

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**ELC CASE NO. E006 OF 2023 (OS)**

**ROBERT KIPKEMOI BYEGON.....**  
**PLAINTIFF**

**VERSUS**

**AGRICULTURAL FINANCE CORPORATION..**  
**.....DEFENDANT**

**AND**

**GRACE**

**CHELANGAT CHELOGOI.....INTENDED 2<sup>ND</sup>**  
**DEFENDANT**

**BARNABA KIPKEMOI KIMELI.....INTENDED 3<sup>RD</sup>**  
**DEFENDANT**

---

**RULING.**

**Introduction.**

1. This ruling is in respect of the 2<sup>nd</sup> and 3<sup>rd</sup> Intended Defendants/Applicants Notice of Motion application dated 7<sup>th</sup> May, 2025. The application is expressed to be brought under **Order 1 Rule 3, Order 51 (1)** and **Order 40 Rules 1 & 3** of the Civil Procedure Rules.

2. The application seeks the following orders;

**a. Spent**

**b. That the honourable (sic) be pleased to enjoin the Applicants as 2nd & 3rd defendants in this suit.**

**c. That pending the hearing and determination of this suit the honorable (sic) be pleased to issue an injunction restraining the Plaintiff from evicting the Applicants, selling, charging, leasing and /or dealing with land parcel no. 1.r Kericho/Kipchorian Lelu Block 5/71.**

**d. That the Applicants upon being enjoined, be granted leave to file her (sic) response unto the suit.**

**e. That the title deed reverts unto the Defendant.**

**f. That costs of this application be awarded to the Applicant (sic).**

3. The application is based on the grounds on its face and the supporting affidavit of **Grace Chelangat Chelogoi** sworn on 7<sup>th</sup> May, 2025.

## **Factual Background.**

4. The Plaintiff/Respondent commenced the present proceedings vide the Originating Summons dated 18<sup>th</sup> May, 2023 where he seeks for the determination of the following questions;

***a. Whether the Plaintiff has gained proprietary rights over all that parcel of land known as Kericho/Kipchorian/Lelu/Block 5 (Kebeneti)/71 by virtue of continued uninterrupted possession of an initial period of ten (10) years and a further twenty (20) years adverse to the title acquired, albeit illegally, by the Defendant on 27<sup>th</sup> August, 2001? (sic)***

***b. Whether having not been evicted from 27<sup>th</sup> August, 2001 to date vide any legal process, the Plaintiff should be declared a bona fide proprietor of all that parcel of land known as Kericho/Kipchorian/Lelu***

**Block 5 (Kebeneti)/71 and be registered as such.**

**c. Whether costs of the suit should be provided for.**

5. The Defendant/Respondent did not file a response to the Originating Summons.

6. The Court delivered judgment on 2<sup>nd</sup> May, 2024 and issued the following orders;

**a. The Plaintiff has acquired title deed by adverse possession over LR No. Kericho/Kipchorian/Lelu Block 5 (Kebeneti)/71.**

**b. The land LR No. Kericho/Kipchorian/Lelu Block 5 (Kebeneti) 71, be registered in the names of the Plaintiff and the Defendant be ordered to sign the same, within 30 days of the delivery of this judgement.**

**c. The Plaintiff shall have the cost of this suit at a lower scale since the same was undefended.**

- 7.** After judgement was delivered, the Defendant/Respondent filed an application dated 22<sup>nd</sup> July, 2024 seeking among other orders, that the judgement delivered on 2<sup>nd</sup> May, 2024 be set aside.
- 8.** The Court delivered a ruling on the said application on 27<sup>th</sup> March, 2025 and set aside the judgement delivered on 2<sup>nd</sup> May, 2024.
- 9.** As at the time of writing of this ruling, the Defendant/Respondent has not filed a response to the Originating Summons.
- 10.** The application under consideration first came up for hearing on 13<sup>th</sup> May, 2025 and the Court issued directions that it be served upon the Respondents.
- 11.** On 26<sup>th</sup> June, 2025 the application came up for hearing and Counsel for the Defendant/Respondent informed the Court that he would not be opposing the application.

**12.** The Court issued directions that the application be canvassed by way of written submissions. It was mentioned to confirm filing of submissions on 16<sup>th</sup> September, 2025 and reserved for ruling.

