



REPUBLIC OF KENYA



KENYA LAW

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Elijah & another (Suing as the Personal Representatives of the Estate of Elijah Arap Cheruiyot) v Langat (Sued as the Personal and Legal Representative of the Estate of the Late James Kipkirui Langat) & 5 others (Environment and Land Case E008 of 2023) [2025] KEELC 5515 (KLR) (24 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5515 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND CASE E008 OF 2023**

LA OMOLLO, J

JULY 24, 2025

BETWEEN

RUTH CHEROTICH ELIJAH 1ST PLAINTIFF

RAPHAEL KIPRUTO LANGAT 2ND PLAINTIFF

**SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF ELIJAH
ARAP CHERUIYOT**

AND

**ESTHER CHEROTICH LANGAT (SUED AS THE PERSONAL AND LEGAL
REPRESENTATIVE OF THE ESTATE OF THE LATE JAMES KIPKIRUI
LANGAT) 1ST DEFENDANT**

ESTHER CHEROTICH LANGAT 2ND DEFENDANT

BETTY CHEBET 3RD DEFENDANT

LAND REGISTRAR KERICHO 4TH DEFENDANT

ATTORNEY GENERAL 5TH DEFENDANT

LETSHEGO KENYA LIMITED 6TH DEFENDANT

RULING

Introduction

1. This ruling is in respect of the Plaintiffs/Applicants Notice of Motion application dated 19th October, 2023. It is expressed to be brought under Section 3A of the *Civil Procedure Act*, Order 40 Rules 1 & 4, Order 5 Rule 17 and Order 50 Rule 1 of the Civil Procedure Rules.



2. The application seeks the following orders;
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That pending the hearing and determination of the suit, a temporary injunction do issue restraining the Defendants, their agents/servants and employees from trespassing, entering, invading, developing, occupying, interfering with, carrying out any demolition, construction or any transaction whatsoever on Title No. Kericho/Kabartegan/340 or on any portion thereof or on any buildings thereon.
 - e. That costs be provided for.
3. The application is based on the grounds on its face and the supporting affidavit of Ruth Cherotich Elijah the 1st Plaintiff/Applicant.

Factual Background.

4. The Plaintiffs/Applicants commenced the present proceedings vide the Complaint dated 19th October, 2023 where they seek the following prayers;
 - a. A declaration that the late Elijah Arap Cheruiyot is the original and rightful owner of all that parcel of land known as Kericho/Kabartegan/340.
 - b. A declaration that any purported transfer, sub-division, charge, guarantee and/or sale of Title No. Kericho/Kabartegan/340 or a portion thereof by the Defendants or any of them is null and void.
 - c. A declaration that any dealing in respect of title No. Kericho/Kabartegan/340 or a portion thereof after the date of the late Elijah Arap Cheruiyot's death i.e 15th September, 1995 without the Plaintiff's involvement is null and void.
 - d. A permanent injunction restraining the Defendants, their agents/servants and employees from transferring, charging, trespassing, entering, invading, developing, occupying, interfering with, carrying out any demolition, construction or any transaction whatsoever on Title No. Kericho/Kabartegan/340 or on any buildings thereon.
 - e. An order evicting the 1st, 2nd and 3rd Defendants, their agents/servants and employees from title No. Kericho/Kabartegan/340 and or any portion thereof.
 - f. A declaration that title number Kericho/Kabartegan/1394 is null and void and the cancellation of the illegal title registered as Kericho/Kabartegan/1394 and or any other being resultant sub-divisions of Kericho/Kabartegan/340 and a consequent order directing the 4th Defendant to rectify the register in respect of the suit premises by restoring the late Elijah Arap Cheruiyot as the registered proprietor of the suit premises. (sic)
 - g. The OCS Kabartegan Police Station do ensure compliance with orders c and d above.
 - h. An order directing the Defendants to restore Title No. Kericho/Kabartegan/340 and any buildings thereon to their status before the Defendants' unlawful possession and or illegal and fraudulent dealings.



