

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT ELDORET**  
**SUCCESSION CAUSE NO. 59 OF 1997**

**IN THE MATTER OF THE ESTATE OF THE LATE KIPKOSGEI**  
**KIPLAGAT KAMAR**

**JOHN KIBET KAMAR.....1<sup>ST</sup>**  
**ADMINISTRATOR/RESPONDENT**  
**TAPYOTIN KIMOI KAMAR.....2<sup>ND</sup> ADMINISTRATOR**  
**JOSEPH KIPKOSGEI KAMAR.....3<sup>RD</sup> ADMINISTRATOR**  
**CHARLES KIBIWOTT KAMAR.....4<sup>TH</sup> ADMINISTRATOR/RESPONDENT**

**AND**

**RUTH JEMUTAI KAMAR.....1<sup>ST</sup> OBJECTOR/APPLICANT**  
**MARGARET JEPKOECH KAMAR.....2<sup>ND</sup> OBJECTOR/ APPLICANT**  
**EVERLYN JERUIYOT KIPKOSGEY.....3<sup>RD</sup> OBJECTOR/**  
**APPLICANT**  
**JANE JESANAI NAKADONY.....4<sup>TH</sup> OBJECTOR/ APPLICANT**  
**ELIZABETH JEPYEGO KAMAR.....5<sup>TH</sup> OBJECTOR/ APPLICANT**  
**HELLEN JESIRE KIPKEMOI.....6<sup>TH</sup> OBJECTOR/ APPLICANT**

**RULING**

1. If the deceased persons in some of these Succession matters were to somehow resurrect and witness the raging battles over the management of the estates they left behind having worked so hard and painstakingly sacrificed to build, they are likely to prefer a swift return to their graves out of disappointment. In this matter, for instance, the estate is so vast, so huge, that one would imagine that sharing it out would be a simple exercise as there seems to be more than enough for everyone, in fact excess! Not so here! The deceased died in 1993, 32 years ago, and even after the Court delivered a Judgment in 2015 distributing the estate among the beneficiaries, they still continued wrangling. Even after a mutual breakthrough was finally reached in 2021 after years of endless protracted Court battles, that agreement is still yet to be implemented to date, reason? you cannot imagine it! A mere failure to agree on location of the respective portions allocated to beneficiaries on one specific parcel of land measuring a whole 846 acres! Location, not the shares but, yes, say it again, mere position or location on the parcel of land, that is, who settles on the western side of the land, and who settles on the eastern side! May God save us!
2. I summarized the background of this matter in my Ruling rendered herein on 6/10/2023, in the following terms.

“25. From my reading of the record, I gather that the deceased died intestate on 20/10/1993 and left behind two widows and 16 children. In terms of the law of Succession, it is said that he left 2 Houses.

26. The Petition for Letters of Administration was then filed on March 1997 through the firm of Birech & Co. Advocates. The Petitioners were Toiyoi Tabarno Kamar (widow from 1<sup>st</sup> House), Kimitei Kipkosgei Kamar (son from 1<sup>st</sup> House), Tapyotin Kimoi Kamar (widow from 2<sup>nd</sup> House) and Joseph Kipkosgei Kamar (son from 2<sup>nd</sup> House). The Grant of Letters of Administration was then granted on 21/10/1997 to the 4 Petitioners as co-Administrators

27. I also gather that the survivors of the deceased were as follows:

<i>1<sup>st</sup> House</i>	<i>2<sup>nd</sup> House</i>
<i>Toiyoi Tabarno Kamar - Widow</i>	<i>Tapyotin Kimoi Kamar – Widow</i>
<i>Mary Jepkemoi Kiboi</i>	<i>Joseph Kipkosgei Kamar</i>
<i>Dr. Kimitei Kipkosgei Kamar Kamar</i>	<i>Ruth Jemutai Kamar</i>
<i>Lilian Kigen Seroney</i>	<i>Prof. Margaret Jepkoech Kamar</i>
<i>Esther Toroitich Rotich</i>	<i>Evelyn Jeruiyot Kipkosgei</i>
<i>John Kibet Kamar</i>	<i>Jane Jesanai Nakedony</i>
<i>Susan Jepkeikei Mibei</i>	<i>Elizabeth Jepyego Kibor</i>
<i>Charles Kibiwot Kamar</i>	<i>Hellen Jesire Kimaiyo</i>
<i>Nerisa Jepkorir Kamar</i>	
<i>Christopher Kimutai Kamar</i>	

28. Thereafter on 2/12/2014, 3 of the 4 Administrators - Joseph Kipkosgei Kamar, Toiyoi Tabarno and Tapyotion Kimoi Kamar - through Rioba Omboto & Co. Advocates filed the Summons for Confirmation of Grant dated 30/07/2014.

