REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ELCLC NO. E028 OF 2024

DAMALIS KANINI MUTUSE ……1ST PLAINTIFF
JACINTA WANZA MUTUSE ……2ND PLAINTIFF
(Suing as the legal representatives and administrators of the Estate of Augustine Mutuse Mbuvi *Alias* Augustine Mutuse Ndonyo)

-VERSUS-

JOSEPH MUTUNGA NDILE ……....DEFENDANT/APPLICANT

RULING

1. Before this court for determination is the application dated 17th February, 2025 in which the Defendant/Applicant seeks issuance of the following orders: -
    1) **[*SPENT*]**
    2) **[*SPENT*]**
    3) **THAT the 2nd Plaintiff/Respondent be restrained from charging, selling, transferring, alienating, disposing and/or dealing in any way with the suit premises including the Defendant's portion pending the hearing and determination of this suit.**
    4) **THAT costs of this application be provided for.**
2. The application is premised on the ground appearing on its face and the supporting affidavit of Joseph Mutunga Ndile sworn on even date. He averred that he purchased a piece of land measuring nine acres from the late Augustine Mutuse Mbuvi *alias* Augustine Mutuse Ndonyo in Plot No. 121 KAI "B" Settlement Scheme between 2001 and 2005. He further averred that he took possession of the land, fenced it and constructed a permanent residential home.
3. The Defendant lamented that in the Plaintiff's certificate of confirmation of grant issued on 15/11/2023, they failed to disclose his share of nine acres within

Plot No. 121 KAI "B" Settlement Scheme. He further contended that despite the Plaintiffs admitting that the Defendant had purchased six acres of land, they still failed to disclose the same in the schedule of distribution.

4. The Defendant contended that the 1st Plaintiff had passed on and that the 2nd Plaintiff intends to transfer the entire land to herself and subsequently register a charge over the title to a bank or sell the land in order to defeat the Defendant's interest. He averred that he would suffer irreparable loss unless the injunction orders sought are issued having been in possession since the year 2001.
5. Opposing the application, Jacinta Wanza Mutuse filed a replying affidavit on 12th March, 2025. She averred that the Defendant only purchased six acres of land from her late father between the years 2001 and 2004 for excision from Plot No. 121 KAI "B" Settlement Scheme. That the Defendant paid the purchase price in full following a series of written sale agreements.
6. The 2nd Plaintiff averred that the Defendant took possession of the six acres of land purchased but sometimes in the year 2022, he encroached and hived off an extra three acres of land from Plot No. 121 KAI "B" Settlement Scheme. She asserted that she was ready and willing to transfer the six acres which the Defendant lawfully purchased. She denied the allegation that she intends to unlawfully transfer the land to herself and charge the title to a bank.
7. The 2nd Plaintiff averred that the application is frivolous, based on falsehoods and therefore warrants dismissal with costs.
8. The application was canvassed by way of written submissions.
9. In the Defendant/Applicant's submissions dated 15th July, 2025, Counsel reiterated that the Defendant is in possession of a total of nine acres of the suit property and that the portion in dispute is three acres. That having failed to declare the Defendant's proprietary interest in the suit property when the

summons for confirmation of grant was issued, the Plaintiffs filed the present suit to claim the three acres which is now in dispute.

10. Relying on the principles enunciated in the case of **Giella v Cassman Brown & Co. Ltd [1973] EA 358** Counsel contended that the Defendant had demonstrated that he was a purchaser for value over a portion of the suit property and that the Plaintiffs had failed to disclose the said fact during the succession proceedings. Accordingly, Counsel submitted that the Applicant had demonstrated a prima facie case with a probability of success.
11. Submitting on irreparable loss, Counsel opined that allowing interference and trespass in the suit property by the Plaintiffs will expose the Defendant to loss which cannot be compensated by damages as he has made significant developments including his matrimonial home.
12. Submitting on balance of convenience, Counsel opined that since the Defendant is in possession of the suit property, it is vital that the status quo be preserved pending hearing and determination of the suit. Counsel urged the court to allow the application as prayed.
13. In the Plaintiffs' submissions dated 11th June, 2025, Counsel identified the following issues for determination: -
    a) *Whether the Defendant/Applicant has met the conditions for issuance of temporary injunction orders; and*
    b) *Whether the Defendant /Applicant is entitled to the orders sought.*
14. Counsel submitted that the Defendant had not established a prima facie case to warrant injunctive orders because he had not demonstrated the slightest infringement to his rights. Counsel contended that the Defendant had not presented any evidence of a threat of sale, charge, transfer or interference with the suit property in a manner that would defeat the decision of the court in the

main suit. Counsel further contended that the application is made on the basis of fear and apprehension which the court should not make a decision from.