- i. Damages for trespass on Title No. Kericho/Kabartegan/340.
 - j. Interest on (i) above.
 - k. Costs of the suit and interest thereon.
5. As at the time of writing of this ruling, the Defendants/Respondents had not filed their Statements of Defence.
 6. The application under consideration first came up for hearing on 25th October, 2023 when the Court directed that it be served upon the Respondents within seven days. Parties were also directed to take a date at the registry for the hearing of the application.
 7. While the application was pending hearing, the 1st and 3rd Defendants/Respondents filed a preliminary objection dated 24th November, 2023.
 8. On 25th January, 2024 the Court issued directions that the Preliminary Objection be heard first.
 9. The matter was mentioned severally to confirm filing of submissions and a ruling on the preliminary objection delivered on 24th October, 2024.
 10. Upon delivery of the said ruling, Counsel for the 1st, 2nd and 3rd Defendants/Respondents filed the application dated 29th October, 2024 seeking to cease acting for them. The application was allowed on 4th February, 2025.
 11. On the same date, 4th February, 2025, the Court gave directions that the application dated 19th October, 2023 be heard on 26th February, 2025.
 12. On 26th February, 2025 the hearing of the application was rescheduled to 20th March, 2025 when the Court issued directions that the application be canvassed by way of written submissions.
 13. On 8th May, 2025 the matter was mentioned to confirm filing of written submissions and then reserved for ruling.

The Plaintiffs/Applicants Contention.

14. The affidavit in support of the application is sworn by Ruth Cherotich Elijah the 1st Plaintiff/Applicant.
15. She contends that she has the authority of the 2nd Plaintiff/Applicant to swear the affidavit on his behalf.
16. She also contends that the 2nd Plaintiff/Applicant is her brother and they are both children of the late Elijah Arap Cheruiyot who died on 15th September, 1995.
17. She further contends that they (Plaintiffs/Applicants) were issued with a Limited grant for purposes of filing this suit on 6th October, 2023.
18. It is her contention that their deceased father was the owner of land parcel No. Kericho/Kabartegan/340 and adds that Succession Cause No. 5 of 2018 was filed with respect of his estate and the succession proceedings are still pending in Court.
19. It is also her contention that on 12th October, 1995, the 2nd Defendant/Respondent fraudulently and illegally registered the suit parcel in the name of her husband, James Kipkirui Lan'gat (deceased). She



- adds that this registration was done before succession proceedings with respect to the estate of the late Elijah Arap Cheruiyot was commenced.
20. It is further her contention that as at 12th October, 1995, the late James Kipkirui Langat was critically ill and that he died on 2nd April, 1996 six months after their father's demise.
 21. She contends that James Kipkirui Langat (deceased) was her brother, the 2nd Defendant/Respondent's husband and the 3rd Defendant/Respondent's father.
 22. She also contends that thereafter, the 2nd Defendant/Respondent in collusion with the 4th Defendant/Respondent transferred the suit parcel to her name by using a 'false and fabricated' succession cause.
 23. She further contends that the said succession cause is Kericho HC Succession cause No. 39 of 1997; Estate of the late Joseah Kibet Rator. She goes on to state that the said estate has no nexus with either the estate of the late Elijah Arap Cheruiyot or the late James Kipkirui Langat.
 24. It is her contention that the parties in Kericho HC Succession cause No. 39 of 1997; Estate of the late Joseah Kibet Rator are not related to the estate of the late Elijah Arap Cheruiyot or the parties listed therein (sic).
 25. It is also her contention that the 2nd Defendant/Respondent and the 4th Defendant/Respondent colluded to subdivide the suit parcel and that Upon subdivision, one of the resultant parcels, land parcel No. Kericho/Kabartegan/1394 was charged to the 6th Defendant/Respondent to guarantee the 3rd Defendant/Respondent a loan facility of Kshs. 5,000,000/=.
 26. It is further her contention that the estate of the late Elijah Arap Cheruiyot was not aware of the said fraudulent dealings until they filed succession proceedings and adds that the succession cause is Kericho HC Succession Cause No. 5 of 2018.
 27. She contends that they (Plaintiffs/Applicants) were perturbed to learn that their late father's land had been subdivided and yet the green card did not state that the parcel had been closed for subdivision.
 28. She also contends that the fraudulent dealings by the Defendants/Respondents were done deliberately to defraud the estate of the late Elijah Arap Cheruiyot.
 29. She further contends that the subdivision of the suit parcel and the various transfers and the Charge registered on one of the resultant subdivisions was fraudulently done and the said transactions ought to be cancelled. She goes on to state that the register should be rectified to reflect the late Elijah Arap Cheruiyot as the owner so that succession proceedings with regard to his estate can proceed.
 30. It is her contention that there are illegal dealings and construction going on the suit property. She adds that they (Plaintiffs/Applicants) are apprehensive that unless the application is heard and determined urgently, the suit parcel shall be irredeemably destroyed by the Defendants/Respondents.
 31. The 1st Plaintiff/Applicant ends her deposition by stating that unless the Court grants the orders sought, the estate of their deceased father will be wasted while the Defendants/Respondents will continue to benefit from their illegal activities.

