

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ELC CASE NO. E009 OF 2025

SIMEON CHERUIYOT LANGAT.....
PLAINTIFF

VERSUS

JOEL KIPSANG BETT

(Sued as the personal representative of the estate of DANIEL KIPKEMOI ROTICH (Deceased).....
.....DEFENDANT

RULING.

Introduction.

- 1.** This ruling is in respect of the Plaintiff/Applicant's Notice of Motion application dated 17th February, 2025 and the Defendant/Respondent's Preliminary Objection dated 7th March, 2025.
- 2.** The Notice of Motion application dated 17th February, 2025 is expressed to be brought under **Order 40 Rules 1, 2 & 4** of the **Civil Procedure Rules** and **Sections 1A, 1B & 3A** of the **Civil Procedure Act.**

3. The application seeks the following orders;

a. *Spent*

b. *Spent*

c. *Spent*

d. *That this Honourable Court do issue an order of inhibition in respect of all that parcel number known as Kericho/Kipkelion/Barsiele Block 6 (Chemamul)3 during pendency of this application and the hearing and determination of the entire suit herein.*

e. *That this Honourable Court do to (sic) issue an order compelling the Defendant/Respondent to transfer six acres of land to the Plaintiff/Applicant to be hived from Kericho/Kipkelion/Barsiele Block 6 (Chamamul) 3 and the Respondent be further compelled to compensate the Applicant Mesne profits for loss of use.*

f. *That the costs of this application be provided for.*

4. The application is based on the grounds on its face and the supporting Affidavit of **Simeon Cheruiyot Langat** sworn on 17th February, 2025.

5. The Defendant/Respondent's Preliminary Objection is on the following grounds;
 - a. ***The Defendant lacks locus standi to be sued in this matter, having transferred all interests in the subject property, and therefore, the suit discloses no cause of action against the Defendant.***
 - b. ***The suit is incompetent, bad in law, and an abuse of the Court process as the suit property has already been subdivided and new titles issued, rendering the Plaintiff's claim moot and unenforceable.***
 - c. ***The suit is fatally defective for non-joinder of the substantive parties, namely, the current registered owners, who are the proper parties against whom relief should be sought.***
 - d. ***The Plaintiff's claim, if any, should be directed against the current registered proprietors and not the Defendant.***

- e. The suit offends the doctrine of indefeasibility of title as per Section 26 of the Land Registration Act, 2012, and is therefore unsustainable.***
- f. The suit is otherwise an abuse of the Court process and should be struck out with costs to the Defendant.***

Factual Background.

- 6.** The Plaintiff/Applicant commenced the present proceedings vide the Plaint dated 17th February, 2025 wherein he seeks the following prayers;

- a. An order do issue declaring the Plaintiff herein as the lawful and sole bonfide owner of all that parcel of land measuring Six (6) acres to be excised from Kericho/ Kipkelion/Barsiele Block 6(Chemamul)3 presently registered in the name of the Defendant and two other administrators who are deceased.***
- b. An Order do issue directing the Registrar of Lands, Kericho County and the County Surveyor to survey,***

subdivide and register the said parcel of Land in favour (sic) of the Plaintiff.

c. Any other order to issue as the Court may just and fair. (sic)

d. Cost of the suit be provided for.

- 7.** As at the time of writing of this ruling, the Defendant/Respondent has not filed his Statement of Defence.
- 8.** The application under consideration first came up for hearing on 20th February, 2025 when the Court directed that it be served upon the Defendant/Respondent.
- 9.** On 10th March, 2025, the Court was informed that the Defendant/Respondent had filed the Preliminary Objection dated 7th March, 2025.
- 10.** The Court directed that the application under consideration and the Preliminary objection be heard contemporaneously.

The Court also issued directions that they be heard by way of written submissions.

- 11.** The matter was mentioned severally to confirm filing of submissions before it was reserved for ruling on 16th July, 2025.

The Plaintiff/Applicant's Contention.

- 12.** The Plaintiff/Applicant contends that he purchased a six-acre portion of land from **Leah Chepkoros Kimeto**, who is now deceased, at a consideration of Kshs 2,500,000/=.
- 13.** The Plaintiff/Applicant also contends that at the time he was purchasing the said portion of land, **Leah Chepkoros Kimeto** (deceased) was a joint administrator of the estate of **Daniel Kipkemoi Rotich** (deceased). He goes on to state that she was the widow of **Daniel Kipkemoi Rotich** (deceased).

