

REPUBLIC OF KENYA

**IN THE ENVIRONMENTAL AND LAND COURT OF KENYA AT
SIAYA**

E.L.C.C SUIT NO. E023 OF 2024

**THOMAS OCHANDA ONGIRA1ST
PLAINTIFF**

**MONICA AKOTH ONGIRA2ND
PLAINTIFF**

**(Suing as the legal Representatives/Administrator of the
estate of Joash Ongira Ogutu)**

VERSUS

**BENARD OCHIENG OKEYO1ST
DEFENDANT**

**RONY OTIENO OTIENO2ND
DEFENDANT**

**(Sued as the legal Representatives/Administrator of the
estate of Gerald Otieno Ongera)**

**BONDO DISTRICT LAND
REGISTRAR.....INTERESTED PARTY**

RULING

1. The plaintiff commenced these proceedings by way of
plaint dated 3/10/2024 which was subsequently amended
to join M/s Safaricom PLC. The plaintiff together with the
plaint filed a Notice of Motion application dated 3/10/2024

which was amended on 11/02/2025. The Amended Notice of Motion dated 10/02/2025 is the subject of this ruling.

2. In the amended motion the following prayers are sought; -
 - 1) THAT, this application be treated as urgent and be heard ex-parte in the first instance;
 - 2) THAT, pending hearing and determination of this Application ex- parte, an interim order be issued restraining the Defendants either by themselves, servants, employees or any other person deriving authority from them from further encroachment, using or dealing with the suit property known as SIAYA/USIGU/3919 a subdivision of land parcel number SIAYA/ USIGU/485 in any manner whatsoever;
 - 3) THAT, pending hearing and determination of this suit inter- parte, an interim order be issued restraining the Defendants either by themselves, servants, employees or any other person deriving authority from them from further encroachment, using or dealing with the suit property known as SIAYA/USIGU/3919 a subdivision of land parcel number SIAYA/ USIGU/485 in any manner whatsoever;
 - 4) THAT the Interested parties herein be stopped from making any payments to the 1st and 2nd defendants herein until this matter has been heard to full determination.
 - 5) THAT, cost of this application be provided for.

3. The application is premised on the grounds on its face and supported by the affidavit sworn by Thomas Ochanda Ongira the 1st plaintiff with authority of the 2nd plaintiff.
4. It is averred that the 2nd defendant's father (now deceased) a younger brother of the 1st plaintiff secretly and fraudulently cancelled the name of the plaintiff's father from the adjudication record of parcel SIAYA/ USIGU/485 and transferred the parcel to himself knowing very well the same was family property. The deceased then leased the same to Safaricom Ltd for construction of a booster in the year 2006. A copy of the undated lease agreement is annexed.
5. It is deponed that the 2nd defendant's father subdivided the land into two parcels which he registered in his name without the knowledge and consent of the plaintiff and without succeeding the estate of the plaintiff's father. That later the 1st defendant obtained a grant and acquired through transmission one of the subdivisions SIAYA/ USIGU/3919 to hold in trust for the 2nd defendant. A copy of the certificate of grant and the title are attached. That the plaintiff's also filed an application for revocation of the grant and annexed a copy.
6. It is averred that the plaintiff's have never appointed and administrator to administer their late father's estate. That they have been deprived of their rights as the beneficiaries of their father's estate the suit having been fraudulently registered in the 1st defendant's name. That if

the orders are not sought the estate of the late Joash Angira will suffer irreparable loss.

7. The application is opposed through the replying affidavit of Bernard Ochieng Okeyo. He admits he was registered on the Suit Property upon transmission vide Succession Cause No. 286 of 2020 at Siaya Magistrates Court in the estate of the late GERALD OTIENO ONGERA "the deceased" he is not an absolute owner but is holding the property in trust trust for the 2nd Defendant who was a minor during succession and the only surviving beneficiary of the Deceased.
8. That Deceased during his lifetime was the sole registered owner and occupier of SIAYA/USIGU/3919 to which a portion of the same was leased to Safaricom PLC and the other portion the had rental houses that were constructed by the Deceased. At the time of the deceased death, the same was still registered in his name hence was a free property of the Deceased forming part of his estate a copy of the greencard search is annexed. That the mother title SIAYA/USIGU/485 was originally an ancestral land but was registered in the Deceased name at adjudication on the 20th July 1988 pursuant to objection proceedings determined in favor of the deceased and not through fraud as claimed. A copy of the adjudication record is annexed.
9. The deponent admits the deceased had caused a subdivision of the mother title above into two SIAYA/USIGU/3918 and SIAYA/USIGU/3919 upon which

SIAYA/USIGU/3918 was transferred to Linus Dondo Madara. That the said Linus developed the portion and has been residing on the said portion to date and all this while the Plaintiff/Applicants never raised any complaint or claim and only started raising complaints and claims after the Deceased death. The plaintiffs claims are termed ingenuine for the reason that if they had a legitimate and genuine claim then they would have raised it during the Deceased lifetime as all dealings and transactions by the Deceased in regards to the property in were done openly and during the Deceased lifetime and with the Applicants' full knowledge.

10. It is stated that the rightful heir to the estate of the Deceased is his son the 2nd defendant and he is currently in dire need of financial support to enable him further his studies and the only available source of income is only the rental income from the subject property
11. That following determination of the summons for revocation in Succession Cause No. 286 of 2020 at Siaya Magistrate Courts the plaintiffs counsel wrote to Safaricom to stop remitting the money and henceforth Safaricom has not been transmitting any rents to the estate of the Deceased despite there being a determination on the Plaintiff's claims at the lower courts.
12. It is deponed that the plaintiffs have do not have a legitimate interest in the property. That if the orders sought are granted, then it is the 2nd Defendant who will be prejudiced as he stands to suffer an irreparable harm

as his education solely depends on the income received as rent from the subject property and any order stopping the remittance of such rents will greatly interfere with his prospects of continuing with his education. That the said application is baseless, ill advised, lacking in merit, vexatious, frivolous and is not anchored in law hence not worth this court's precious time.