The 6th Defendant/Respondent's Response.

32. The 6th Defendant/Respondent filed a Replying Affidavit sworn on 24th January, 2024 by Rita Njora one of its business partners.
33. She deposes that the prayers sought in the application under consideration are similar to the prayers sought in Kericho ELC Case No. 68 of 2018 (OS). She goes on to state that Kericho ELC Case No.



- 68 of 2018 (OS) was dismissed on 27th March, 2023 and therefore the present suit and the application under consideration are res judicata.
34. She also deposes that she has been advised by counsel for the 6th Defendant/Respondent that the application under consideration and the present suit does not disclose any cause of action against the 6th Defendant/Respondent. She adds that the application and the suit should therefore be dismissed with costs.
 35. She further deposes that the 3rd Defendant/Respondent sought a credit facility of kshs. 5,000,000/= from the 6th Defendant/Respondent. The said loan was advanced to her vide the Letter of Offer dated 23rd February, 2018.
 36. It is her deposition that before advancing the said loan facility, the 6th Defendant/Respondent required the 3rd Defendant/Respondent to furnish security. The 3rd Defendant/Respondent gave land parcel No. Kericho/Kabartegan/1394 registered in the name of the 2nd Defendant/Respondent as security.
 37. It is also her deposition that a charge was registered over the said parcel on 2nd October, 2014 in favour of the 6th Defendant/Respondent to secure the sum of Kshs. 5,000,000/= which was advanced to the 3rd Defendant/Respondent.
 38. It is further her deposition that the 2nd Defendant/Respondent executed a guarantee and an Undertaking Agreement thereby committing herself to settle the arrears in the event the 3rd Defendant/Respondent defaulted in the repayment of the loan.
 39. She deposes that the 2nd and 3rd Defendants/Respondents defaulted in the repayment of the loan and as at 24th January, 2024 the arrears were at kshs. 3,824,116.66/=. She adds that the said amount continues to attract interest until settlement in full.
 40. She also deposes that upon default, the 6th Defendant/Respondent issued the relevant statutory notices to both the 2nd and 3rd Defendants/Respondents requesting them to rectify the default and repay the outstanding amount. She goes on to state that the said notices have not elicited any remedial steps from the Applicant and the 1st Respondent (sic).
 41. She further deposes that the 6th Defendant/Respondent instructed Antique Auctioneers to issue a Redemption Notice and a Notification of Sale to the 2nd and 3rd Defendants/Respondents for failing to settle the arrears of kshs. 3,415,018.70 which amount was outstanding as at 20th June, 2018.
 42. It is her deposition that upon the lapse of 45 days, an advertisement to sell the suit property by public auction was made on 31st August, 2018.
 43. It is also her deposition that from the foregoing, it is evident that the creation of the charge and the recovery proceedings were done with utmost diligence and in strict adherence with the Provisions of the Land Act.
 44. It is further her deposition that she is advised by Counsel for the 6th Defendant/Respondent that the Plaintiffs/Applicants have not established a prima facie case with a probability of success. She adds that the Plaintiffs/Applicants have not created a nexus between their allegations of fraud and the 6th Defendant/Respondent's relationship with the 2nd and 3rd Defendants/Respondents.
 45. She deposes that this was the finding of this Court in the ruling delivered on 23rd January, 2020.
 46. She also deposes that the Plaintiffs/Applicants case does not reveal any risk of irreparable harm that can be occasioned to them or the alleged estate of the late Elijah Arap Cheruiyot (deceased) which cannot



be compensated by way damages. She goes on to explain that this is because, the charged property can be valued and appropriate damages, if any ascertained.