- 14.** The Plaintiff/Applicant further contends that the proceeds of the said sale were used to settle the liabilities of the estate of **Daniel Kipkemoi Rotich** (deceased).
- 15.** It is the Plaintiff/Applicant's contention that at the time of the sale, the family of the deceased had filed HC Succession Cause No. 89 of 2014.
- 16.** It is the Plaintiff/Applicant's contention that a grant was issued in the said succession proceedings and a Certificate of Confirmation of Grant was also issued on 25th September, 2019.
- 17.** It is further the Plaintiff/Applicant's contention that the said Certificate of Confirmation of Grant set out a list of parcels of land that had been sold by **Leah Chepkoros Kimeto** (deceased). He adds that the Certificate of Confirmation of Grant stated that the said parcels of land were to be transferred to the respective purchasers.

- 18.** He contends that some of the children of the deceased were dissatisfied with the Court's directions and they filed objection proceedings which objection proceedings were dismissed on 25th September, 2019.
- 19.** He also contends that the High Court at paragraph 39 of its ruling delivered on 25th September, 2019 directed that land parcel No's Kericho/Kipkelion/Barsiele Block 6 (Chemamul) 3, 7 and 28 were to be transferred to the respective purchasers.
- 20.** He further contends that the said ruling was not appealed and neither was it set aside, therefore it is a valid Court order.
- 21.** It is his contention that it has been five years since the Court delivered its ruling and the surviving administrators have not been able to transfer the said parcel of land to his name. He goes on to state that towards the end of the year 2023, he took possession of the said parcel of land.

- 22.** It is also his contention that he came to learn that the beneficiaries of the estate of the deceased, filed an application to rectify the grant without his knowledge.
- 23.** It is further his contention that as a result, the Court issued a Rectified Confirmed Grant on 2nd February, 2023 notwithstanding the earlier ruling of the Court on the distribution of the estate.
- 24.** He contends that he instructed his advocates on record to issue a letter to the administrators of the estate of the deceased demanding for the immediate transfer of the said portion of land and adds that the letter was issued but it did not elicit any response.
- 25.** He also contends that the administrators of the estate of the deceased asked him to pay survey fees of Kshs. 27,200/= which he paid to their NCBA account, Kericho Branch.

- 26.** He further contends that he eventually instructed his advocates to seek for orders of transmission in the succession proceedings because the administrators of the estate of the deceased had refused, neglected and ignored the orders of the Court.
- 27.** It is his contention that his advocates filed the Chamber Summons application dated 26th October, 2023 which application was dismissed on 5th December, 2024. The High Court held that it was *functus officio* and directed him to seek redress before this Court.
- 28.** It is also his contention that he has come before this Court seeking for orders that the parcel of land he purchased be transferred to him. He goes on to state that the estate should be ordered to pay him mesne profits for the loss of use from the date of purchase to the date he takes occupation.

- 29.** It is further his contention that he has been suffering as the purchase price of kshs. 2,500,000/= that he paid in the year 2015 would have assisted him and his family in other profitable enterprises.
- 30.** He contends that he is swearing the said affidavit in support of his application which seeks that the Court issues an order of temporary injunction restraining the Defendant/Respondent, by himself, agents, servants and/or other beneficiaries of the estate from interfering with land parcel No. **Kericho/Kipkelion/Barsiele Block 6 (Chemamul)** 3 pending hearing and determination of the application under consideration.
- 31.** He also contends that he has been advised by his advocates on record that he is entitled to his property as provided for under **Article 40** of the Constitution of Kenya.

- 32.** He further contends that he is entitled to enjoy the fruits of the ruling of the High Court delivered on 25th September, 2019.
- 33.** He ends his deposition by stating that it is just and fair that the Court grants the orders sought.
- 34.** The Plaintiff/Applicant has attached a copy of a land sale agreement dated 15th June, 2025 entered between him and **Leah Chepkoros Kimeto** to his affidavit in support of the application. The Plaintiff/Applicant has also attached a copy of a Certificate of Confirmation of Grant issued on 25th September, 2019 in Kericho HC Succession Cause No. 89 of 2014 In the matter of the Estate of **Daniel Kipkemoi Rotich alias Kipkemoi A.Rotich** (deceased). Copies of rulings delivered in Kericho HC Succession cause No. 89 of 2014 on 25th September, 2019 and 5th December, 2024 have also been attached.