**The 2<sup>nd</sup> and 3<sup>rd</sup> Intended Defendants/Applicants contention**

**13.** The affidavit in support of the application is sworn by **Grace Chelangat Chelogoi** the 2<sup>nd</sup> Intended Defendant/Applicant.

**14.** She contends that she has the authority of the 3<sup>rd</sup> Intended Defendant/Applicant to swear the affidavit.

**15.** She also contends that this matter is pending hearing and avers that she and the 3<sup>rd</sup> Intended Defendant/Applicant are in possession of land parcel **No. Kericho/Kipkelion/Lelu**

**Block 5/71.** She goes on to state that they have built a homestead and made massive developments on the land.

- 16.** It is her contention that her deceased husband one **Francis Kimeli Arap Chelogoi**, purchased the suit parcel of land from the Defendant/Respondent and further states that the Defendant/Respondent handed over to them the original title deed and an executed transfer in favour of her deceased husband.
- 17.** It is also her contention that she is a joint administrator of the estate of her deceased husband.
- 18.** It is further her contention that the Plaintiff/Respondent was aware that they were in occupation of the suit parcel of land but he decided to only sue the Defendant/Respondent. She goes on to state that this was meant to mislead the Court.

- 19.** She reiterates that her family and the 3<sup>rd</sup> Intended Defendant/Applicant have made massive developments on the suit parcel of land.
- 20.** She contends that she has been informed by the Land Registrar, Kericho that the Plaintiff/Respondent has been registered as the owner of the suit parcel of land and is now trying to forcefully evict her and her family.
- 21.** She also contends that she has perused the present proceedings and confirmed that there is no order restraining the Plaintiff/Respondent from selling, transferring, leasing and/or alienating the suit parcel of land to third parties.
- 22.** She ends her deposition by seeking that the Court grants the orders sought in the application.

**The Plaintiff/Respondent's Response.**

**23.** In response to the 2<sup>nd</sup> and 3<sup>rd</sup> Intended Defendants/Applicants application, the Plaintiff/Respondent filed Grounds of Opposition dated 10<sup>th</sup> June, 2025. They are as follows;

***a. That the Notice of Motion is misconceived, frivolous, incompetent and vexatious and otherwise a gross abuse of the Court process and should summarily be dismissed with costs.***

***b. That the Court is functus officio as the issue of enjoining the intended parties was dispensed with vide the Ruling dated 27<sup>th</sup> March, 2025.***

***c. That the Court after considering all the elements of joinder of parties made a Ruling at paragraph 107 of the said Ruling. (sic) (See paragraph 107 of the Ruling).***

***d. That the Applicant (sic) in blatant disregard of the said Ruling and order has made this present application.***

***e. That the Applicant has approached this honourable Court with unclean hands.***

***f. That the introduction of the intended parties herein is a ploy to further delay this suit to the detriment of the Plaintiff and his family.***

***g. That the Intended parties have no better claim or title than the Defendant/Respondent herein.***

***h. That the addition of the intended 3<sup>rd</sup> Defendant is a tactical (sic) manoeuvre aimed at distorting real issues and facts in this present suit.***

***i. That the Applicant has an option of appealing against the Ruling of this honourable Court.***

***j. That for the foregoing reasons, the application dated 7th May, 2025 has no merit and should be dismissed with costs to the Respondents***

### **Issues for Determination.**

**24.** The 2<sup>nd</sup> and 3<sup>rd</sup> Intended Defendants/Applicants filed their submissions on 17<sup>th</sup> September, 2025 and the Plaintiff/Respondent filed his submissions on 18<sup>th</sup> August, 2025.

- 25.** The 2<sup>nd</sup> and 3<sup>rd</sup> Intended Defendants/Applicants rely on **Order 1 Rules 3 & 10** of the Civil Procedure Rules and reiterate that they are in possession of the suit parcel of land, that they have made massive developments on the land and add that the Plaintiff/Respondent concealed material facts when he instituted the present suit.
- 26.** The 2<sup>nd</sup> and 3<sup>rd</sup> Intended Defendants/Applicants submit that the Plaintiff/Respondent has never been in possession of the suit parcel of land but his acts of trespass and interference have immensely affected their day to day activities.
- 27.** The 2<sup>nd</sup> and 3<sup>rd</sup> Intended Defendants/Applicants also submit that they have never participated in the present proceedings.