47. She further deposes that she is advised that the balance of convenience tilts in favour of dismissing the application under consideration as the 6th Defendant/Respondent is at risk of losing the funds advanced to the 3rd Defendant/Respondent on the strength of the 2nd Defendant/Respondent's title.
48. She reiterates that as at 24th January, 2024, the arrears were at kshs. 3,824,116.66/= and they continue to accrue interest which is likely to outstrip the value of the property if the orders sought are granted.
49. She ends her deposition by stating that it is in the interest of justice that the Plaintiffs/Applicants application be dismissed with costs and the 6th Defendant/Respondent be allowed to proceed with the realization of its security.

Issues for Determination.

50. The Plaintiffs/Applicants filed their submissions on 14th April, 2025 while the 6th Defendant/Respondent filed its submissions on 7th May, 2025.
51. The Plaintiffs/Applicants submit on the following issues;
 - a. Whether the application herein is void ab initio by reason that the remedies sought herein were substantially the same as those sought in Kericho ELC Number 68 of 2018 (OS) which was dismissed through a ruling delivered on 27th March, 2023 thus making the present matter res judicata? (sic)
 - b. Whether the Applicants have satisfied the conditions for grant of stay of orders of temporary injunction set out under Order 40 Rule 1 of the Civil Procedure Rules, 2010.
52. On the first issue, the Plaintiffs/Applicants rely on Section 7 of the Civil Procedure Act and submit that in Kericho ELC Case No. 68 of 2018 (OS), the Plaintiffs were Ruth Cherotich Elijah and David Kiprono Langat. In the present suit, the Plaintiffs/Applicants are Ruth Cherotich Elijah and Raphael Kiprono Langat.
53. It is the Plaintiffs/Applicants submissions that in the present matter, David Kiprono Langat is not a party.
54. The Plaintiffs/Applicants submit that the Court in determining whether a matter is res judicata considers whether the issues raised in the previous suit were substantively heard and determined.
55. The Plaintiffs/Applicants also submit that it is not disputed that the subject matter in the present suit and the previous suit i.e land parcel No. Kericho/Kabartegan/340 is the same.
56. The Plaintiffs/Applicants further submit that the previous suit was struck out on the ground that the Plaintiffs in the said suit did not have locus standi and adds that the suit was therefore not heard and determined on merit.
57. It is the Plaintiffs/Applicants submissions that when a matter is dismissed, parties are barred from further litigating on an issue unlike in instances where a suit is struck out.
58. It is also the Plaintiffs/Applicants submissions that the Court should therefore consider whether the issues in the previous suit were heard and determined on merit or whether the matter was dismissed at the interim stage.