29. ....

30. By the Notice of Appointment filed on 13/02/2015, Miyenda & Co. Advocates came on record for Charles Kibiwot Kamar who described himself as an Objector. He protested against the mode of distribution proposed by the Administrators and presented his own.

31. By the Judgment delivered on 22/12/2015 by Hon. Lady Justice C.W. Githua, upon considering the Objection filed, determined the Summons for Confirmation. She found that some of the properties comprising the estate, namely, Mosop

*Chepkorio/21, Mosop/Choroget/326, Uasin Gishu/Munyewet (Kabao), Chepkorio Plot 11 and Eldoret Municipality Block 7/26, had no dispute over their mode of their distribution. She accordingly upheld the mode of distributions proposed by the parties except for the last property, Eldoret Municipality Block 7/26, which she directed be sold and the proceeds thereof be shared amongst the beneficiaries.*

*32. The 2 properties that the Judge found had disputes were L.R. 7439/Sigowo and Chepkorio/14. She then ruled thereon and distributed the properties amongst the survivors.”*

3. Several Applications have been filed and determined since then, with long-standing protracted litigation over the years. In the same breath, some consents were filed in Court in respect to the mode of distribution of the estate. Some of these consents were challenged and Rulings delivered thereon. At present, the consent order in force is the one dated 3/05/2021 which is in the following terms:

*“(i) The Elgeyo Marakwet Land Surveyor do move into LR. NO. 7439(SIGOWO) measuring Eight Hundred and Forty-Six (846) Acres to survey, demarcate and beacon the said parcel into 3 blocks as follows:-*

*(a) A portion measuring Twenty-Three (23) acres to be allocated to CHARLES KIBIWOTT KAMAR.*

*(b) A portion measuring Four Hundred and Fifty-Seven (457) acres for the beneficiaries in the 1<sup>st</sup> house including CHARLES KIBIWOTT KAMAR.*

*(c) A portion measuring Three Hundred and Sixty-Six (366) acres for the beneficiaries in the 2<sup>nd</sup> house.*

*(ii) The demarcation and allocation of the aforesaid portions do take into account the existing access roads as well as present occupation and use of the homestead by the beneficiaries.*

*(iii) Each and all the beneficiaries be at liberty to jointly or severally avail their own private Surveyor(s) during the survey exercise.*

*(iv) A Certificate of Grant be prepared and filed in Court within Thirty (30) days from the date of filing this consent.*

*(v) The Survey costs and incidental expenses and the estate legal fees be paid by the two (2) houses in the ratio of 10:8 upon ascertainment.*

*“(vi) The application dated 17<sup>th</sup> March, 2021 be deemed as compromised upon adoption of this Consent Order.*

*“(vii) The matter be mentioned on 20<sup>th</sup> September, 2021 to confirm compliance.”*

4. The latest in the long list of seemingly unending Applications, the subject of this Ruling, are now two respective Applications, one filed by the Objectors, and the other filed by the 2<sup>nd</sup> and 3<sup>rd</sup> Administrators.
5. The 1<sup>st</sup> Application is the Notice of Motion dated 8/03/2025 filed by the 2<sup>nd</sup> and 3<sup>rd</sup> Administrators. The same is filed through **Messrs Omondi & Co. Advocates**, and seeks orders as follows:
  - a) [.....] spent
  - b) [.....] spent
  - c) **A conservatory order be and is hereby issued restraining any and all 3<sup>rd</sup> parties who are neither members of the 1<sup>st</sup> house nor the 2<sup>nd</sup> house and specifically FRESHCROP LIMITED and MR. GASPERI CHRIS from trespassing into, alienating, wasting, cultivating or in any other way intermeddling and using the 366 acres of land on the western side of L.R. NO. 7439 (SIGOWO) purportedly leased to them by JOHN KAMAR and or CHARLES KIBIWOTT KAMAR.**
  - d) **Costs be provided for.**
6. The Application is supported by the Affidavit sworn by the 3<sup>rd</sup> Administrator, **Joseph Kipkosgei Kamar**, who deponed that after recording of the said consent order dated 3/05/2021, it was agreed, with guidance from community elders, between the houses that the 1<sup>st</sup> house will occupy the eastern part of the said parcel of land known as **L.R. No. 7439 (Sigowo)**, and the 2<sup>nd</sup> house (to which the Objectors belong) the western part portion of 366 acres part of the parcel of land known as **L.R. No. 7439 (Sigowo)**. He deponed that pursuant thereto, the County Land Surveyor visited the land, and in the presence of representatives from both houses, took measurements with for purposes of drawing up mutations for the proposed sub-divisions, and which made provisions for access roads, and which proposed **Eldoret High Court P&A Cause No. 59 of 1997**

sketch was forwarded to this Court. He deponed further that the 1<sup>st</sup> and 4<sup>th</sup> Administrators, for reasons best known to themselves, disowned the Surveyor's work with the result that execution of the consent order is now in limbo.