- 28.** The 2<sup>nd</sup> and 3<sup>rd</sup> Intended Defendants/Applicants further submit that the Plaintiff/Respondent has not denied that they are in occupation of the suit parcel of land.
- 29.** It is their submissions that they did not participate in the ruling referred to by the Plaintiff/Respondent and therefore the Court is not *functus officio*.
- 30.** It is also their submissions that they have met the requirements of joinder and that their presence in this suit will be necessary for the Court to effectually determine the dispute herein.
- 31.** It is further their submissions that the present suit has not been determined and no prejudice will be occasioned if they are joined to the suit.
- 32.** The 2<sup>nd</sup> and 3<sup>rd</sup> Intended Defendants/Applicants submit that they are necessary parties to the suit as they will be affected by its outcome.

- 33.** The 2<sup>nd</sup> and 3<sup>rd</sup> Intended Defendants/Applicants also submit that they have explained to the Court that the Plaintiff/Respondent concealed the fact that they are in occupation of the suit parcel of land.
- 34.** The 2<sup>nd</sup> and 3<sup>rd</sup> Intended Defendants/Applicants conclude their submissions by urging the Court to issue the injunction sought and restrain the Plaintiff/Respondent from evicting them, selling, charging and/or leasing the suit parcel of land.
- 35.** The Plaintiff/Respondent submits on the following issues;
- a. Whether the Applicants should be enjoined.***
  - b. Whether the Applicants are entitled to orders of injunction.***
  - c. Whether the Applicant should be granted leave to file her response.***
  - d. Whether the title deed should revert to the Defendant.***

- 36.** On the first issue, the Plaintiff/Respondent relies on **Order 1 Rule 10 (2)** of the Civil Procedure Rules and submits that the Defendant/Respondent filed an application dated 22<sup>nd</sup> July, 2024.
- 37.** The Plaintiff/Respondent also submits that in the said application, the Defendant/Respondent sought that the Applicant (sic) be joined to the suit.
- 38.** The Plaintiff/Respondent further submits that the Court delivered a ruling on 27<sup>th</sup> March, 2025 where at paragraph 107, it declined the prayer for joinder.
- 39.** It is the Plaintiff/Respondent's submissions that the present application constitutes the re-opening of proceedings and it invites the Court to sit on appeal from its own decision.
- 40.** The Plaintiff/Respondent relies on the judicial decision of **Francis Kariuki Muruatetu & another vs Republic [2016] eKLR** and submits that the Applicant (sic) has not

proved any personal stake in the matter and neither has she (sic) demonstrated any prejudice she (sic) is likely to suffer if she (sic) is not joined to the suit.

- 41.** The Plaintiff/Respondent also submits that the Applicants have has not set out the case they intend to make before this Court and that what they have stated is a replication of the Defendant's case.
- 42.** The Plaintiff/Respondent relies on the judicial decisions of **Human Rights Alliance vs Mumo Matemu & 5 Others [2015] eKLR, Skov Estate Limited & 5 Others vs Agricultural Development Corporation & another [2015] KEELC 624 (KLR)** in support of his submissions.
- 43.** It is the Plaintiff/Respondent's submissions that he has sued the Defendant/Respondent and he seeks orders of adverse possession.

- 44.** It is also the Plaintiff/Respondent's submissions that he has no claim against the 2<sup>nd</sup> and 3<sup>rd</sup> Intended Defendants/Applicants and therefore their application should be dismissed.
- 45.** The Plaintiff/Respondent relies on the judicial decision of **Carol Construction Engineers Ltd vs Naomi Chepkorir Langat [2019] KEELC 1912 (KLR)** in support of his submissions.
- 46.** On the second issue, the Plaintiff/Respondent submits that since the 2<sup>nd</sup> and 3<sup>rd</sup> Intended Defendants/Applicants have failed to establish a case for joinder, the other prayers sought ought to be dismissed.
- 47.** The Plaintiff/Respondent submits that that notwithstanding, the conditions that must be met in order for orders of injunction to be issued, were set out in the judicial decision of **Giella vs Cassman Brown Ltd [1973] EA 358.**