The Defendant/Respondent's Response to the Plaintiff/Applicant's application

- 35.** In response to the Plaintiff/Applicant's application, the Defendant/Respondent filed a Replying Affidavit sworn on 7th March, 2025 and a preliminary objection also dated 7th March 2025.
- 36.** The grounds on the preliminary objection have been set out in the preceding paragraphs.
- 37.** In the Replying Affidavit he deposes that he has been wrongly sued as he no longer holds any legal and/or beneficial interest in land parcel No. **Kericho/Kipkelion/Barsiele Block 6 (Chemamul)3.**
- 38.** He also deposes that the suit parcel was subdivided and transferred to third parties.

- 39.** He further deposes that the suit parcel of land was closed upon subdivision and therefore the Plaintiff/Applicant's application has been overtaken by events.
- 40.** It is his deposition that the orders sought against him cannot be enforced and therefore the Plaintiff/Applicant's suit is misconceived and legally untenable.
- 41.** It is also his deposition that the Plaintiff/Applicant has failed to join the registered owners of the resultant subdivisions of the suit parcel of land and yet they are the only persons against whom orders of ownership, transfer and/or injunction can be issued.
- 42.** It is further his deposition that the law requires that any person seeking ownership of land sues the person currently holding the title and not the previous owner.

43. He deposes that without the joinder of the third parties, the present suit is incompetent and an abuse of the Court process.
44. He also deposes that the Plaintiff/Applicant is seeking an order of injunction, an order of inhibition and transfer of land and yet he (Defendant/Respondent) does not have any legal rights over the suit parcel of land.
45. He further deposes that he is not in possession of the suit parcel and neither does he have the authority to transfer, subdivide or sell the said parcel of land.
46. It is his deposition that the Plaintiff/Applicant has not demonstrated any lawful claim over the suit parcel. He goes on to state that in **Giella v Cassman Brown & Co. Ltd [1973] EA 358**, a party seeking for an order of injunction must establish a *prima facie* case with a probability of success, that they will suffer irreparable harm if the

injunction is not granted and that the balance of convenience tilts in their favour.

- 47.** It is also his deposition that the Plaintiff/Applicant has not proved any of those elements as he has not attached any ownership document for the six-acre portion of land that he is claiming.
- 48.** It is further his deposition that the Plaintiff/Applicant will not suffer any irreparable harm and should there be any genuine claim, then it should be directed to the current registered owners. He goes on to state that the balance of convenience tilts in his favour and that he should not be forced to defend a claim over land that he does not own.
- 49.** He deposes that the Plaintiff/Applicant has not alleged and/or proved any fraud in the transfer of the suit parcel which means that the new registered owners hold indefeasible titles.

50. He also deposes that the Plaintiff/Applicant is engaging in speculative litigation and is attempting to obtain land through improper legal means rather than filing a proper suit against the current registered owners.

51. He further deposes that by suing the wrong party, the Plaintiff/Applicant has wasted the Court's time and subjected him to unnecessary litigation.

52. It is his deposition that if the suit is allowed, he will suffer prejudice and unnecessary costs in defending a matter which he has no interest in.

53. He ends his deposition by urging the Court to dismiss the Plaintiff/Applicant's application dated 17th February, 2025 with costs.

54. The Defendant/Respondent has attached copies of certificates of title for land parcel No's

Kericho/Kipkelion/Barsiele Block 6 (Chemamul)
233,232,231,230,229,228,226,224,221,223,234,
220, 225 and 227 to his Replying Affidavit. Land Parcel No.
Kericho/Kipkelion/Barsiele Block 6 (Chemamul) 233 is
registered in the name of **Grace Chepchirchir Chumo**,
Kericho/(Kipkelion/Barsiele Block 6 (Chemamul) 232 is
registered in the name of **Grace Chepkirui Kimeto**,
Kericho/Kipkelion/Barsiele Block 6 (Chemamul)231 is
registered in the name of **Joseph Kiptonui Bett**, land
parcel No. Kericho/Kipkelion/Barsiele Block 6(Chemamul) 230
is registered in the name of **Maurine Jepkemoi Kanda**,
land parcel No. Kericho/Kipkelion/Barsiele Block 6
(Chemamul) 229 is registered in the name of **Chepkorir
Nancy**, land parcel No. Kericho/Kipkelion/Barsiele Block 6
(Chemamul) 228 is registered in the name of **Kimettoh
Chelangat**, land parcel No. Kericho/Kipkelion/Barsiele Block
6 (Chemamul) 226 is registered in the name of **Grace
Chepkurui Korir**, land parcel No. Kericho/Kipkelion/Barsiele
Block 6 (Chemamul) 224 is registered in the name of **Rose
Chepkirui Bett**, land parcel No. Kericho/Kipkelion/Barsiele