7. He contended further that on 8/03/2025 while on a routine tour of the farm, he came across people ploughing huge chunks of land and on inquiry, he learnt that they had leased the portions they were ploughing from the 1<sup>st</sup> and 4<sup>th</sup> Administrators, that specifically, he found several tractors ploughing on the western part of the land which rightly belongs to the 2<sup>nd</sup> house, and that on inquiry, he was informed by those cultivating that they were doing so on behalf of **Fresh Crop Limited** and one **Mr. Gasperi Chris**, who had leased 400 acres of the land from the 1<sup>st</sup> Administrator, whom he tried to reach but did not pick his calls. According to him therefore, the said acts of the 1<sup>st</sup> and 4<sup>th</sup> Administrators constitute intermeddling with the estate, and that the attempt by them to disown the consent order is meant to allow them have free use of the entire land as members of the 2<sup>nd</sup> house all reside away from home and their mother (2<sup>nd</sup> Administrator) is an old and sickly woman of over 90 years of age. He contended further that it is inconceivable that for all the years since the deceased died, the 1<sup>st</sup> house has had free access and use of an entire land measuring 800 acres to the exclusion of the 2<sup>nd</sup> house, and that the 1<sup>st</sup> and 3<sup>rd</sup> Administrators who lease out the farm on a yearly basis are never willing to render any accounts of the proceeds from the leasing. He also observed that by the order made on 19/06/2023 the Court restricted access to the land by 3<sup>rd</sup> parties and urged that during subsistence of that order, sanity prevailed and members of the 1<sup>st</sup> house were ready and willing to resolve issues pertaining to distribution of the estate. He thus urged that it is fair and just that 3<sup>rd</sup> parties be kept away from the land until proper sub-division is finalized.

8. The 2<sup>nd</sup> Application is the Chamber Summons dated 12/03/2025 filed by the Objectors. The same is filed, through **Messrs Chebii & Co. Advocates**, and seeks orders as follows:

i) [.....] spent

ii) [.....] spent

iii) **THAT there be temporary orders of injunction restraining the Petitioners/Respondents by themselves, their servants and/or agents from trespassing, entering, ploughing, planting, leasing, damaging, wasting, alienating, transferring or in any other way interfering with the Applicants'/Objectors' use, possession, occupation and ownership of part of that parcel known as L.R. No.**

**7439 (Sigowo) measuring 366 acres, pending the hearing and determination of this cause.**

**iv) THAT costs of this Application be provided for.**

9. The Application is supported by the Affidavit sworn by the 3<sup>rd</sup> Objector, **Everlyn Jeruiyot Kipkosgey**, who deponed that by the said consent order dated 3/05/2021, a portion of 366 acres part of the parcel of the land known as **L.R. No. 7439 (Sigowo)** was allocated to the 2<sup>nd</sup> house, and that a Surveyor has already identified the respective portions of the land and demarcated the same into portions of 457 acres to the 1<sup>st</sup> house, and 366 acres to the 2<sup>nd</sup> house, and that the said 366 acres was being utilized by the Respondents herein leaving the Applicants with 110 acres only, and that in February 2025, the Respondents entered the land and ploughed the same ready to plant potatoes and other crops, and that the 1<sup>st</sup> and 4<sup>th</sup> Administrators, **John Kibet Kamar** and **Charles Kibiwott Kamar**, respectively, have wasted the estate by leasing it out to unknown entities. She thus deponed that the said acts of the Administrators have denied the Applicants their right of use and occupation of the 366 acres.

10. The 4<sup>th</sup> Administrator, **Charles Kibiwot Kamar**, in opposition to the two Applications, through **Messrs Nabasenge & Co. Advocates**, filed two separate but identical Replying Affidavits both sworn on 27/05/2025. He deponed that the Applications seeks to injunct beneficiaries from the 1<sup>st</sup> house from cultivating land which they have lived on, occupied and cultivated throughout their lives. He then urged that the estate consists of about 823 acres of land, and by the consent dated 3/05/2021, the 1<sup>st</sup> house was allocated 457 acres, while the 2<sup>nd</sup> house 336 acres, and that the 1<sup>st</sup> house has continued to utilize and occupy about 249 acres which is part of the 457 acres allocated to it. He deponed further that the 1<sup>st</sup> house has two groups which cultivates and occupies their said portions as follows:

<b>Group 1</b>		<b>Group 2 (jointly)</b>	
Charles Kamar	27 acres	Mary Kibos	-
Jepkorir Kamar	4 acres	Esther Rotich	-
Christopher Kamar	22 acres	Jane Kamar	-
Susan Kamar	16 acres	Dr. Kimitei Kamar	-
<b>Total</b>	<b>69 acres</b>	John Kibet Kamar	-
		<b>Total</b>	<b>40 acres</b>

11. He deponed further that their mother was also allocated about 40 acres which they also utilize jointly. He contended further that under the consent order, the demarcation and **Eldoret High Court P&A Cause No. 59 of 1997**

allocation of the acreages was to be based on present occupation and use of the homestead by the beneficiaries, that the 1<sup>st</sup> house has been in occupation of the land they utilize even before the deceased died, and that the 2<sup>nd</sup> house utilizes the 366 acres that it was allocated, and that it is also to be noted that over 60 acres of the land is occupied by forest.

12. He acknowledged existence of the consent order dated 3/05/2021 but urged that the same is disputed and a review thereof had been sought but was declined by this Court and as a result, he has lodged an Appeal. He then denied that at any time did the community elders pass any resolutions in respect to location of the portions on the land (western side or eastern side) allocated to the respective two houses, but that if there was any, then it was passed against clause 2 of the consent order. In his view, the Applications seek to review terms of the consent which review was declined by the Court. He deponed further that the County Land Surveyor visited the land without notifying all the family members, and that the Surveyor is working under the instructions of the Applicants to the detriment of other beneficiaries and has failed to abide by clause 2 of the consent order which requires that demarcation of the land should be based on present occupation. He averred that they are farming on their allocated portions, and thus cannot be intermeddles being beneficiaries, and denied that he has ever leased out any portion of the land, and that in any event, he was allocated 23 acres which he may utilize as he wishes.

13. The 1<sup>st</sup> Administrator, **John Kibet Kamar**, also in opposition to the two Applications, through **Messrs Birech Ruto & Co. Advocates**, filed the Grounds of Opposition dated 30/04/2025 as well as the one Replying Affidavit sworn on the same date. In the Grounds of Opposition, he averred that the Applications are made in bad faith as the Court already delivered a Judgment on 22/12/2015 and distributed the said land **L.R. No. 7439 (Sigowo)** in ratio of 10:8 between the 1<sup>st</sup> house and the 2<sup>nd</sup> house, and thus the issues raised in the Applications ought to be raised at the **Environment and Land Court (ELC)** as the jurisdiction of this Court is only limited to distribution of the estate, which distribution was already made vide the said Judgment.

14. In the Replying Affidavit, the 1<sup>st</sup> Administrator (member of the 1<sup>st</sup> house) agreed that the County Land Surveyor visited the land to implement the consent order, upon which the land was demarcated, beacons placed, boundaries clearly indicated, a sketch map provided, and the same divided into 3 blocks as follows:

<b>1<sup>st</sup> House</b>	<b>2<sup>nd</sup> House</b>	<b>Charles Kibiwott Kamar</b>
<b>Eastern Side</b>	<b>Western Side</b>	-

<b>457 acres</b>	<b>366 acres</b>	<b>23 acres</b>

15. He deponed that the two houses agreed to plant trees on the boundary so as to establish a permanent boundary between them, and that the 2<sup>nd</sup> house planted tea bushes in a portion measuring 100 acres along their boundary after planting trees, which boundary has been maintained after the land was demarcated and each house has been utilizing their portions. He deponed that he has been utilizing 70 acres in the portion allocated to the 1<sup>st</sup> house and he has partnered with **Fresh Crop Limited** whose director is **Gasperi Chris**, who provides farm inputs which includes fertilizer, seedlings and herbicides to farmers in form of credit and shall be paid upon harvest of the crops. He denied that **Fresh Crops** or **Gasperi Chris** have ever leased any portion of the land or that they have trespassed into the 2<sup>nd</sup> house’s 366 acres portion. He averred that the land was surveyed as per the possession and occupation of each house and a sketch map was provided indicating the boundaries which have been maintained for over 10 years. He then invited the Court to visit the site or direct an expert to do so to ascertain actual position and status thereof. He also reiterated the argument that this Probate Court has no jurisdiction over the issues raised in the Applications and that such issues are reserved for the **ELC**. He also urged the Court to direct the County Land Surveyor to carry out a fresh survey in the presence of all the parties or representatives from both houses, and provide a sketch map with a well-defined boundary, and that the same should be done in the presence of clan elders agreed upon.