59. On the second issue, the Plaintiffs/Applicants rely on the judicial decisions of *Mrao vs First American bank of Kenya Ltd & 2 Others* [2003] eKLR, *Nguruman Ltd vs Jan Bonde Neilsen & 2 Others* [2014] eKLR and submit that they have demonstrated that they have a bonafide case.
60. It is the Plaintiffs/Applicants submissions that their deceased father Elijah Arap Cheruiyot is the owner of land parcel No. Kericho/Kabrategan/340.
61. They also submit that their late father died on 15th September, 1995 and before succession proceedings could commence, the suit parcel was on 12th October, 1995 fraudulently transferred to James Kipkurui Langat (deceased). They submit that the said transfer was facilitated by the 2nd Defendant/Respondent.
62. The Plaintiffs/Applicants submit that the 2nd Defendant/Respondent allegedly fabricated succession proceedings and transferred the suit parcel to her name.
63. The Plaintiffs/Applicants reiterate the 1st Plaintiff/Applicant's averments in the affidavit in support of the application and submit that the 6th Defendant/Respondent is on the verge of exercising its statutory power of sale over land parcel No. Kericho/Kabartegan/1394 one of the resultant subdivisions of the suit parcel.
64. The Plaintiffs/Applicants submit that the 2nd Defendant/Respondent acquired title to the suit parcel fraudulently as she has not adduced any evidence to show how the land was transferred from a deceased person to her name in the absence of transfer by transmission.
65. The Plaintiffs/Applicants also submit that this demonstrates that their case is likely to succeed.
66. The Plaintiffs/Applicants further submit that the harm they are likely to suffer if the orders sought are not granted cannot be quantified in monetary terms. Therefore, they will suffer irreparable damage which cannot be compensated by an award of damages.
67. The Plaintiffs/Applicants submit that the suit parcel has sentimental value to them as that is where their parents are buried.
68. The Plaintiffs/Applicants conclude their submissions by urging the Court grant the temporary injunction sought.
69. The 6th Defendant/Respondent relies on the judicial decisions of *Giella vs Cassman Brown & Co. Ltd* [1973] EA 358, *Muthoni v K-Unity Sacco Limited (Commercial Case E003 of 2023)* [2024] KEHC 3638 (KLR) (12 April 2024) (Ruling) and submits that the Court has to ascertain whether the Plaintiffs/Applicants have a legally protected right that is at a risk of infringement in order for the remedy sought to be granted.
70. The 6th Defendant/Respondent reiterates the averments in its Replying Affidavit and submits that none of the Plaintiffs/Applicants allegations of fraud are attributed to it.
71. The 6th Defendant/Respondent also submits that the Plaintiffs/Applicants application is based on mere allegations and that they have failed to establish a prima facie case.
72. On whether the Plaintiffs/Applicants will suffer irreparable harm if the orders sought are not granted, the 6th Defendant/Respondent relies on the judicial decision of *Wesley Kibagendi Jason v ECO Bank Ltd & another* [2020] eKLR and submits that they (Plaintiffs/Applicants) will not suffer irreparable loss as they are not the registered owners of the suit parcel.



73. The 6th Defendant/Respondent also submits that the Plaintiffs/Applicants have not provided any evidence demonstrating the nature and/or extent of harm that they will suffer if the orders sought are not granted.
74. The 6th Defendant/Respondent relies on the judicial decision of *Mary Wanjiku Mwaniki & another v Dream Credit Limited* [2017] KEELC 339 (KLR) and submits that the balance of convenience tilts in its favour.
75. The 6th Defendant/Respondent reiterates that the 3rd Defendant/Respondent is in default of the credit facility advanced to her and the loan is in arrears.
76. The 6th Defendant/Respondent submits that it will be inconvenienced if the orders sought are granted.
77. The 6th Defendant/Respondent concludes its submissions by urging the Court to dismiss the Plaintiffs/Applicants application with costs.

Analysis and Determination.

78. I have considered the application, the response thereto and the rival submissions filed by parties herein.
79. It is my view that the following issues arise for determination;
 - a. Whether the Plaintiffs/Applicants application is res judicata.
 - b. Whether the Plaintiffs/Applicants have met the criteria for grant of an order of temporary injunction pending the hearing and determination of this suit.
 - c. Who should bear costs of the application.

A. Whether the Plaintiffs/Applicants application is res judicata.

80. The 6th Defendant/Respondent in its Replying Affidavit contends that the Plaintiffs/Applicants application is res judicata.
81. The 6th Defendant/Respondent contends that the prayers sought in the application under consideration were also sought by the Plaintiffs/Applicants in Kericho ELC Case No. 68 of 2018 (OS) which was dismissed on 27th March, 2023.
82. The Plaintiffs/Applicants in response submit that the former suit was not heard and determined on its merits as it was struck out.
83. The Plaintiffs/Applicants also submit that even though the subject matter of the suit i.e Kericho/Kabartegan/340 is the same, the parties are different.
84. Section 7 of the [Civil Procedure Act](#) provides as follows;

“No court shall try any suit or issue in which the matter directly and substantively in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they claim or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”



85. In the judicial decision of Christopher Kenyariri vs Salama Beach [2017] eKLR the Court stated as follows on the ingredients to be satisfied when determining res judicata;

“...the following elements must be satisfied...in conjunctive terms;

- a) The suit or issue was directly and substantially in issue in the former suit.
- b) Former suit between same parties or parties under whom they or any of them claim.
- c) Those parties are litigating under the same title.
- d) The issue was heard and finally determined.
- e) The Court was competent to try the subsequent suit in which the suit is raised.”

