Kago v Cheboi (Environment and Land Case E010 of 2025)
[2025] KEELC 5821 (KLR) (17 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5821 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

ENVIRONMENT AND LAND CASE E010 OF 2025

LL NAIKUNI, J

JULY 17, 2025

BETWEEN

DAVID MUNGAI KAGO ..... PLAINTIFF

AND

MARION JELAGAT CHEBOI ..... DEFENDANT

RULING

I. Introduction

1. This Honourable Court was tasked to make a determination unto the Notice of Motion application filed by David Mungai Kago, the Plaintiff/Applicant herein dated on 5th February 2025. It was brought against the Defendant/Respondent – Marion Jelagat Cheboi herein - pursuant to the provisions of Article 40 of the *Constitution* of Kenya, 2010, Section 3A of the *Civil Procedure Act*, Cap. 21, Order 40 Rules 1, 2 and 3; Order 51 Rule 1 of the Civil Procedure Rules, 2010, Section 80 (1) of the *Environment and Land Court Act*, 2011 and all other enabling provisions of the law.

2. While opposing the application, the Defendant through a Replying Affidavit dated 26th February, 2025. The Honourable Court shall be dealing with it indepth at a later stage of this ruling hereof.

II. The Plaintiff/Applicant's Case

3. The Plaintiff/Applicant sought for the following orders:-

    a. Spent.

    b. Spent.

    c. An order of temporary injunction do and is hereby issued restraining the Respondent, her agents and/or servants from interfering, selling, transferring, charging or in any other way

alienating the suit property known as Kwale/Ramisi Phase 11 SS/4488 located in Kwale pending the hearing and determination of this suit

d. The Officer Commanding Ukunda Police Station do enforce the orders issued herein

e. The costs of this application be provided for

4. The application was premised upon the grounds, testimonial facts and averments made out under the 16 Paragraphed supporting affidavit of David Mungai Kago sworn on 5th February 2025. He averred that:-

a. He was the Plaintiff/Applicant herein and hence fully conversant with the facts of the matter.

b. In the year 2023 while seeking to purchase all that property known as Land reference number Kwale/Ramisi/Phase II S.S/940 measuring 1.228 Hectares in Diani, he came across the Defendant/Respondent and her husband's You Tube channel "Kenya British life". The channel featured property listings for sale and provided guidance on navigating land purchases while avoiding fraudulent practices.

c. The Defendant/Respondent also personally represented herself as a property agent, which led the Deponent to engage with her regarding the purchase.

d. The Plaintiff/Applicant engaged the Respondent, who initiated the property search and subsequently claimed to have identified land owned by one Saidi Ferusi Mwavumbaji [ID No XXX]and that it was available for purchase at a sum of Kenya Shillings Three Million (Kshs. 3,000,000/-).

e. The Defendant/Respondent facilitated the acquisition process for the said property on the Plaintiff/ Applicant's behalf. They undertook official search at the Land Registry and paid for the surveying of the land and the replacement of the beacons.

f. The Defendant/Respondent introduced the Deponent to a firm of Advocates who drafted the sale agreements and other relevant transfer forms.

g. All payments in regards to the said property were made and received by the said Law firm.

h. Throughout the acquisition process, the Defendant/Respondent blocked any direct communication between the Seller – Saidi Ferusi Mwavumbi and the Deponent ensuring that all correspondence were through the Defendant/Respondent and the said law firm. Despite of this, he trusted the process and continued obliging.

i. However, later on he came to learn that the Defendant/Respondent arranged for the sub – division of the suit property into two portions numbers 4488 and 4489 and fraudulently transferring one portion measuring 0.2 Hectares to herself for a sum of Kenya Shillings Five Hundred Thousand (Kshs. 500,000/) and the other portion measuring 0.2 Hectares to the Plaintiff/Applicant for a sum of Kenya Shillings Three Million (Kshs. 3,000,000/-) without the Plaintiff/Applicants knowledge or consent.

j. On or about the 26th December, 2024 the Plaintiff/Applicant and the Seller met and who informed him that all the transaction was down wrongfully contrary to the original Seller's offer.