16. There is also Supplementary Affidavit sworn by the 3<sup>rd</sup> Objector, **Everlyn Jeruiyot Kipkosgey**, filed through **Messrs Chebii & Co. Advocates**, in which she denied that this Court is bereft of jurisdiction. She deponed that the Surveyor’s sketch exhibited by the 1<sup>st</sup> Administrator, **John Kibet Kamar**, is not the correct version that was presented to Court, and does not accord with the consent order which required that the existing use and occupation be put into account in the subdivision. She maintained that the said **Gasperi Chris** had encroached into the 2<sup>nd</sup> house’s portion, and averred that there is no basis for the 1<sup>st</sup> Administrator to allege that he was allocated a specific portion. She urged that the 2<sup>nd</sup> house’s prayer is that the County Land Surveyor do apply beacons mapping out the land into the identified portions.

17. There is also the Further Affidavit sworn by the 3<sup>rd</sup> Administrator, **Joseph Kipkosgei Kamar**, on 21/05/2025, and filed through **Messrs Omondi & Co. Advocates**. He, too, observed that the Survey Report exhibited by the 1<sup>st</sup> Administrator, **Joseph Kipkosgei Eldoret High Court P&A Cause No. 59 of 1997**

**Kamar**, is not the correct version as it was expunged from the record after both houses rejected it, and the Surveyor directed by the Court to repeat the exercise, the Report having been prepared on erroneous basis. He drew the Court's attention to the proceedings of 23/05/2022 before **Ogola J**, in which the Report was expunged as aforesaid. He deponed that the Surveyor thus repeated the exercise, and on being guided by **John Kibet, Charles Kamar** and **Ruth**, completed the exercise.

18. He reiterated that the new demarcation placed the 1<sup>st</sup> house on the eastern side and the 2<sup>nd</sup> house on the western side, and explained that the Surveyor told him that in forwarding the 2<sup>nd</sup> sketch, he again used the same letter dated 17/09/2022, which he had used to forward the 1<sup>st</sup> sketch (now expunged) and that this was because he was short of stationery to prepare a fresh forwarding letter. He then confirmed that the 2<sup>nd</sup> house is in agreement with the sketch. He reiterated matters already stated in his Supporting Affidavit, including the existence of the lease to **Fresh Crop**, adding that it is not the first time that the 1<sup>st</sup> Administrator has leased out the land, and cited restraining orders issued against the 1<sup>st</sup> Administrator over the sale leasing issue on 19/06/2023. He also refuted the 1<sup>st</sup> Administrator's claim that there has been a tea bushes boundary for over 10 years demarcating the portions occupied and used by each of the two houses.

19. The two Applications were then canvassed by way of Written Submissions. For the Applicants, **Messrs Omondi & Co.**, for the 3<sup>rd</sup> Administrator, filed the Submissions dated 22/05/2025, while **Messrs Chebii & Co.**, for the 3<sup>rd</sup> Objector, filed the Submissions dated 19/06/2025. For the Respondents, **Messrs Birech Ruto & Co.** for the 1<sup>st</sup> Administrator, filed the Submissions dated 12/06/2025, while **Messrs Nabasenge & Co.**, for the 4<sup>th</sup> Administrator, filed the Submissions dated 25/06/2025.

20. Having extensively recounted the parties' respective Affidavits, I do not deem it necessary to recite the Submissions as they, save for citing authorities and restating the applicable legal principles, basically recount the same facts and contents of the parties' respective Affidavits.

### **Determination**

21. The issue that arises for determination in this matter can broadly be summarized as follows:

**“Whether an of injunction should be issued to the 1<sup>st</sup> and 4<sup>th</sup> Administrators (both from the 1<sup>st</sup> house) and/or their agents (third parties) from encroaching or interfering with the 1<sup>st</sup> house family's occupation and/or use of the demarcated 366**

acres located on the western side of the parcel of land known as L.R. No. 7439 (Sigowo).”

22. It is now agreed, as was held in the Court of Appeal case of **Floris Pierro & another v Giancarlo Falasconi (as the administrator of the estate of Santuzza Billioti alias Mei Santuzza) [2014] eKLR**, that a Probate Court has powers under **Section 47** of the **Law of Succession Act** and also **Rule 73** of the **Probate and Administration Rules** to grant temporary injunctions.

23. **Section 47** provides as follows:

“**The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.**”

24. On its part, **Rule 73** of the **Probate and Administration Rules** provides as follows:

“**Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.**”

25. To this extent, the argument by **Ms. Tum** that this Court lacks the jurisdiction to entertain the nature of grievances contained in the Applications is, in my view, misconceived and borne out of a clear misapprehension of the nature of grievances and reliefs sought by the Applicants. The parties to the Application are all beneficiaries and the dispute is *intra partes* among them, not outsiders.