86. As was held in the above cited judicial decision, in determining whether a matter is res judicata, the Court has to consider whether the issues in the present suit and the former suit are the same, whether the parties in both the former and present suit are the same, whether the issue was heard and finally determined and whether the Court is competent to try the subsequent suit.

87. I will first determine whether the parties in the present suit and the former suit are the same.

88. The 6th Defendant/Respondent has attached to its replying affidavit a copy of a ruling delivered in Kericho ELC Case No. 68 of 2018 (OS) on 27th March, 2023.

89. The Plaintiffs in the former suit are;

- a. Ruth Cherotich Elijah
- b. David Kiprono Langat

They are described as suing as representatives of the estate of Elijah Kipkurui Cheruiyot.

90. I have established that Ruth Cherotich Elijah is the 1st Plaintiff/Applicant in the present suit and is suing in her capacity as the personal representative of the estate of Elijah Arap Cheruiyot.

91. The Defendants in the former suit are;

- a. Esther Cherotich Langat
- b. Betty Cheret
- c. Land Registrar, Kericho
- d. The Attorney General
- e. Letshego Kenya Limited

92. I have established that Esther Cherotich Langat is the 2nd Defendant/Respondent in the present proceedings while the Land Registrar Kericho, The Attorney General and Letshego Kenya Limited are the 4th, 5th and 6th Defendants/Respondents in the present suit. Betty Cheret is not a party to the present proceedings.

93. The 1st Plaintiff/Applicant, the 2nd, 4th, 5th and 6th Defendants/Respondents were parties in the former suit. The 2nd Plaintiff/Applicant, the 1st and 3rd Defendants/Respondents were not.



94. The Originating Summons dated 29th August, 2018 filed in Kericho ELC Case No. 68 of 2018 (OS) sought for the following orders;
- a. That the Applicants are the children and beneficiaries of the Estate of Elijah Kipkurui Cheruiyot (deceased) the original registered owner of the suit property No. Kericho/Kabartegan/340.
 - b. That the entry on the title deed for parcel No. Kericho/Kabartegan/340 in the name of Esther Cheruiyot Langat be declared null and void and the same to revert to the estate of Elijah Kipkirui Cheruiyot.
 - c. That the Land Registrar Kericho to effect the removal of Esther Cheruiyot Langat from the proprietorship section in No. Kericho/Kabartegan/340. (sic)
 - d. That the subsequent division of No. Kericho/Kabartegan/340 to produce No. Kericho/Kabartegan/1394 in the name of Esther Cheruiyot Langat be declared null and void.
 - e. That the charge effected on parcel No. Kericho/Kabartegan/1394 by the 5th Respondent to the land on behalf of Betty Chebet be declared null.
95. The 6th Defendant/Respondent has attached to its Replying Affidavit a ruling delivered in Kericho ELC Case No. 68 of 2018 (OS) on 27th March, 2023. The Court stated as follows;
- “...All said and done, I find that not only did the current suit offend the Provisions of Order 37 Rule 8 of the Civil Procedure Rules, but the Applicants herein had no locus standi to bring the said suit and I thus proceed to strike out the Originating Summons as well as the Notice of Motion both dated the 18th August 2018 with costs.”
96. It is evident that Kericho ELC Case No. 68 of 2018 (OS) was struck out on grounds that the Applicants therein did not have locus standi to commence the proceedings. The suit was therefore not heard and determined on merits.
97. It is also evident that even though the subject matter of the present suit and former suit are the same, the parties are not. Further, the former suit was not determined on its merits. Consequently, the plea of res judicata fails.

B. Whether the Plaintiffs/Applicants have met the criteria for grant of an order of temporary injunction pending the hearing and determination of this suit.

