

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC CASE NO. E005 OF 2024

PETER KIHARA NDIBA (*suing as the administrator of the estate of the late SAMUEL NDIBA KIHARA*) ::::::::::::::: **PLAINTIFF/APPLICANT**

VERSUS

JOSEPHINE WANGUI NDIBA::::::::::::::: **1 ST DEFENDANT/RESPONDENT**

PAUL NJENGA MUNYA::::::::::::::: **2 ND DEFENDANT/RESPONDENT**

PETER NDONGA WAINAINA::::::::::::::: **3 RD DEFENDANT/RESPONDENT**
WANGECHI

WACHIORI::::::::::::::: **4TH DEFENDANT/RESPONDENT**

CATHERINE WANGUI MUNGAI::::::::::::::: **5TH DEFENDANT/RESPONDENT**

WILFRED MUTHINAKASSO::::::::::::::: **6TH DEFENDANT/RESPONDENT**

RODA WAMBUI MAINA::::::::::::::: **7TH DEFENDANT/RESPONDENT**

LILIAN WANGERI NJERI::::::::::::::: **8TH DEFENDANT/RESPONDENT**

GRACE WANJIKU KIMANI::::::::::::::: **9TH DEFENDANT/RESPONDENT**

MARAGARET WAMBUI NDUNGU::: **10TH DEFENDANT/RESPONDENT**

JAMES MUCHIRI CHEGE::::::::::::::: **11TH DEFENDANT/RESPONDENT**

BENSON NDIRANGU MACHARIA::: **12TH DEFENDANT/RESPONDENT**
JAMES CHEGE

KIMANI::::::::::::::: **13TH DEFENDANT/RESPONDENT** **CHARLES**

WANJOHI WANGARI::: **14TH DEFENDANT/RESPONDENT**

MARGARET KANANA NAIRUTI:.....15TH DEFENDANT/RESPONDENT

FLORENCE WAITHIRA NDUNGU:.....16TH DEFENDANT/RESPONDENT

SUSAN NDUKU KAMAU:.....17TH DEFENDANT/RESPONDENT

REGISTRAR OF TITLES

MACHAKOS:.....18TH DEFENDANT/RESPONDENT

ATTORNEY GENERAL:.....19TH DEFENDANT/RESPONDENT

RULING

The application is dated 8th November 2024 and is brought under Order 51(1) and Order 40 Rule 1(a)(b) 2 (1) (2) of the Civil Procedure Rule and Section 3A, IA & 1B of the Civil Procedure Act Cap 21 of the laws of Kenya and Sections 24(a) (b), 25 (1) (a) (b) & 26 (1) (a) (b) (2) the Land Registration Act 2012 seeking the following orders;

1. That this application be certified as urgent, be heard ex-parte in the first instance and service be dispensed with.
2. That an order do issue restraining all the defendants by themselves or their agents, or servants or anybody associated with them from further subdividing, selling, advertising for sale, charging, disposing any portion, leasing, taking prospective purchasers to the ground, mortgaging and/or dealing with

MAVOKO TOWN BLOCK 3/89997 Formerly MAVOKO TOWN BLOCK

3/31848 AND 31849 in anyway or manner pending the hearing and determination of this application.

2(a) that an order do issue confirming that Plot Numbers MAVOKO TOWN BLOCK 3/31848 AND 3/31849 do not exist by virtue of the amalgamation done on 30th April, 2021 and MAVOKO TOWN BLOCK 3/8997 created.

3. That all the defendants be restrained by themselves, or their agents, or servants from removing old beacons, boundaries, roads, perimeter fence, two iron sheet structures, gates erected on MAVOKO TOWN BLOCK 3/89997 formerly MAVOKO TOWN BLOCK 3/31848 AND 31849 of approximately 3 acres located within Machakos County pending hearing and determination of this application.
4. That the 18th defendants be restrained by himself, his agents, or servants from issuing titles, leasing, registration of titles, execution of titles, handling further illegal subdivisions, opening and preparing green cards or any document obtained through the process of fraud, forged signature and/or dealing with MAVOKO TOWN BLOCK 3/31848 AND 3/31849 of approximately 3 acres pending hearing and determination of the main application.
5. That an order do issue restraining all the defendants by themselves, or their agents or servants, or anybody associated with the defendants from

intermeddling, entering, digging of trenches, replacing of old beacons with new ones with MAVOKO TOWN BLOCK 3/8997 formerly MAVOKO TOWN BLOCK 3/31848 AND 31849 the estate of the deceased Samuel Ndiba Kihara pending hearing and determination of the suit.