SUBMISSIONS

13. The application was canvassed by way of written submissions. The plaintiffs submissions are dated 19/5/2025. The Respondents submissions are dated 16/06/2025.

Applicants' submissions

14. It is submitted on behalf of the applicants that the plaintiff will suffer irreparable loss if the orders are not granted at interlocutory stage as the land is already leased and the Interested Party has been paying rent to the 1st and 2nd defendants. That the purpose of an injunction is to preserve the suit property. That the plaintiffs have presented a prima facie case and that a scrutiny of the facts will reveal there is a legal right of ownership to property which has been infringed upon by the unlawful deletion of the plaintiffs fathers name from the adjudication record. The case of **Mrao Ltd Vs First**

American Bank of Kenya Ltd (2003) eKLR is relied upon.

Respondents Submissions

15. The respondents submissions are dated 16/6/2025. It is submitted that the applicant has not surmounted the hurdles and conditions established in law to warrant the grant of temporary injunction. The applicants have failed to demonstrate that the balance of convenience tilts in their favor. They have not had any benefit and it cannot start to accrue at the instant application. That the status quo should be maintained pending the full hearing of the main suit.

ANALYSIS AND DETERMINATION

16. Having considered the foregoing, the main issue for determination is whether on the evidence and material placed before court, the applicants have satisfied the condition upon which a temporary injunction can be granted.
17. The application is substantively brought under the provisions of Order 40 of the Civil Procedure Rules.
18. The law on granting of 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."

19. The test for granting of an interlocutory injunction was considered in the **American Cyanamid Co. v Ethicom Limited (1975) A AER 504** where three elements were noted to be of great importance. There must be a serious issue to be tried, damages are not an adequate remedy and the balance of convenience lies in favour of granting or refusing the application.

20. In the celebrated case of **Giella vs Cassman Brown (1973) EA 358** the court stated that an applicant must

show a prima facie case with a probability of success, the applicant must demonstrate that they will suffer irreparable injury that cannot be adequately compensated by an award of damages if the court does not intervene by granting the injunction and where in doubt, the court will weigh and grant the orders based on the balance of convenience. All the conditions must be met separately.

21. Guided by the law and case law cited above I will proceed to review the application to determine if it has met all the above conditions. However, I'm also aware that the test on balance of convenience could apply if the court is in doubt.

22. Firstly, based on the provisions of Order 40 hereinabove, the main objective is to preserve the suit property from being wasted damaged, or alienated by any party to the suit. The applicants have not demonstrated such wastage or damage. All they state is that the property has already been leased to the Interested Party. A copy of the unsigned lease is annexed and it is not in dispute that such lease exists. I have not been led to any allegations that the lease is causing any damage to the property. A lease is temporary in nature and may be terminated at any time by an order of the court and therefore it has not been alienated in perpetuity in my view. In any event the lease arrangements on the portion of the property have been in existence since the year 2015 and I cannot injunct that which has already occurred.

23. I have not seen anything to be protected based on the circumstances of the case and the material placed before court.

24. On the requirement for the establishment of a prima facie case the applicants urge that they have met this requirement. It is trite that at this stage of the application the court is not supposed to delve into the merits of the case which I note the parties have done. As to the legality of the registration of the suit property herein starting with adjudication process inter alia this can only be interrogated at a full hearing where parties will be put through the rigours of cross examination to enable the court effectually adjudicate over the contest between the parties which is whether the Plaintiffs are entitled to the suit property. For now it is clear title is in the name of the 1st and 2nd defendant and who it would appear are in 'possession'. It is trite that under the law the holder of a title should be taken as the prima facie registered owner of the suit property unless illegality and fraud is proved, which can only await the hearing.

25. It is the finding of this court that the applicant has not met the test of proving a prima facie case.

26. But of utmost importance is the requirement for an applicant to demonstrate he will suffer irreparable injury that cannot be adequately compensated by an award of damages if the court does not intervene by granting the injunction. The applicants have clearly stated they want the Interested Party stopped from remitting the proceeds

of the lease to the 1st and 2nd defendant which according to the respondents they have since succeeded. But assuming this is not true, I will consider what amounts to irreparable loss.

27. The court in **Pius Kipchirchir Kogo Vs. Frank Kimeli Tenai (2018) eKLR** cited by the respondents where Ombwayo J had this to state on what constitutes irreparable injury/loss;-

'Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that *irreparable injury* will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury. The defendant has been collecting rent since the year 2005 and therefore the issue of irreparable harm if injunction is not granted should not arise so long as the matter is fast-tracked for hearing.'

28. I'm fully persuaded by the above dictum. In terms of rent being paid by the Interested party Safaricom and the other premises yielding rent, this is quantifiable and can be reimbursed depending with the outcome of the case provided that accounts are rendered. The registration and entries on the parcel register can also be rectified pursuant to the powers of the court conferred under

section 80 of the Land registration Act should the court find in favor of the applicants ultimately.

29. I think I have said enough to demonstrate that the applicants has not met the requirements for the grant of orders of injunction.

30. The application dated 10th February 2025 is hereby dismissed with costs to the respondents.

Orders accordingly.

Delivered and Dated at Siaya This 20th Day of November 2025

LADY JUSTICE A.E. DENA

JUDGE

20/11/2025

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Ms. Owenga for the applicants

Mr. Otieno G. for Respondents

No appearance for the Interested Party

Mr. Ishmael Orwa Court Assistant.