98. In the judicial decision of *Giella vs. 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.”



99. The Plaintiffs/Applicants must first establish a prima facie case. A prima facie case was defined in the judicial decision of *Mrao Limited vs. 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.”
100. The Plaintiffs/Applicants contend that they are legal representatives of the estate of the late Elijah Arap Cheruiyot.
101. They also contend that he was the registered owner of land parcel No. Kericho/Kabartegan/340.
102. They further contend that the late Elijah Arap Cheruiyot died on 15th September, 1995 and that on 12th October, 1995 the suit parcel was transferred to the late James Kipkurui Langat the 2nd Defendant/Respondent’s husband. It is their further contention that the transfer was done after the death of their father and before succession proceedings could be commenced.
103. The Plaintiffs/Applicants also contend that the 2nd Defendant/Respondent fraudulently transferred the suit parcel to her name using succession proceedings filed in Kericho High Court Succession Cause No. 39 of 1997 Estate of the Late Joseah Kibet Rator.
104. The Plaintiffs/Applicants submit that the said succession proceedings have no nexus with either the estate of their deceased father Elijah Arap Cheruiyot and/or the estate of the late James Kipkurui Langat.
105. It is the Plaintiffs/Applicants contention that land parcel No. Kericho/Kabartegan/340 was later subdivided by the 2nd Defendant/Respondent in collusion with the 4th Defendant/Respondent and one of the resultant subdivisions, that is land parcel No. Kericho/Kabartegan/1394 charged to the 6th Defendant/Respondent.
106. A copy of a Grant of Letters of Administration Ad Litem issued in Kericho HC Ad Litem No. E033 of 2023 in the matter of the late Elijah Kipkurui Cheruiyot alias Elijah Arap Cheruiyot alias Elijah Kipkurui Cheruiyot alias Elijah Kipkurui Arap Cheruiyot on 6th October, 2023 to Ruth Cherotich Elijah and Raphael Kipruto Langat has been attached to the Plaintiffs/Applicants affidavit in support of the application.
107. The Plaintiffs/Applicants have also attached a copy of a Death Certificate. The death certificate is No. 451441 and it states that Elijah Kipkurui Cheruiyot died on 15th September, 1995. The death certificate was issued on 13th May, 1998.
108. A copy of a green card for land parcel No. Kericho/Kabartegan/340 has been attached. Entry No. 1 on the green card is dated 21st November, 1968 when Elijah Arap Cheruiyot was registered as the owner. Entry No. 2 is dated 25th November, 1971 when the Certificate of Title was issued. Entry No’s 3 and 4 are dated 2nd September, 1985 and 27th August, 1991 respectively. The said entries relate to various charges registered on the suit parcel. Entry No. 5 is dated 12th October, 1995 when James Kipkurui Langat was registered as the owner. Entry No. 6 is dated 12th October, 1995 when the title deed was issued. Entry No. 7 is dated 14th November, 2003 when Esther Cheruiyot Langat was registered as the owner. She was issued with a title deed on 14th November, 2003 as per Entry No. 8.



109. A copy of a Grant of Letters of Administration Intestate issued in Kericho PM Succession Cause No. 39 of 1997 in the matter of the estate of Joseah Kibet Rator to Grace Chepkurui Rator on 6th January, 1998 has been attached.
110. A copy of a Certificate of Confirmation of Grant dated 28th February, 2003 issued in Kericho PM Succession Cause No. 39 of 1997 in the matter of the estate of Joseah Kibet Rator to Grace Chepkurui Rator has been attached. The suit parcel does not form part of the schedule of properties that is on the face of it.
111. The Plaintiffs/Applicants have also attached black and white photographs. Some of the photographs are of a barbed wire fence, others are of trees while others are of what seems to be a maize plantation.
112. On the other hand, the 6th Defendant/Respondent contends that it gave a credit facility to the 3rd Defendant/Respondent.
113. The 6th Defendant/Respondent also contends that it registered a charge over land parcel No. Kericho/Kabartegan/1394 registered in the name of the 2nd Defendant/Respondent as security for the advanced loan.
114. The 6th Defendant/Respondent further contends that the 3rd Defendant/Respondent defaulted in the repayment of the loan and it thereafter issued all the requisite notices and that it now intends to exercise its statutory power of sale.
115. The 6th Defendant/Respondent submits that none of the Plaintiffs/Applicants allegations of fraud have been attributed to it and therefore the Plaintiffs/Applicants have not demonstrated that they have a prima facie case.
116. The 1st to 5th Defendants/Respondents did not file any response to the Plaintiffs/Applicants application.
117. From the documents attached to the Plaintiffs/Applicants affidavit in support of the application, it is evident that land parcel No. Kericho/Kabartegan/340 was initially registered in the name of the late Elijah Arap Cheruiyot.
118. It is equally evident that he died on 15th September, 1995 and after his death, the suit parcel was transferred to James Kipkurui Langat on 12th October, 1995 before it was later transferred to Esther Cheruiyot Langat the 2nd Defendant/Respondent.
119. The Plaintiffs/Applicants contend that the said transfer was done before succession proceedings were commenced.
120. Given the said circumstances, it is my view that the Plaintiffs/Applicants have established a prima facie case.
121. The second condition for grant of orders of temporary injunction is that the Plaintiffs/Applicants must demonstrate that they will suffer irreparable injury that would not be adequately compensated by way of damages.
122. In *Nguruman Limited vs. 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 facie, 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.”