6. That an order do issue compelling the 18th Defendant to cancel all titles issued on numbers from 91661-91682 and revert the said land to MAVOKO TOWN BLOCK 3/89997 formerly MAVOKO TOWN BLOCK 3/31848 and 31849 as it was after amalgamation on 30th April, 2021 originally pending hearing of the main suit.
7. That a permanent injunction do issue against all the defendants restraining them from entering, sub diving, selling, advertising, tampering, leasing, further sub diving MAVOKO TOWN BLOCK 3/8997 formerly MAVOKO TOWN BLOCK 3/31848 and 31849 of approximately 3 acres pending hearing and determination of the suit.
8. That an order do issue allowing the applicant effect service on the respondents through substituted service i.e. any of the daily new paper
9. Costs be provided

It is based on the following grounds that MAVOKO TOWN BLOCK 3/89997 of approximately 3 acres was created after amalgation of MAVOKO TOWN BLOCK 3/31848 AND 31849 and were is registered in the name of the late Samuel Ndiba

Kihara who passed on the 21st June ,2021 interstate leaving the said property intact as a block. That through succession process, Peter Kihara Ndiba was issued with letters of administration dated 10th November, 2022 and the same was confirmed on 30th October , 2023 in which Peter Kihara Ndiba held in trust the entire estate for all beneficiaries. That as the administrator was in the process of consolidating all the estate of the deceased when he proceeded to Machakos Land Registry and applied for an Official search of MAVOKO TOWN BLOCK 3/89997 of approximately 3 acres but he was informed that MAVOKO TOWN BLOCK 3/89997's mother title was surrendered by the 1st Defendant to pave way for subdivision and as such, a search on MAVOKO TOWN BLOCK 3/89997 could not be obtained as a block. That the registrar further informed the plaintiff(administrator) that MAVOKO TOWN BLOCK 3/89997 had been subdivided on the 29th July 2021 and new numbers given i.e. ranging from 91661-91682 and therefore block 3/89997 does not exist. That after subdivision, the 1st Defendant sold all the 24 plots to all the defendants in which some own one, two or three plots. That the subdivision was done after the death of the registered owner Samuel Ndiba Kihara had passed on way back in June,2021 and who had amalgated MAVOKO TOWN BLOCK 3/31848 and 31849 in which MAVOKO TOWN 3/31848 and 31849 in which MAVOKO TOWN BLOCK 3/89997 was created. That the 1st Defendant solely and in an illegal manner surrendered the

mother title of MAVOKO TOWN BLOCK 3/89997 to the registrar at Machakos Lands Office purporting to be the only beneficiary of the estate of the deceased Samuel Ndiba Kihara when actually there are several beneficiaries of the estates will be shown on the certificate of confirmation of grant. That the 1st Defendant is fond of intermeddling with the estate of the deceased as shown on the warrants of arrests which were issued by Githunguri Law Courts in which she was arrested and penalized Kshs. 100,000/= and in default to serve 3 months jail. That the illegal subdivision sale occupation on MAVOKO TOWN BLOCK 3/89997 had been carried out under the watch and participation of the 1st Defendant who pretends to be the only beneficiary of the estate of the deceased Samuel Ndiba Kihara and mostly using fake and forged documents. That the 18th Defendant being aware that the mother title of MAVOKO TOWN BLOCK 89997 was registered in the name of Samuel Ndiba Kihara proceeded to accept a forged surrender letter from the 1st Defendant who does not appear on the said mother title and to approve and registered the illegal subdivision. That the 2nd to 17th Defendants being aware that the 1st defendant was not registered owner of MAVOKO TOWN BLOCK 3/89997 formerly MAVOKO TOWN BLOCK 3/31848 and 31849 of approximately 3 acres proceeded to purchase several plots in which each Defendant were allocated plots depending on his or her capability to purchase. That if any title or titles were issued after the illegal subdivision in which the following numbers were issued. i.e. from

91661-91682 the same be cancelled forthwith and the 18th Defendant be compelled to revert MAVOKO TOWN BLOCK 3/89997 to its original position as a block.

This court has considered the application and the submissions therein. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella vs Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that;

“in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.

Consequently, the Plaintiff ought to, first, establish a prima facie case. In *Mrao Ltd vs First American Bank of Kenya Ltd (2003) EKLR* the Court of Appeal gave a

determination on a prima facie case. The court stated that;

“... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

In support of his application, the Plaintiff/Applicant stated that MAVOKO TOWN BLOCK 3/89997 of approximately 3 acres was created after amalgamation of MAVOKO TOWN BLOCK 3/31848 AND 31849 and were is registered in the name of the late Samuel Ndiba Kihara who passed on the 21st June ,2021 interstate leaving the said property intact as a block. That through succession process, Peter Kihara Ndiba was issued with letters of administration dated 10th November, 2022 and the same was confirmed on 30th October, 2023 in which Peter Kihara Ndiba held in trust the entire estate for all beneficiaries. That as the administrator was in the process of consolidating all the estate of the deceased

when he proceeded to Machakos Land Registry and applied for an Official search of MAVOKO TOWN BLOCK 3/89997 of approximately 3 acres but he was informed that MAVOKO TOWN BLOCK 3/ 89997's mother title was surrendered by the 1st Defendant to pave way for subdivision and as such, a search on MAVOKO TOWN BLOCK 3/89997 could not be obtained as a block.