- 48.** The Plaintiff/Respondent also submits that he was registered as the owner of the suit parcel of land after he proved that he acquired it by way of adverse possession. He further submits that this is not controverted.
- 49.** It is the Plaintiff/Respondent's submissions that the Applicants admit that they are no longer in possession of the suit parcel of land. They will therefore not suffer irreparable harm if the orders sought are not granted.
- 50.** The Plaintiff/Respondent relies on the judicial decision of **Pius Kipchirchir Kogo versus Frank Kimeli Tenai [2018] eKLR** and submits that the Applicants have not demonstrated whether they are likely to suffer irreparable harm which cannot be remedied by an award of damages.
- 51.** The Plaintiff/Respondent relies on the judicial decision of **Joash Ochieng Ougo & another v Virginia Edith**

**Wambui Otieno [1987] eKLR** in support of his submissions.

- 52.** On the third issue, the Plaintiff/Respondent submits that since the Applicant (sic) has failed to demonstrate why they should be joined to the suit, leave should not be granted for a response to be filed.
- 53.** On the fourth issue, the Plaintiff/Respondent relies on **Section 26** of the Land Registration Act, the judicial decision of **Lucy Wangui Gachara vs Minudi Okembo Lore [2015] eKLR** and submits that prayer (5) of the application is in the nature of a mandatory injunction which cannot be granted at the interlocutory stage.
- 54.** The Plaintiff/Respondent concludes his submissions by urging the Court to dismiss the application under consideration.

## **Analysis and Determination.**

**55.** I have considered the application, the response thereto and the rival submissions. It is my view that the following issues arise for determination;

***a. Whether Grace Chelangat Chelogoi and Barnaba Kipkemoi Kimeli should be joined to this suit as Defendants.***

***b. Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Intended Defendants/Applicants have met the criteria for grant of an order of temporary injunction pending the hearing and determination of this suit.***

***c. Whether the title deed for land parcel No. Kericho/Kipchorian Lelu Block 5/71 should revert to the Defendant/Respondent's name.***

***d. Who should bear costs of the application.***

**A. Whether Grace Chelangat Chelogoi and Barnaba Kipkemoi Kimeli should be joined to this suit as Defendants.**

- 56. Grace Chelangat Chelogoi and Barnaba Kipkemoi Kimeli** are seeking to be joined to the present suit as Defendants.
- 57.** They contend that the 2<sup>nd</sup> Intended Defendant/Applicant's deceased husband, one **Francis Kimeli Arap Chelogoi** purchased the suit parcel of land from the Defendant/Respondent.
- 58.** They also contend that they have been in possession of the said parcel of land where they have established a homestead and made developments.
- 59.** They further contend that the Plaintiff/Respondent failed to sue them and yet he was aware that they are in possession of the suit parcel of land.

60. In response, the Plaintiff/Respondent contends that the Court delivered a ruling on 27<sup>th</sup> March, 2025 where it declined to join them to the suit.
61. The 2<sup>nd</sup> and 3<sup>rd</sup> Intended Defendants/Applicants submit that they did not file the application that was subject of the ruling delivered on 27<sup>th</sup> March, 2025.
62. Upon perusal of the Court record, it is evident that there is a ruling delivered on 27<sup>th</sup> March, 2025.
63. The ruling was on the Defendant/Respondent's application dated 22<sup>nd</sup> July, 2024. Prayer (d) of the said application sought the following order;

***"That this Honourable Court be pleased to enjoin the Interested Party to the suit, as the Interested Party has been in occupation of the suit parcel Kericho/Kipchorian/Lelu/Block 5 (Kebeneti)/71."***

64. The 2<sup>nd</sup> Intended Defendant/Applicant was listed as a Proposed Interested Party in the said application.
65. The Plaintiff/Respondent contends that the Court at paragraph 107 of its ruling declined to join her to the suit and this Court is therefore *functus officio*.
66. The Court held as follows in its ruling delivered on 27<sup>th</sup> March, 2025;

***“105. In the present case, other than alleging that the Proposed Interested Party was in possession of the suit parcel, the Defendant/Applicant has not demonstrated the stake that the proposed Interested Party has in this suit, how her presence will assist in the settlement of the questions involved in the suit, any prejudice the proposed Interested Party is likely to suffer if she is not joined to the suit.*”**

**106. Curiously, it is the Defendant/Applicant who seeks that the proposed Interested Party be joined to this suit. It is not clear whether the proposed Interested Party is aware that the Defendant/Applicant wants her to be joined to the suit and/or whether she is interested in being joined to the suit.**

**107. I decline to make an order for joinder of the proposed Interested Party to this suit.”**

**67.** It is evident from the said ruling that the Defendant/Respondent had sought that the 2<sup>nd</sup> Intended Defendant/Applicant be joined to the suit as an Interested Party.