123. The judicial decision in Pius Kipchirchir Kogo vs 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.”

124. The Plaintiffs/Applicants contend that they stand to suffer irreparable harm which cannot be adequately compensated by way of damages if the orders sought are not granted as the 6th Defendant/Respondent is on the verge of exercising its statutory power of sale over land parcel No. Kericho/Kabartegan/1394.

125. The Plaintiffs/ Applicants also contend that their parents remains are interred on the suit parcel and that the suit parcel bears sentimental value. Needless to say that no value can be attached to the sentiments that a parcel of land may bear on an individual, in this instance, as the resting place of the Plaintiffs/Applicants parents.

126. While the Plaintiffs/Applicants contend that land parcel No. Kericho/Kabartegan/1394 is one of the resultant subdivisions of land parcel No. Kericho/Kabartegan/340, nothing has been placed before this Court to show this nexus.

127. On the other hand, the 6th Defendant/Respondent contends that it is likely to suffer irreparable harm if the Court issues the injunction sought as the loan arrears are accruing interest with the possibility of the arrears outstripping the forced sale value of the suit property leading it to suffer huge financial losses.

128. It is important to note that the application under consideration seeks an order of injunction with respect to land parcel No. Kericho/Kabartegan/340 and not Kericho/Kabartegan/1394.

129. Given the circumstances of this case, it is my view that the Plaintiffs/Applicants have demonstrated that they are likely to suffer irreparable damage which cannot be adequately compensated by way of damages in the event that any dealings in respect of the suit property are allowed.

130. 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 Plaintiff/Applicant must demonstrate that the balance of convenience tilts in their favour.

131. While the Plaintiffs/Applicants have surmounted the hurdles of prima facie case and irreparable injury, I shall, for what it is worth, consider whether the balance of convenience tilts in their favour.



132. In Pius Kipchirchir Kogo vs 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 3called 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”

133. In Paul Gitonga Wanjau vs 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.”

134. In the instant application, I find that balance of convenience tilts in favour of the Plaintiffs/Applicants. The Plaintiffs/Applicants are likely to suffer greater inconvenience compared to inconvenience likely to be occasioned to the 6th Defendant/ Respondent, if orders of temporary Injunction are not granted.

Disposition.

135. Taking the foregoing into consideration and also in the interest of justice, the application dated 19th October, 2023 is allowed in the following terms;

- a. A temporary injunction is hereby issued restraining the Defendants, their agents/servants and employees from trespassing, entering, invading, developing, occupying, interfering with, carrying out any demolition, construction or any transaction whatsoever on Title No. Kericho/Kabartegan/340 or on any portion thereof or on any buildings thereon pending the hearing and determination of this suit.
- b. Costs of the application shall abide the outcome of the suit.

136. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 24TH DAY OF JULY, 2025.

L. A. OMOLLO

JUDGE.



In the presence of: -435

Miss Mugweru for the Plaintiffs/Applicants.

Miss Misiku for the 6th Defendant/ Respondent.

AG for 4th -5th Defendants/ Respondents.

The firm of Mboga Lalu for 1st, 2nd and 3rd Defendant- Absent.

Mr. Pkukat – Court Assistant