Block 6 (Chemamul) 221 is registered in the name of **Annah Chepkorir Ronoh**, land parcel No. Kericho/Kipkelion/Barsiele Block 6 (Chemamul) 223 is registered in the name of **Erick Kipkorir Bett**, land parcel No. Kericho/Kipkelion/Barsiele Block 6 (Chemamul) 234 is registered in the name of **Geoffrey Kibet Tarus**, land parcel No. Kericho/Kipkelion/Barsiele Block 6 (Chemamul) 220 is registered in the name of **Joel Kipsang Bett**, land parcel No. Kericho/Kipkelion/Barsiele Block 6 (Chemamul) 225 is registered in the name of **Joel Kipsang Bett** and land parcel No. Kericho/Kipkelion/Barsiele Block 6 (Chemamul) 227 is registered in the name of **Philiph Kipkoech Bett**.

Issues for Determination.

- 55.** The Plaintiff/Applicant filed his submissions on 15th July, 2025 while the Defendant/Respondent filed his submissions on 8th July, 2025.
- 56.** The Plaintiff/Applicant relies on **Order 1 Rule 3** of the **Civil Procedure Rules** and while reiterating his averments in his

affidavit in support of the application, submits that the Defendant/Respondent is the administrator of the estate of the deceased and he therefore has every right to sue him.

57. The Plaintiff/Applicant relies on the judicial decisions of **Mukisa Biscuits Manufacturing Ltd vs West Distributors (sic) Ltd Civil Appeal No. 9 of 1969 (1969) EA 696, Law Society of Kenya vs Commissioner of Lands & Others Nakuru High Court Civil Case No. 464 of 2000, Alfred Njau and Others vs City Council of Nairobi [1989] KAR 229** and submits that he has demonstrated proprietary interest in the six-acre portion of the suit parcel of land.

58. He reiterates that the suit parcel is registered in the name of the Defendant/Respondent who is the administrator of the estate of the deceased.

59. He submits that the other administrators are deceased and the Defendant/Respondent has been rightfully sued.

- 60.** The Plaintiff/Applicant concludes his submissions by urging the Court to dismiss the Defendant/Respondent's preliminary objection dated 7th March, 2025.
- 61.** The Defendant/Respondent submits on the following issue;
- a. *Whether the suit as instituted discloses a reasonable cause of action against the Defendant and whether the Defendant is properly enjoined in the suit. (sic)***
- 62.** The Defendant/Respondent relies on the judicial decision of **Alfred Njau v City Council of Nairobi** (citation not given) and submits that he is the administrator of the estate of **Daniel Kipkemoi Rotich** (deceased).
- 63.** The Defendant/Respondent also submits that he distributed the said estate in his capacity as administrator.

- 64.** The Defendant/Respondent further submits that all proprietary interests in the suit parcel of land were transferred to the rightful beneficiaries and/or third-party purchasers.
- 65.** It is the Defendant/Respondent's submissions that after the transfer of the suit parcel of land, he ceased to have any proprietary interest.
- 66.** The Defendant/Respondent relies on the judicial decision of **Abdulrehman Adam Omar v Registrar of Titles & another [2011] eKLR** and submits that he has not been properly joined to the suit and any claim of land lies with the current registered owners of the suit parcel.
- 67.** The Defendant/Respondent relies on **Section 26(1)** of the Land Registration Act, the judicial decision of **Joseph Arap N'gok vs Justice Moijo Ole Keiwua & 5 Others [1997] eKLR** and submits that the Plaintiff/Applicant has not raised any issues of fraud, misrepresentation and/or illegality

against the current registered owners of the suit parcel and neither has he challenged the legality of their titles.

- 68.** The Defendant/Respondent also submits that the reliefs sought by the Plaintiff/Applicant cannot be enforced against him (Defendant/Respondent) since he has no interest in the suit property.
- 69.** The Defendant/Respondent concludes his submissions by urging the Court to allow his preliminary objection with costs.

Analysis and Determination.

