024, seeking the following orders:

a) Spent

b) Spent

c) THAT the Defendant/Respondents herein be restrained whether by themselves, their agents, servants, employees and/or however else from constructing (or continuing to construct) upon the property, charging, selling or alienating or causing any interference on the property known as MITI MINGI/MBARUK/BLOCK 3/330 (MBARUK) subdivided into MITI

MINGI/MBARUK/BLOCK 8149 to 8158 which is the subject of this suit pending the hearing and determination of this suit.

d) THAT this Honourable Court be minded to direct that the OCS Kaptembwo Police Station to oversee the implementation of the orders herein.

e) THAT the costs of this application be provided for.

2. The application is supported by the annexed affidavit of Peter Mutai, one of the Plaintiff/Applicants sworn on 14th November, 2024, where he deponed that they are the beneficial owners of the entire land parcel No. MITI MINGI/MBARUK/BLOCK 3/330 (MBARUK) by virtue of being the beneficiaries of Michael Kipkoskei Chepkelat (deceased). It was his deposition that the deceased had issued the subject property to the interested party as security for a loan of Ksh 500,000/= facility advanced to him.

3. It was the applicant's deposition that the 1st Defendant with the assistance of the 4th and 9th Defendants/Respondents, had secretly or fraudulently caused the suit property to be transferred from the name of the deceased to the 1st Defendant's name. He stated that the property has been subdivided and subsequently registered in the names of the 2nd, 3rd, 5th, 6th, 7th and, 8th Defendant/Respondents without taking out the Grant of letters of administration in respect of the estate of the deceased.

4. It was the Applicant's case that the continuous illegal occupation of the suit property by the Defendants is an infringement on their absolute proprietorship rights and the applicants stand to suffer real and substantial loss. Further that the respondents will suffer no prejudice if the orders sought are granted.
5. Jane Chepkorir Kibiemto, the 3rd Defendant/Respondent, filed a Replying Affidavit sworn on 14th December, 2024, and deponed that she has the authority of the 5th Respondent to swear the affidavit on her behalf. It was her deposition that she is the registered owner of MITI MINGI/MBARUK BLOCK 3/8151 (BARUT), MINGI/MBARUK BLOCK 3/8152 (BARUT), MINGI/MBARUK BLOCK 3/8153(BARUT), MINGI/MBARUK BLOCK 3/8154 (BARUT), MINGI/MBARUK BLOCK 3/8155 (BARUT), and MINGI/MBARUK BLOCK 3/8156(BARUT).
6. She deponed that she bought the said parcels from Wiliam Wanjohi Muritu on various days between 2013 and 2017. It was her deposition that the Plaintiff is guilty of material non-disclosure and they are innocent purchasers for consideration and without notice. She deponed that their titles are clean and she prayed that the application be dismissed with costs.
7. Edwin Lubanga filed a Replying Affidavit sworn on 7th February, 2025, where he deponed that he is the 9th Defendant's Remedial and Recoveries analyst. He further deponed that on or about 15th June, 1992,

upon the request by the late Michael Kipkoskei Chepkelat (deceased), the 9th Defendant advanced a financial facility of Ksh 500,000/=, which was secured by a legal charge of Ksh 270,000/= over Title No MITI/MINGI/MBARUK BLOCK 3/330 (BARUT).

8. It was further his disposition that when the loan was not serviced and from 2002 to 2011, the family of the deceased engaged the 9th Defendant on the repayment of the facility and to have the loan settled at Ksh 700,000/=, but the applicant defaulted in the payment of the instalments to settle the loan.
9. The 9th Defendant's Remedial and Recoveries Analyst went on to depone that the orders sought by the applicants have been overtaken by events as the suit property has since been sold on auction to Bhatia Settlement Scheme Limited for a sum of Ksh 1,000,000/= which was used to pay off the loan and the 9th Defendant no longer has interest in the subject property.
10. Peter Mutai filed a Supplementary Affidavit sworn on 27th January, 2025, and deponed that the 3rd, 5th, 6th, 7th and 8th Defendant/Respondents were duty-bound to ascertain the legality of the 1st Defendant/Respondent's title. It was his deposition that if the process followed before issuance of a certificate of title did not comply with the law, then such a title cannot be held as infeasible.