26. The principles guiding the handling of Applications for temporary injunctions are well settled, and are as was set out in the case of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358** and also in **American Cyanamid Co. v Ethicom Limited (1975) A AER**. Following the said cases, the Court of Appeal in **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR** stated as follows:

“**In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;**

(a) **establish his case only at a *prima facie* level,**

(b) **demonstrate irreparable injury if a temporary injunction is not granted, and**

(c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests 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. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. 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 is 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. The existence of a *prima facie* case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted."

27. The important consideration before granting a temporary injunction is proof that the property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or that the defendant threatens or intends to remove or dispose the property. The question that therefore arises is whether the two instant Applications meet the threshold laid for the granting of orders of temporary injunction.

28. Regarding the first consideration, namely, establishment of a *prima facie* case, the Court of Appeal, in the case of **Mrao Ltd v First American Bank of Kenya and 2 others**, (2003) KLR 125, which it also cited with approval in its subsequent case of **Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others**, (2014) eKLR, defined the phrase "a *prima facie* case" as follows:

"A *Prima facie* case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.**

29. In this matter, as already illustrated above, the Respondents, namely, the 1<sup>st</sup> and 4<sup>th</sup> Administrators (**John Kibet Kamar** and **Charles Kibiwott Kamar**) are from the 1<sup>st</sup> house, while the Applicants (the 3<sup>rd</sup> Administrator, **Joseph Kipkoskei Kamar**, and the 3<sup>rd</sup> Objector, **Everlyn Jeruiyot Kipkosgei**) are from the 2<sup>nd</sup> house.
30. Applying the facts of this case to the legal principles enunciated in the above authorities, I start from the precinct that pursuant to the Judgment rendered herein by **Githua J** on 22/12/2015, the parties subsequently recorded a consent order in this matter on 3/05/2021 recorded before **Sewe J**, whereof they agreed on distribution of the parcel of land known as **L.R 7439 (Sigowo)** said to comprise of about 846 acres. Apart from a portion of 23 acres allocated to the 4<sup>th</sup> Administrator in his individual capacity, the distribution was basically an apportionment between the 1<sup>st</sup> house (456 acres) and the 2<sup>nd</sup> house (366 acres). The parcel of land was therefore “divided” into 3 portions, and the Elgeyo Marakwet Land County Surveyor was then directed to carry out survey, demarcation. The consent did not identify or specify the respective locations of the 3 portions but Clause 2 thereof directed that the demarcation and allocation “*do take into account the existing access roads as well as present occupation and use of the homestead by the beneficiaries*”.
31. Pursuant thereto, the Surveyor got down to work, proceeded to the ground and conducted the exercise culminating into his sketch received by this Court on 4/11/2021, which sketch was however rejected by all the parties, was thus expunged from the record, and the Surveyor directed to conduct a fresh exercise. For the second time, the Surveyor proceeded to the ground on or about and repeated the exercise culminating into the second sketch received by this Court on a date that is not specified but, perusing the record, it must have been around October 2024. There is no dispute that the sketch plan places the 1<sup>st</sup> house on the eastern side of the said parcel of land and the 2<sup>nd</sup> house on the western side. As it is therefore, the Surveyor has completed performance of the duty or assignment he was directed by this Court to carry out.
32. Since the sketch was presented to Court in October 2024 or thereabouts, none of the parties has formally moved the Court to challenge it, or seek its setting aside. Granted, **Ms. Tum** and **Mr. Nabasenge**, Counsels for the 1<sup>st</sup> and 4<sup>th</sup> Administrator, respectively, did convey

their displeasure with the sketch on one or two occasions during routine Court attendances, and although at some point there was an attempt to cross-examine the Surveyor, they have never moved the Court for any orders. Without doing so, I am being told that the 1<sup>st</sup> and 4<sup>th</sup> Administrators (members of the 1<sup>st</sup> house), disregarding the sketch plan presented to Court, and which has never been challenges, have now moved into and started utilizing portions of the 366 acres situated on the western side of the parcel of land, with full knowledge that the same was, as aforesaid, allocated to the 2<sup>nd</sup> house. Indeed, the 1<sup>st</sup> and 4<sup>th</sup> Administrators do not at all deny that they have moved to occupy the portion. They expressly admit the above facts despite their Application seeking to set aside the consent order being declined.