Secondly, The Plaintiff has to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) eKLR provides an explanation for what is meant by irreparable injury and it states;

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

The Applicants stated that that MAVOKO TOWN BLOCK 3/89997 had been subdivided on the 29th July 2021 and new numbers given i.e. ranging from

91661- 91682 and therefore block 3/89997 does not exist. That after subdivision, the 1st Defendant sold all the 24 plots to all the Defendants in which some own one, two or three plots. That the subdivision was done after the death of the registered owner Samuel Ndiba Kihara had passed on way back in June,2021 and who had amalgated MAVOKO TOWN BLOCK 3/31848 and 31849 in which MAVOKO TOWN 3/31848 and 31849 in which MAVOKO TOWN BLOCK 3/89997 was created.

Thirdly, the Plaintiff has to demonstrate that the balance of convenience tilts in their favour. In the case of Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) EKLK which defined the concept of balance of convenience as:

'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”.

In the case of Paul Gitonga Wanjau vs Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR, the court dealing with the issue of balance of convenience expressed itself thus;

“ Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which 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.”

The Applicants contend that the balance of convenience tilts in their favour because if the orders sought herein are not granted there is risk of the Plaintiffs losing because the 1st Defendant solely and in an illegal manner surrendered the mother title of MAVOKO TOWN BLOCK 3/89997 to the registrar at Machakos Lands Office purporting to be the only beneficiary of the estate of the deceased Samuel Ndiba Kihara when actually there are several beneficiaries of the estates will be shown on the certificate of confirmation of grant.

The decision of *Amir Suleiman vs Amboseli Resort Limited* (2004) eKLR where the learned judge offered further elaboration on what is meant by “*balance of convenience*” and stated;

“The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”

The 2nd to 17th Respondents submitted that they are bonafide purchasers for value of a property known as Mavoko Town Block 3/311848 and Mavoko Town Block 3/31849 from Samuel Ndiba Kihara (deceased) for consideration of kshs. 7,500,000/= and they attached a sale agreement. That the property has been

subdivided and there is no title in place registered as Mavoko Town Block 3/89997. That the Applicants have failed to establish a prima facie case, irreparable harm, or balance of convenience.

Bearing this in mind, I am convinced that there is a risk in not granting orders of temporary injunction than granting them, as I wait to hear the suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the current situation on the ground. I have also not had the opportunity to interrogate the annexures therein.

In *Robert Mugo wa Karanja vs Ecobank (Kenya) Limited & Another* (2019) eKLR where the court in deciding on an injunction application stated;

“circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to grant a temporary injunction to restrain such acts...”

The Applicant sought for permanent injunction and cancellation of the title deeds issued. Mandatory/ permanent injunction is ordinarily granted after a full hearing and when all the evidence has been adduced and all facts have been established. In the case of Kenya Power & Lighting Co. Limited vs Sheriff Molana Habib (2018) eKLR it was held inter alia as follows;

“...A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties...”

When it comes to mandatory injunctions, courts have been hesitant to grant the same particularly at the interlocutory stage, save in clear-cut cases. Such was the

reasoning taken by the court in *Lucy Wangui Gachara vs Minudi Okemba Lore* (2015) eKLR when it rendered itself thus;

“...the court will not grant a mandatory injunction if the damage feared by the plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. We would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a summary hearing.

Persuasive judicial pronouncements by Indian courts have also affirmed that great circumspection is called for before awarding a mandatory injunction at interlocutory stage. In BHARAT PETROLEUM CORP LTD V. HARO CHAND SACHDEVA, AIR 2003, Gupta, J. of the Delhi High Court

observed as follows:

“While Courts power to grant temporary mandatory injunction on interlocutory application cannot be disputed, but such temporary mandatory injunctions have to be issued only in rare cases where there are compelling circumstances and where the injury complained of is immediate and pressing and is likely to cause extreme hardship. If a mandatory

injunction has to be granted at all on interlocutory application, it is granted only to restore status quo and not to establish a new state of things.”

I find that it would be premature for me to grant final orders at this interim stage in favour of the Applicant.

In view of the foregoing, I find that the application is merited in part and I order that the status quo be maintained pending the hearing and determination on the suit. Costs of the application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF FEBRUARY 2026.

N.A. MATHEKA

JUDGE