PLAINTIFF/APPLICANTS' SUBMISSIONS

11. Counsel for the Applicants filed submissions dated 27th January, 2025, and identified the following issues for determination:
 - a) *Whether the Plaintiff/Applicants have met the threshold for the grant of an injunction?*
 - b) *Who shall bear the costs of the application?*
12. On the first issue, counsel submitted that the Applicants rights over the subject property have been infringed and have established a *prima facie* case. On establishing irreparable injury, counsel submitted that the Defendant/Respondents may swiftly advertise the subject property for sale and the beneficiaries of the deceased are at risk of being rendered homeless. Counsel submitted that the balance of convenience tilts in the Plaintiff's favour as the purported exercise of the statutory power of sale by the 9th Defendant/Respondent is void.
13. Counsel urged the court to grant the orders sought, relied on provisions of Order 40 Rule 1 of the Civil Procedure Rules and the cases of **Giella v Cassman Brown & Co Ltd [1973] EA 358, Mrao Ltd vs First American Interested Party of Kenya Ltd & 2 others (2003) eKLR, Alice Chemutai Too vs Nickson Kipkurui Korir & 2 others, Exclusive Estates Ltd vs Kenya Posts & Telecommunications Corporation & Another, Civil Appeal No 62 of 2004, Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) eKLR, Paul Gitonga Wanjau vs Gathuthis Tea Factory Company Ltd & 2 others (2016) eKLR, Amir Suleiman vs Amboseli Resrt Limited [2004] eKLR and Robert Mugo Wa Karanja vs Ecobank (Kenya) Limited & Another (2019) eKLR.**

14. On the second issue, counsel relied on Section 27 of the Civil Procedure Act and urged the court to exercise its discretion on awarding costs.

1ST DEFENDANT/RESPONDENT'S SUBMISSIONS

15. Mr. Kimure, counsel for the 1st Defendant filed submissions dated 7th February, 2025, and submitted that the Plaintiff has not established a *prima facie* case as there is no legal or equitable right that the applicant has established that requires protection as the same was extinguished at the exercise of the sale by auction, a remedy the Plaintiff would have sought in 2011. Counsel relied on Section 26 of the Auctioneers Act, Sections 17 & 26 (b) of the Limitation of Actions Act and the cases of **Mzee Wevi vs Thomas Njeru Nthuni (2021) eKLR**, **Kenleb Cons Ltd vs New Gatitu Service Ltd & Another (1990_ KLR 557**, **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR** and **Nancy Kahoya Amadiva vs Expert Credit Limited & Another [2015] eKLR**.
16. Counsel submitted that the applicants will not suffer any irreparable injury if the orders sought are denied, as the Plaintiffs are residing on their lawful portions that their brother bought from the 1st Defendant, therefore not suffering any risk of being rendered homeless.
17. According to counsel, the balance of convenience tilts in favour of the Respondents and relied on the case of **Mary Vuhya Choge & 20 others (Suing on their own behalf and on behalf of Njoro Church of God)**

vs Board of Governors Njoro Township School & 30 others. Counsel urged the court to dismiss the application with costs to the Respondents.

3RD AND 5TH DEFENDANT/RESPONDENTS' SUBMISSIONS

18. Mr. Kahiga, counsel for the 3rd and 5th Defendants, informed the court that they are not filing any submissions. On the court record however are the 3rd and 5th Defendant's submissions dated 20th January, 2025, where he submitted that the Plaintiff does not have any legal interest in the suit property as the estate ceased to be the legal, registered and beneficial owner of the property.
19. Counsel submitted that the Plaintiff misled the court when they alleged that the suit property was fraudulently transferred to the current owners yet they were aware that the deceased failed to fulfil his side of the contract which led to the property being procedurally sold through public auction.
20. Counsel urged the court to dismiss the application with costs and relied on the cases of **Giella vs Cassman Brown [1973] EA 358, Nguruman Limited vs Jan Bonde Mielsen & 2 others CA 77 of 2012 (2014) eKLR, Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) eKLR** and **Peter Kairu Gitu vs KCB Kenya Limited & another [2021] eKLR.**

9TH DEFENDANT/RESPONDENT'S SUBMISSIONS

21. Mr. Opar, counsel for the 9th Defendant/Respondent filed submissions dated 7th February, 2025, and submitted that the Plaintiffs have not established a *prima facie* case with a probability of success and further that they are guilty of material non-disclosure. Counsel submitted that the Plaintiffs cannot come to court twelve years down the line and pretend not to be aware of what happened. Counsel relied on the case of **Kenya Breweries Ltd vs Okeyo (2002) 1EA**.
22. Counsel relied on the case of **Andrew Muriuki Wanjohi vs Equity Bank Buliding Society Limited & 2 others [2006] eKLR**, and submitted that the Plaintiffs have not shown that they will suffer irreparable loss not capable of being compensated by way of damages.
23. Counsel submitted that the balance of convenience lies with the 9th Defendant being allowed to enjoy its right of statutory power of sale, and urged the court to dismiss the Plaintiff's application with costs.