**68.** It is also evident that it was not clear whether the 2<sup>nd</sup> Intended Defendant/Applicant was aware that such an application had been made.

**69.** It is important to note that unlike the previous application where the Defendant/Respondent sought that the 2<sup>nd</sup> Intended Defendant/Applicant be joined as an Interested Party, the present application has been filed by the 2<sup>nd</sup> and 3<sup>rd</sup> Intended Defendants/Applicants and they seek to be joined as Defendants to this suit.

**70.** This Court cannot therefore be said to be *functus officio* as no determination has been made on whether or not the 2<sup>nd</sup> and 3<sup>rd</sup> Intended Defendants/Applicants can be joined to the suit as Defendants.

**71. Order 1 Rule 3** of the Civil Procedure Rules provides as follows;

***“3. All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative,***

***where, if separate suits were brought against such persons any common question of law or fact would arise.”***

**72. Order 1 Rule 10 (2)** of the Civil Procedure Rules provides as follows;

***“(2) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as Plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”***

73. In the judicial decision of **Civicon Limited v Kivuwatt Limited 2 others 2015 KECA 588 (KLR)** the Court of Appeal held as follows;

***“...From the forgoing the power of the Court to add a party to a suit is wide and discretionary, the overriding consideration being whether he has interest in the suit. The question is whether the right of a person may be affected if he is not added as a party. Generally in exercising this jurisdiction the Court will consider whether a party ought to have been joined as plaintiff or defendant, and is not so joined, or without his presence, the question in the suit cannot be completely and effectively decided... Again the power given under the Rules is discretionary which discretion must of necessity be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence***

**at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined.**

**In the same vein, a party seeking joinder who fails to establish any right over or interest in the subject matter cannot be enjoined. This Court in *Meme vs Republic* (2004) KLR 637 considering an application for joinder held that joinder will be permissible:**

**(i) Where the presence of the party will result in the complete settlement of all the question involved in the proceedings;**

**(ii) Where the joinder will provide protection for the rights of a party who would otherwise be adversely affected in law: and**

***(iii) Where the joinder will prevent a likely course of proliferated litigation.***

***The Court made reference to the Supreme Court of Uganda case of Deported Asians Property Custodian Board vs Jaffer Brothers Limited (1999) I EA 55 (SCU) in which it was held that,***

***“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the Court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party’s presence is necessary in order to enable the Court effectually and completely adjudicate upon and settle all the***

**questions involved in the cause or matter...**

**For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders, which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies, (on an application of a Defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind**

**that person.” (emphasis provided).**

**From the foregoing, it may be concluded that being a discretionary order, the Court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”**

[Emphasis Mine]

**74.** In the above cited judicial decision, the Court of Appeal held that a party is joined to a suit at the discretion of the Court. The Court of Appeal also held that Courts have to take into consideration the following issues when determining whether or not a party should be joined to a suit;

***a. Whether an Applicant has an interest in the suit.***

***b. Whether an Applicant's rights may be affected if they are not added as parties to the suit.***

**75.** In the present case, the 2<sup>nd</sup> and 3<sup>rd</sup> Intended Defendants/Applicants contend that the 2<sup>nd</sup> Intended Defendant/Applicant's deceased husband one **Kimeli Arap Chelogoi** (deceased) purchased the suit parcel of land from the Defendant/Respondent.

**76.** The 2<sup>nd</sup> and 3<sup>rd</sup> Intended Defendants/Applicants also contend that they are in possession of the suit parcel of land where they have a homestead and have made developments.

**77.** The 2<sup>nd</sup> and 3<sup>rd</sup> Intended Defendants/Applicants have attached an undated copy of Transfer of Land Forms for land parcel No. Kericho/Kipchorian/Lelu/Block 5 (Kebeneti)/71. The Transfer is from **Agricultural Finance Corporation** to **Grace Chelangat Chelogoi**.