- 70.** I have considered the Plaintiff/Applicant's application dated 17th February, 2025, the Defendant/Respondent's preliminary objection dated 7th March, 2025 and the Replying Affidavit. I have also considered the rival submissions and it is my view that the following issues arise for determination;

- a. **Whether the Defendant/Respondent's preliminary objection is merited.**
- b. **Whether this Court should issue an order of inhibition over land parcel number Kericho/Kipkelion/Barsiele Block 6 (Chemamul) 3 pending the hearing and determination of this suit.**
- c. **Whether the Court should issue an order compelling the Defendant/Respondent to transfer a six-acre portion of land parcel No. Kericho/Kipkelion/Barsiele Block 6 (Chemamul)3 to the Plaintiff/Applicant.**
- d. **Whether the Court should issue an order compelling the Defendant/Respondent to pay the Plaintiff/Applicant mesne profits for loss of use.**
- e. **Who should pay costs of this application and the Preliminary Objection.**

A. Whether the Defendant/Respondent’s preliminary objection is merited.

71. The judicial decision of **Ushago Diani Investment Limited v Abdulwahab (Environment & Land Case 12 of 2023) [2023]**

KEELC 20213 (KLR) (27 September 2023) (Ruling) cited with approval **Oraro v Mbaja [2005] eKLR 141** where the Court held as follows on the nature of preliminary objections;

“A preliminary objection is now well identified as and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary

objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary objection anything that purports to be a preliminary objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

(Emphasis mine)

- 72.** In summary, a preliminary objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained. Further, a preliminary objection must stem from the proceedings and raise pure points of law and should not deal with disputed facts nor should it derive its foundation from factual information.

73. The grounds on the face of the Defendant/Respondent's preliminary objection have been set out in the preceding paragraphs but I will nonetheless replicate them as hereunder;

a. The Defendant lacks locus standi to be sued in this matter, having transferred all interests in the subject property, and therefore, the suit discloses no cause of action against the Defendant.

b. The suit is incompetent, bad in law, and an abuse of the Court process as the suit property has already been subdivided and new titles issued, rendering the Plaintiff's claim moot and unenforceable.

c. The suit is fatally defective for non-joinder of the substantive parties, namely, the current registered owners, who are the proper parties against whom relief should be sought.

d. The Plaintiff's claim, if any, should be directed against the

current registered proprietors and not the Defendant.

e. The suit offends the doctrine of indefeasibility of title as per Section 26 of the Land Registration Act, 2012, and is therefore unsustainable.

f. The suit is otherwise an abuse of the Court process and should be struck out with costs to the Defendant.

74. The Defendant/Respondent in his preliminary objection essentially contends that he ought not to have been sued because he has already subdivided and transferred the suit parcel of land to third parties.

75. The Defendant/Respondent also contends that the Plaintiff/Applicant's suit is defective as the registered owners of the resultant subdivisions of the suit parcel of land have not been joined to the suit.

- 76.** The Defendant/Respondent further contends that the suit offends the doctrine of indefeasibility of title as provided for under **Section 26** of the Land Registration Act.
- 77.** In response, the Plaintiff/Applicant submits that he has properly sued the Defendant/Respondent as he is legal representative of the estate of **Daniel Kipkemoi Rotich** (deceased). He also submits that he purchased a portion of the suit parcel from the administrators of the said estate.
- 78.** It is not disputed that the Defendant/Respondent is one of the administrators of the estate of **Daniel Kipkemoi Rotich** (deceased).
- 79.** It is also not disputed that the suit parcel, that is land parcel No. **Kericho/Kipkelion/Barsiele/Block 6 (Chemamul)3**, belongs to the estate of **Daniel Kipkemoi Rotich** (deceased).

80. What is disputed is whether the Defendant/Respondent has subdivided the suit parcel land and transferred the resultant subdivisions to third parties. This is the issue that has been raised by the Defendant/Respondent in the preliminary objection under consideration.

81. It is this Court's view, that the determination of the question whether the Defendant/Respondent has subdivided the suit parcel land and transferred the resultant subdivisions to third parties requires the examination of evidence and is, therefore, beyond the scope of a preliminary objection.

B. Whether this Court should issue an order of inhibition over land parcel number Kericho/Kipkelion/Barsiele Block 6 (Chemamul) 3 pending the hearing and determination of this suit.

82. The Plaintiff/Applicant is seeking under prayer **4** of his application, that the Court issues an order of inhibition over land parcel No. **Kericho/Kipkelion/Barsiele Block 6**

(Chemamul) 3 pending hearing and determination of this suit.