33. In his Replying Affidavit, the 4<sup>th</sup> Administrator, **Charles Kibiwott Kamar**, at paragraph 15, depones that:

**“14. .... It is true that there is a consent herein dated 3<sup>rd</sup> May 2021 which consent is disputed by some of the beneficiaries whereby they had sought to review the same but it was declined by this Honourable Court .....**”

**“15. .... In view of the foregoing I have since preferred to lodge an appeal in the Court of Appeal since I was not involved in the said consent .....**”

34. In short, the 4<sup>th</sup> Administrator seems to be giving the Court notice that he does not recognize the consent order, that he is dissatisfied with the Court’s dismissal of his Application whereof he sought the setting aside of the order, and that he has lodged an Appeal. He is therefore informing the Court that until the Appeal is concluded, he has no intention, in the meantime, of abiding with, or honouring the consent order, together with any consequential Court process undertaken or performed on the basis thereof.

35. I find the style of litigation employed by the 1<sup>st</sup> and 4<sup>th</sup> Administrators to be a bit disturbing. I say so because although they have seemingly chosen not to challenge the Surveyor’s sketch as presented in Court, they seem to have decided to go round it by employing extra-judicial means to frustrate it, and by extension, to also frustrate the process of implementation of the consent order. I understand the 1<sup>st</sup> and 4<sup>th</sup> Administrators to be claiming that the Surveyor, in preparing the sketch map, did not involve them, or is acting under instructions of the 2<sup>nd</sup> house, and/or ignored the requirement in Clause 2 of the consent order that the demarcation **“do take into account the existing access roads as well as present occupation and use of the homestead by the beneficiaries”**. I however note that they do not expressly deny that they were present when the survey exercise was conducted. Be that as it may, whatever the

nature of their grievances, the 1<sup>st</sup> and 4<sup>th</sup> Administrators are represented by able and experienced Advocates who, no doubt, understand that the only lawful means of having the Survey exercise or the sketch plan declared void is by moving the Court for a finding and a declaration to that effect. A party cannot unilaterally take it upon himself to block the adoption of a Report prepared by an expert, a Surveyor in this case, before he has moved the Court and obtained directions. In conducting the Survey work and filing the Report, the Surveyor was executing a Court order and was to that extent acting as an officer of the Court. The Report he has filed in Court, until and unless judicially declared void by the Court, remains valid and fully in force, and until ruled otherwise, a party cannot be allowed to employ extra-judicial means to frustrate its adoption.

36. The 1<sup>st</sup> and 4<sup>th</sup> Administrators have not even disclosed any reason why they are fighting so hard to inherit the western side of the parcel of land, no reason at all! So what is so special about the western side that they are not disclosing but are fighting tooth and nail, through extra-judicial tactics, to inherit? In a civilized country as we like to call ours, such “jungle law” tactics cannot at all be tolerated.

37. A look at the record also suggests a pattern by the 1<sup>st</sup> and 4<sup>th</sup> Administrators of constantly employing steps in the case whose only achievement seems to be frustration of, and/or delay of the conclusion of this Cause. If not challenging consent orders, they are seeking reviews of orders, if not leasing out portions of the estate to third parties in dispute, they are encroaching into other beneficiaries’ portions. It seems they do not want this Cause to be concluded at all. It is also not lost on me that the rest of the members of the 1<sup>st</sup> house, have not even come out to support the actions of the 1<sup>st</sup> and 4<sup>th</sup> Administrators, their fellow members of the 1<sup>st</sup> house.

38. I believe I have said enough to indicate my displeasure with the tactics employed by the 1<sup>st</sup> and 4<sup>th</sup> Administrators in this matter. I do not mean to offend any litigant but I believe it is sometimes in order for the Court to strongly come out loud and admonish a party, where his conduct clearly offends the basic tenets of the rule of law.

39. Having found as above, I am satisfied that the Applicants - the 3<sup>rd</sup> Administrator and the 3<sup>rd</sup> Objector – have demonstrated the existence of a *prima facie* case, which is genuine and arguable. I find their claim to be such that meet the required threshold, and which can be described as one which, on the material presented, a tribunal properly directing itself will conclude that there exists a right which may have been apparently infringed by the opposite party as to call for an explanation or rebuttal from the later. In view of the above, I find that

the Applicants have established a *prima facie* case to the extent contemplated in the case of **Giella vs. Cassman Brown**.