ANALYSIS AND DETERMINATION

24. The issue for determination is whether the Plaintiff/Applicants have met the threshold for the grant of a temporary injunction. The principles for the grant of temporary injunctions are well established and there is no need to reinvent the wheel. In the case of **Rockland Kenya Limited v Elliot White Miller [1994] eKLR**, the court held as follows:

“The object of an interlocutory injunction is to protect the Plaintiff against injury by violation of his legal right for which he could not be adequately compensated in damages

recoverable in the action if the matters in dispute were resolved in his favour at the trial. However, his need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal right for which he could not be adequately compensated under the Plaintiff's undertaking in damages if the subject-matter of the trial was decided in his favour. It is a remedy that is both temporary and discretionary. In cases where the legal rights of the parties depend on facts that are in dispute between them, the evidence available to the Court at the hearing of the application for an interlocutory injunction is given on affidavit and is therefore incomplete as it has not been tested by oral cross-examination. At that stage therefore, it is not the function of the Court to attempt to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. Such matters are to be dealt with at the trial. Nonetheless, the Court must in the exercise of its discretionary power in this regard be satisfied that the claim in respect of which an interlocutory injunction is sought is neither frivolous nor vexatious: in other words, that there is a serious question to be tried.”

25. Order 40 Rule 1 of the Civil Procedure Rules 2010 provides as follows:

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.

26. It is the Applicants case that the 1st Defendant with the assistance of the 4th and 9th Defendant/Respondents, have secretly or fraudulently caused the suit property to be transferred from the name of the deceased to the 1st Defendant's name. It is their case that the property has been subdivided and subsequently registered in the names of the 2nd, 3rd, 5th, 6th, 7th and 8th Defendants/Respondents without taking out the Grant of letters of administration in respect of the estate of the deceased.
27. The 9th Defendant/Respondent on the other hand contends that the orders sought by the applicants have been overtaken by events as the suit property has since been sold on auction to Bhatia Settlement Scheme Limited for a sum of Ksh 1,000,000/= which was used to pay the outstanding loan by taken by the deceased and the 9th Defendant no longer has interest in the subject property.
28. This court dealt with preliminary objections by the Defendants on the issue of the jurisdiction of this court to hear and determine this matter.

The court in its ruling dated 18th June, 2025, applied the principle of the substantial question in issue when dealing with concurrent jurisdiction.

29. This is a case that involves property which was allegedly transferred fraudulently to the Defendants without the knowledge of the Applicants. The Applicants claim beneficial ownership of the suit parcels, which have subsequently been subdivided and changed ownership. The Respondent submitted that the orders sought have been overtaken by events as the suit property has since been sold on auction to Bhatia Settlement Scheme Limited for a sum of Ksh 1,000,000/=.
30. The purpose of a temporary injunction is to restrain a party or stop an event or action from happening. Where an event has already taken place, the court cannot grant orders in vain. This follows the maxim that “Equity, like nature, will do nothing in vain” which means that courts will not grant a remedy that would not be effective. A court order cannot be granted in vain if it will not serve any purpose or will be an exercise in futility.
31. In the case of **Muyumba Watita & 51 others v Joannes Satia & 4 others [2020] eKLR** the court declined to grant an injunction where parties had been evicted. The court stated:

“An injunctive order is essentially a restraining order aimed at preventing the happening of a certain event. If that event has already occurred then an order of injunction cannot issue.”

32. Similarly, in the Court of Appeal case of **Eric V.J. Makokha & 4 Others vs. Lawrence Sagini & 2 Others Civil Application No.20 of 1994 (12/94 UR)** stated that:

“An application for injunction under Rule 5(2)(b) is an invocation of the equitable jurisdiction of the Court. So its grant must be made on principles established by equity. One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said, “Equity, like nature, will do nothing in vain”. On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the Court will decline to grant it.”

33. The acts that the Applicant urges the court to injunct the Defendants from doing have already happened as have been confirmed in the affidavits that subdivisions were carried out and a sale was conducted through an auction.

34. I find that the Applicants have not met the threshold for the grant of a temporary injunction, as the court cannot grant orders in vain. The remedy for the Applicants is to fast-track the hearing of the case. The

Notice of Motion application dated 14th November, 2024 is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 30TH DAY OF OCTOBER 2025.

**M. A. ODENY
JUDGE**