83. None of the parties submitted on this issue.

84. Section 68 of the Land Registration Act provides as follows;

“(1) The Court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.

(2) A copy of the inhibition under the seal of the Court, with particulars of the land, lease or charge affected, shall be sent to the Registrar, who shall register it in the appropriate register.

(3) An inhibition shall not bind or affect the land, lease or charge until it has been registered.”

85. In the judicial decision of **Dorcas Muthoni & 2 others v Michael Ileri Ngari [2016] KEHC 6213 (KLR)** the Court held as follows;

“An order of inhibition issued under Section 68 of the Land Registration Act is similar to an order of prohibitory injunction which bars the registered owner of property under dispute from registering any transaction over the said property until further orders or until the suit in which the said property is a subject is disposed of. The Court issuing such an order must be satisfied that the applicant has good grounds to warrant the issuance of such an order because, like an interlocutory injunction, such an order preserves the property in dispute pending trial.” (Emphasis mine)

86. In the above cited judicial decision, the Court held that an order of inhibition bars the registered owner of land from registering any transactions on it until the suit where the land is the subject matter, is disposed of. The Court also held that any party seeking for an order of inhibition must demonstrate good grounds for the said orders to be granted.

87. In the present matter, it is evident that the Plaintiff/Applicant has not laid any basis for the Court to issue an order of inhibition.

C. Whether the Court should issue an order compelling the Defendant/Respondent to transfer a six-acre portion of land parcel No. Kericho/Kipkelion/Barsiele Block 6 (Chemamul)3 to the Plaintiff/Applicant.

88. The Plaintiff/Applicant is seeking under prayer (5) of the application under consideration that the Court issues an order compelling the Defendant/Respondent to transfer a six-acre portion of land parcel No.

Kericho/Kipkelion/Barsiele Block 6 (Chemamul) 3 to his name.

89. The Defendant/Respondent submits that the suit parcel of land has been subdivided and transferred to third parties who are not parties to this suit.

90. I have noted that the Plaintiff under prayer (i), the Plaintiff/Applicant is seeking that the Court issues an order that he is the lawful owner of a six-acre portion of land parcel No. **Kericho/Kipkelion/Barsiele Block 6 (Chemamul) 3.**

91. In the application under consideration, the Plaintiff/Applicant is seeking that the Court issues an order for the transfer of the six-acre portion of the suit parcel of land to him.

92. Essentially, the Plaintiff/Applicant is seeking that the Court issues an order of transfer before it makes a determination on ownership.

93. Issuing an order of transfer of the suit parcel to the Plaintiff/applicant is akin to determining the suit at an interlocutory stage. The said prayer cannot therefore be granted.

D. Whether the Court should issue an order compelling the Defendant/Respondent to pay the Plaintiff/Applicant mesne profits for loss of use.

94. The Plaintiff/Applicant is also seeking under prayer (5) of the application under consideration that the Court issues an order compelling the Defendant/Respondent to pay him mesne profits for loss of use.

95. None of the parties submitted on this issue.

96. In the judicial decision of **Nzamba Kitonga v Geoffrey Muthui Mbivya [2017] KEELC 2883 (KLR)** the Court held as follows;

“The Court of Appeal in Kenya Hotel Properties Ltd Vs Willesden Investments Limited (2009) eKLR, defined mesne profits as “a claim for damages for trespass to land.” In my view, damages in the nature of mesne profits require assessment at a formal proof hearing session of the Court. Consequently, it would be irregular to grant final orders in respect of mesne profits at this stage. The prayer for mesne profits ought therefore to go for assessment.” (Emphasis mine)

- 97.** I find that this prayer is premature and cannot be granted in an interlocutory application. It is for determination during hearing.

E. Who should pay costs of this application and the Preliminary Objection.

98. The general rule is that costs shall follow the event. This is in accordance with the **Provisions of Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.

Disposition.

99. Taking the foregoing into consideration I find as follows;

a. *The Plaintiff/Applicant's Notice of Motion application dated 17th February, 2025 lacks merit and it is hereby dismissed with costs.*

b. *The Defendant/Respondent's preliminary objection dated 7th March, 2025 lacks merit and it is hereby dismissed with costs.*

100. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO
THIS 11th DAY OF DECEMBER, 2025.**

**L. A. OMOLLO
JUDGE.**

In the presence of: -

Mr. RK Langat for the Plaintiff/Applicant.

No appearance for the Defendant/Respondent

Court Assistant; Mr. Joseph Makori.

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