40. On the second condition for grant of a temporary injunction, namely, whether the Applicant stands to suffer “*irreparable injury*”, “loss” or “harm” that cannot be easily compensated in any alternative manner, such as by damages, I have already found that the Applicants have established a *prima facie* justification for their claims for entitlement, as the 2<sup>nd</sup> house, to the 366 acres situated on the western side of the subject parcel of land. In the circumstances, it is my considered view that failure by this Court to protect that interest by way of an interim order of injunction pending conclusion of this matter, will mean that such *prima facie* claim has been disregarded thus risking extinction thereof before a final determination is made by the Court. Clearly, this will cause the Applicants harm that will in most probability be irreparable.
41. In respect to “*balance of convenience*”, Ombwayo J, in the case of **Pius Kipchirchir Kogo vs. Frank Kimeli Tenai [2018] eKLR** described the phrase in the following terms:

**“..... the meaning of “balance of convenience” in favour of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.”**

42. Noting that this is a Succession matter, and land being an emotive issue in Kenya, I find that the “*balance of convenience*” tilts towards granting the prayer for a temporary injunction as the parties await determination of all other outstanding matters by the Court. Only this will preserve the estate and ensure the maintenance of order and the *status quo* until then. Any other interpretation will be to encourage lawlessness and breakdown of the rule of law. In any event, the 1<sup>st</sup> and 4<sup>th</sup> Administrators have continuously reminded the Court that the subject land is 846 acres. Why the obsession with only the 366 acres portion situated on the western side allocated in the sketch map to the Applicant? Why the obsession when they can

also occupy and utilize the even larger 456 acres allocated to their 1<sup>st</sup> house on the eastern side, which in fact, they are currently also occupying and utilizing?

43. Before I pen-off, I deem it necessary to remind the parties that acts purporting to transact on property owned by a deceased, clearly amounts to the offence “*intermeddling*” with the estate of a deceased person, which is a criminal offence under **Section 45 of the Law of Succession Act**. **Gikonyo J** in the case of **Re Estate of M’Ngarithi M’Miriti [2017] eKLR**, described “*intermeddling*” in the following terms:

**“Whereas there is no specific definition provided by the Act for the term “intermeddling”, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”**

44. Having said so however, I am unable to issue any specific orders, at least for now, against the entity described as **Fresh Crop**, or the individual described as **Gasperi Chris**, as no sufficient evidence has been presented to prove that the 1<sup>st</sup> Administrator has leased out to them portions of the disputed 366 acres portion of the land as alleged. Even as I say so, I must state that I am not fully convinced by the 1<sup>st</sup> Administrator’s denial over the allegation that he has leased out the land as he has been clearly evasive and not very forthcoming with details on the issue of leasing out of the land. For now, I will give him the benefit of doubt. Be that as it may, as I will now issue a temporary injunction restraining the 1<sup>st</sup> and 4<sup>th</sup> Administrators from committing their acts described above, and which order will also apply to any 3<sup>rd</sup> parties operating or claiming under the 1<sup>st</sup> and 4<sup>th</sup> Administrators, any and all other

3<sup>rd</sup> parties are put on notice on the issue intermeddling and/or unlawful dealings with the estate of a deceased person before the legal process over management and distribution of the estate is completed. Indeed, on 19/06/2023, this Court had issued a similar order barring leasing out the land to 3<sup>rd</sup> parties. Any party breaching that order is surely risking being cited for contempt of Court, and being severely punished as a result.

**Final Orders**

45. The upshot of the foregoing is that the Applications dated 8/03/2025 and 12/03/2025, respectively, are found to be merited and are allowed in the following terms:

- i) Pending the hearing and determination of the remaining issues in this Cause, if any, a temporary order of injunction is hereby issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> Administrators, or any other member of the 1<sup>st</sup> house (family of **Toiyoi Tabarno Kamar**) by themselves, their servants and/or agents from ploughing, cultivating, planting, leasing, alienating, transferring, erecting structures on, or in any other way interfering with the 3<sup>rd</sup> Administrator's and/or the 3<sup>rd</sup> Objector's, or members of the 2<sup>nd</sup> house' (family of **Tapyotin Kimoi Kamar**) use, possession, and occupation of that portion of the parcel of land known as **L.R. No. 7439 (Sigowo)** comprising 366 acres, situated on the western side of the said parcel of land, as more particularly described and illustrated in the sketch map prepared by the County Land Surveyor Elgeyo Marakwet County and presented to this Court on or about the month of October 2024 by a letter erroneously dated as 17/09/2021.
- ii) Consequently, there is now no impediment to conclusion or implementation of the sketch map or plan prepared by the County Land Surveyor Elgeyo Marakwet referred to in (i) above.
- iii) As this is a family matter, I will not impose costs, and instead, order that each party shall bear his own costs.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 15<sup>TH</sup> DAY OF DECEMBER 2025**

.....  
**WANANDA JOHN R. ANURO**  
**JUDGE**

**Delivered in the presence of:**

**Eldoret High Court P&A Cause No. 59 of 1997**

**Mr. Omondi for the 2<sup>nd</sup> and 3<sup>rd</sup> Administrators**

**Ms. Sielei for the 1<sup>st</sup> house**

**Mr. Tum for the 1<sup>st</sup> Administrator**

**Court Assistant: Brian Kimathi**