**78.** It is my view that the 2<sup>nd</sup> and 3<sup>rd</sup> Intended Defendants/Applicants have demonstrated that they have an interest in the suit parcel of land and their rights are likely to be affected if they are not joined to the suit.

**79.** That being the case, that the 2<sup>nd</sup> and 3<sup>rd</sup> Intended Defendants/Applicants have made a case for this court to exercise its discretion in their favour.

**B. Whether the 2nd and 3rd Intended Defendants/Applicants have met the criteria for grant of an order of temporary injunction pending the hearing and determination of this suit.**

**80.** In the judicial decision of **Giella v. Cassman Brown [1973] EA 358**, the Court set out the conditions for grant of interlocutory injunctions. They are as follows;

***“The conditions for the grant of interlocutory injunction are now I think well settled in East Africa. First an Applicant must show a prima facie case with probability of success. Secondly an interlocutory injunction will not be normally 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.”***

**81.** The 2<sup>nd</sup> and 3<sup>rd</sup> Intended Defendants/Applicants must first establish a *prima facie* case. A *prima facie* case was defined in the judicial decision of **Mrao Limited v. First American Bank of Kenya & 2 Others [2003] eKLR** as follows;

***“A prima facie case in a civil case include but is not confined to a “genuine or 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.”***

- 82.** The 2<sup>nd</sup> and 3<sup>rd</sup> Intended Defendants/Applicants did not submit on whether they have a *prima facie* case.
- 83.** The Plaintiff/Respondent on the other hand submits that he is the registered proprietor of the suit parcel of land. He was registered as the owner after the Court found that he had acquired the land by way of adverse possession.
- 84.** It is important to note that the judgment that was delivered on 2<sup>nd</sup> May, 2024, where the Court found that the

Plaintiff/Respondent had acquired the suit parcel of land by way of adverse possession, was set aside on 27<sup>th</sup> March, 2025.

**85.** As it stands, the issue of whether or not the Plaintiff/Respondent has acquired the suit parcel of land by way of adverse possession is still pending hearing and determination.

**86.** The Plaintiff/Respondent submits that the 2<sup>nd</sup> and 3<sup>rd</sup> Intended Defendants/Applicants admit that they are not in possession of the suit parcel of land. This is a misrepresentation.

**87.** The 2<sup>nd</sup> and 3<sup>rd</sup> Intended Defendants/Applicants at paragraph 3 of the Affidavit in support of the application expressly state that they are in occupation and use of the suit parcel of land.

**88.** This Court takes judicial notice of an order of the Court issued in Kericho ELC Case No. E020 of 2024 on 21<sup>st</sup> July, 2025. The parties in the said suit are;

***“Grace Chelogoi (Suing on behalf of the estate of Francis Kimeli Arap Chelogoi(Deceased) versus Robert Kipkemoi Byegon and Agricultural Finance Corporation.”***

**89.** The Plaintiff in Kericho ELC Case No. E020 of 2024 is the 2<sup>nd</sup> Intended Defendant/Applicant in the present suit while the 1<sup>st</sup> Defendant in the said suit is the Plaintiff/Respondent herein. The subject matter of the said suit is land parcel No. Kericho/Kipchorian/Lelu/Block 5 (Kebeneti) 71 which is also the subject matter of this suit.

**90.** The order issued in Kericho ELC Case No. E020 of 2024 on 21<sup>st</sup> July, 2025 is as follows;

***“The Application dated 21<sup>st</sup> August, 2024 is hereby***

***compromised by issuance of the following orders;***

***“The status quo obtaining as at today, shall be maintained pending the hearing and determination of this suit.”***

***For the avoidance of doubt all parties have informed the Court that the 1<sup>st</sup> Defendant is in occupation and he shall therefore remain in occupation pending the hearing and determination of this suit.”***

- 91.** The 2<sup>nd</sup> Intended Defendant/Applicant herein and the Plaintiff/Respondent herein informed the Court in Kericho ELC Case No. E020 of 2024 that it is the Plaintiff/Respondent that is in possession of the suit parcel of land.
- 92.** Given the said circumstances, it is my view that the 2<sup>nd</sup> and 3<sup>rd</sup> Intended Defendants/Applicants have not established a *prima facie* case.