k. The Defendant/Respondent abused the trust vested on her by the Plaintiff/Applicant by fraudulently stealing from him and transferred half of the land to herself.

l. The Advocates were aware throughout the entire process that the Defendant/Respondent was perpetrating fraud and actively assisted her in executing the scheme.

m. The Defendant/Respondent now unlawfully claims ownership of the property that rightfully belongs to the Plaintiff/Applicant.

n. The Respondent was now putting up a fence around the said property and was actively seeking to sell and transfer the property to third parties.

o. It was in the interest of justice that the court should compel the Defendant/Respondent to surrender possession of the portion of the property unlawfully acquired as the entire purchase was funded solely by the Plaintiff/Applicant.

p. This application had been without undue delay and the Defendant/Respondent would not suffer any prejudice if the orders sought herein were granted as prayed.

q. It was in the interest of justice that this application be heard and determined

r. This honourable court was clothed with the requisite power to issue the orders sought herein and unless this application is heard forthwith orders granted as prayed, the land lord/ respondent stood to suffer irreparable harm which could not be compensated by an award of damages.

III. The Defendant/Respondent's case

5. The Defendant/Respondent opposed the application vide a 39 Paragraphed Replying Affidavit sworn on 26th February 2025 by the Respondent herein. The contents of the affidavit are summarised as here below that:-

a. In early March 2024, one Saidi Ferusi Mwavumbaji offered his 1-acre parcel of land for sale to the husband of the Defendant/Respondent – Mr. Oliver Broadway at a purchase price of Kenya Shillings Three Million (Kshs. 3, 000,000/-).

b. They were unable to purchase the property due to lack of a proper vehicle to access the same but urged the vendor to sub - divide it into two portions to make it easier for two separate purchases.

c. They informed the Vendor that in the event they were able to identify a potential purchaser they would contact him. In the course of time, the Plaintiff/Applicant who resided in Australia approached the Defendant/Respondent through her You Tube lifestyle channel indicating an interest to purchase land for purposes of constructing a holiday home.

d. The Defendant/Respondent presented the Plaintiff/Applicant with several offers. He opted for the half acre parcel of the sub - divided parcel of the land known as Kwale/Ramisi/Phase II S.S/940 stating that it had a better offer than what he had previously been shown by other agents.

e. It was averred that the Plaintiff/Applicant was well aware that he was purchasing half an acre of land and not a full acre as evidenced by the land sale agreement and the title deed all of which were duly executed with his knowledge.

f. The sale agreement which was on 3rd April, 2024 duly executed between the Defendant/ Respondent and the Seller by an Advocate M/s. Oguna. Later the said Advocate drew another agreement dated 30th April, 2024 between the Vendor and the Defendant/Respondent for sale

of 0.2 HA (half acre) of the land at a consideration of Kenya Shillings Five Hundred Thousand (Kshs. 500, 000.00/=) and her husband for the remaining half acre forming part of Kwale/ Ramisi/Phase II S.S/940.

g. From the onset the Plaintiff/Applicant was well aware that he was purchasing 0.2 Hectraes of the sub – division of the original parcel of land into two (Kwale /Ramisi Phase II S.S/4488 and 4489) and not an acre as he claimed.

h. The sub - division of the parcel was made prior to the sale to the Plaintiff/Applicant.

i. The Defendant/Respondent maintained that she had followed the due process of the law in purchase of the suit property registered in her names and the subsequent transfer to her.

j. The Defendant/Respondent denied receiving part of the purchase price of a sum of Kenya Shillings (Kshs. 3,000,000/=) which was the purchase price paid to the Vendor through M/s. Oguna Advocate and stated that she was not part of the whole transaction.

k. The Respondent had been denied use of the parcel she purchased and had been threatened against use of the suit land. The threats were reported at Msambweni Police Station.