15. Counsel further contended that the Plaintiffs had already conceded their willingness to transfer the undisputed six acres of the suit property. Moreover, since the Defendant was already in possession of an extra three acres, there can be no threat of sale or interference with land which is beyond their control. Counsel maintained that the sale agreements annexed to the application are for only six acres and that there is nothing worth protecting for the Defendant.

16. On irreparable injury, Counsel maintained that the Defendant had not demonstrated any threat of the land being charged or sold to substantiate a claim for irreparable injury.

17. Submitting on balance of convenience, Counsel contended that the allegations which were advanced by the Defendant were hollow and unsubstantiated and therefore the application should fail. In conclusion, Counsel was of the view that the court cannot issue orders which are founded on nothing and hence the Defendant is not entitled to the orders sought.

18. The prerequisite conditions for a grant of injunctive orders under Order 40 Rule 1(a) of the Civil Procedure Rules, 2010 were articulated in the celebrated case of **Giella v Cassman Brown & Co Ltd [1973] 1 EA 358 at 360 (CAK)** as follows:-

> ***"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. 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. (E.A. Industries v. Trufoods, [1972] E.A. 420.)"

19. 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: -

"A prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

20. A perusal of the Exhibits annexed as **"JMN1"** shows that the Defendant purchased six acres of land within Plot No. 121 KAI "B" Settlement Scheme. As rightly submitted, the said evidence was confirmed by the Plaintiffs in their replying affidavit and also at paragraph 4 of the Plaint.
21. What is in dispute is an extra three acres of land of which the Plaintiffs claim was illegally taken possession of by the Defendant. From the evidence the evidence presented by the Defendant, the alleged threat of disposal, charge, interference or sale of the suit property by the Plaintiffs is not apparent. In the replying affidavit, Plaintiffs have renounced any claim towards the six acres of land which the Defendant purchased. They also conceded that it is the Defendant who is in possession of an extra three acres which forms the crux of the dispute herein. It is therefore doubtful that the Plaintiffs would file a suit for recovery of land which is illegally in possession by the Defendant and at the same time covertly make plans to charge and or dispose of the same.
22. Accordingly, it is undeniably clear that the Defendant/Applicant has not established a prima facie case against the Plaintiffs which presents arguable matters for consideration as per the decision in ***Mrao Ltd (Supra)***.

23. The Court of Appeal in the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR** opined as follows: -

> ***"…these are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially… if the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration."***

24. The Defendant acknowledged that he is in possession of nine acres of the suit property which he has fully developed. Having failed to demonstrate a prima facie case of interference with his possession thereof, it is inconceivable that he will suffer irreparable injury if the injunctive orders are not granted.

25. The Defendant/Applicant contended that the balance of convenience tilts in his favour. In the case of **Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others [2016] eKLR**, the court dealing with the issue of balance of convenience expressed itself thus: -

> ***"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. The burden of proof that the inconvenience which the applicant will suffer if the injunction is refused is greater than that which the respondent will suffer if it is granted lies on the applicant.

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."

26. In this instance, the Defendant has not demonstrated that there is a threat of irreparable injury to his rights of possession of the suit property. What was presented to this court were bald and unsubstantiated allegations of imagined loss.
27. There being no threat to the suit property, the application herein is devoid of merit and the same is dismissed with costs.

It is so ordered.

.....

HON. E. O. OBAGA

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 20TH DAY OF NOVEMBER, 2025.

IN THE PRESENCE OF:

Mr. Muia for Applicants.

Mr. Muthiani for Respondent.

Court assistant - Nelima