**93.** The second condition for grant of orders of temporary injunction is that the 2<sup>nd</sup> and 3<sup>rd</sup> Intended Defendants/Applicants must demonstrate that they will suffer irreparable injury that would not be adequately compensated by way of damages.

**94.** In **Nguruman Limited v. Jan Bonde Nielsen & 2 Others [2014] eKLR**, the Court of Appeal pronounced itself as follows:

***“On the second factor, that the Applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the Applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the Applicant. The equitable remedy of temporary***

***injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”***

95. The judicial decision in **Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR** provides an explanation of what is meant by irreparable injury. It is as follows;

***“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.”***

- 96.** The 2<sup>nd</sup> and 3<sup>rd</sup> Intended Defendants/Applicants have not addressed the issue of whether or not they will suffer irreparable harm which cannot be adequately compensated by way of damages.
- 97.** If after making considerations on the existence of a *prima facie* case and irreparable injury the Court is still in doubt, then an application for temporary injunction is to be determined on the basis of balance of convenience. This means that the 2<sup>nd</sup> and 3<sup>rd</sup> Intended Defendants/Applicants must demonstrate that the balance of convenience tilts in their favour.

**98.** The 2<sup>nd</sup> and 3<sup>rd</sup> Intended Defendants/Applicants have not demonstrated a *prima facie* case and neither have they demonstrated that they are likely to suffer irreparable injury which cannot be compensated by an award of damages if the orders sought are not granted.

**99.** I shall therefore determine this application on the basis of balance of convenience.

**100.** In **Pius Kipchirchir Kogo v Frank Kimeli Tenai (supra)** the Court held as follows;

**“The meaning of balance of convenience will 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 will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer. In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting it”*** (Emphasis mine)

**101.**In **Paul Gitonga Wanjau v Gathuthis Tea Factory Company Ltd & 2 others [2016] eKLR** the Court while considering the question 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 the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... 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 of convenience lies."***

**102.** In the present application, it is my view that the balance of convenience does not tilt in favour of the 2<sup>nd</sup> and 3<sup>rd</sup>

Intended Defendants/Applicants. From previous affidavits sworn by them, I have established that they are not in possession. Further, they have failed to give evidence or make submissions that will enable this court come to the conclusion that the inconvenience that will be suffered by them is greater than that which will be suffered by the Plaintiff/Respondent.

**C. Whether the title deed for land parcel No. Kericho/Kipchorian Lelu Block 5/71 should revert to the Defendant/Respondent's name.**

**103.** Under prayer (5) of the application under consideration, the 2<sup>nd</sup> and 3<sup>rd</sup> Intended Defendants/Applicants are seeking that the title deed for land parcel **No. Kericho/Kipchorian Lelu Block 5/71** reverts back to the Defendant/Respondent's name.

**104.** The Plaintiff/Respondent submits that the said prayer is in the nature of a mandatory injunction which can only be granted after the suit has been heard and determined.

**105.** The 2<sup>nd</sup> and 3<sup>rd</sup> Intended Defendants/Applicants have not set out in the affidavit in support of the Application the reasons for seeking that the title deed for the suit parcel of land reverts back to the Defendant/Respondent. They also failed to address this issue in their submissions.

**106.** I deem it abandoned and shall not consider whether or not the said order can or should be granted.

**D. Who should bear costs of the application?**

**107.** On the question of costs, it is now settled 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.**

**108.** Taking the foregoing into consideration, the application dated 7<sup>th</sup> May, 2025 partially succeeds and I order as follows;

***a. Grace Chelangat Chelogoi and Barnaba Kipkemoi Kimeli are hereby joined to this suit as the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents respectively.***

***b. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are hereby granted leave to file their responses to the Originating Summons and shall do so within 14 days.***

***c. Costs of the application shall abide the outcome of the suit.***

**109.** It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO  
THIS 5<sup>TH</sup> DAY OF FEBRUARY, 2026.**

**L. A. OMOLLO**

**JUDGE.**

**In the presence of: -**

**Mr. Manya for the Defendant/Respondent.**

**Mr. Langat for the Plaintiff/Respondent.**

**Mr. Miruka for intended 2<sup>nd</sup> Defendant**

**Court Assistant; Mr. Joseph Makori.**

ORIGINAL COPY