IV. The further Affidavit by the Plaintiff/Applicant.

6. In a short rebuttal to the averments raised by the Defendant/Respondent in her Replying Affidavit, with the leave of Court, the Plaintiff/Applicant filed a further affidavit sworn on 3rd April 2025. He averred as follows that:-

a. According to the sale agreement that he duly executed, he was to purchase an 1 acre of land and not 0.2 Hectares as alluded by the Defendant/Respondent.

b. There was no property was shared with him until after he had signed the land sale agreement.

c. He had negotiated for the purchase of all that parcel of land known as Kwale/Ramisi/Phase II S.S/940 as the whole parcel. Infact, the Defendant/Respondent informed him that she had negotiated for the price from a sum of Kenya Shillings Three Million Five Hundred Thousand (Kshs. 3,500,000/)- to a sum of Kenya Shillings Three Million (Kshs. 3,000,000/-).

d. It would be improbable that he had to part with a sum of Kenya Shillings Three Million (Kshs. 3, 000, 000/= for the said acreage of land as the Defendant/Respondent who only paid a sum of Kenya Shillings Five Hundred Thousand (Kshs. 500,000/-).

e. The Defendant/Respondent advised the Plaintiff/Applicant against directly dealing with Vendor and opted to be the go between in negotiating for the property and finally dealing with the purchase and registration process.

f. The Respondent made him cater for several fees in relation to creating an access road and sub - division of the land all for her benefit and to the detriment of the Plaintiff/Applicant.

g. The Plaintiff/Applicant urged the Court to allow the application as prayed.

V. Submissions

7. On 4th March 2025 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 5th February 2025 be disposed of by way of written submissions. Pursuant to that all the parties fully obliged. The Honourable Court reserved a date for delivering of the Ruling on 17th July, 2025 accordingly.

A. The Written Submissions by the Plaintiff/Applicant

8. The Plaintiff/Applicant through the Law firm of Messrs. Metto & Co Advocates filed their written submissions dated 2nd April 2025. Mr. Metto Advocate commenced the submissions by providing a brief background of the matter. He stated that the submissions cemented the claim over the suit property by the Plaintiff/Applicant herein. The Learned Counsel underscored two (2) issues for the Court's determination as follows. These were:-

    a). whether the Applicant should be granted the orders sought in his application dated 5th February 2025; and

    b). who should bear the costs of the application.

9. On the first issue for determination. The Learned Counsel submitted that the right to ownership of property was infringed upon by the Defendant/Respondent's actions and she had not offered any cogent rebuttal. That the Defendant/Respondent had taken occupation of the portion belonging to the Plaintiff/Applicant. He asserted that the Defendant/Respondent had used deception and misrepresentation in acquiring the land adjacent to the Plaintiff/Applicant. Indeed, the Applicant had paid for it. The Learned Counsel submitted that "a prima facie case" had been established as stated in the case of "Giella - Versus - Cassman Brown" and the provisions of Order 40 of the Civil Procedure Rules, 2010.

10. On whether the Applicant would suffer irreparable damage and harm. It was submitted that the nature of injury went beyond monetary loss. The Defendant/Respondent had taken advantage of the Plaintiff/Applicant's trust and went ahead to register the property in her name instead of the name of the Plaintiff/Applicant. The Defendant/Respondent was now in use of the property and was infact fencing off the suit property with the intention of disposing it to third parties.

11. Lastly, the Learned Counsel averred that the balance of convenience titled towards allowing the application as was also held in 'the Giella - Versus - Cassman Brown case. The court was further urged to allow application with costs to the Plaintiff/Applicant.

B. The Written Submissions by the Defendant/Respondent.

12. The Defendant/Respondent filed their written submissions dated 24th March 2025 and were filed by the Law firm of Messrs. Chimera Kamotho & Company Advocates. M/s. Ogoti Advocate made reference to the dictum in the case of:- "JM – Versus - SMK & 4 Others [2022] eKLR" where Justice Odunga outlined the principles for interlocutory injunction and which included a prima facie case, demonstrate irreparable damage and loss and lastly if in any doubt showing the balance of convenience in his favour.

13. On establishing a prima facie case, it was submitted that the Plaintiff/Applicant was to prove that he had a right to be protected and which had been infringed by the Defendant/Respondent. That the Plaintiff/Applicant had alleged that the Defendant/Respondent stole from him and fraudulently transferred part of the suit property from him to her name. The court was referred to what transpired with regards to sub - division of all that parcel of land known as Land Reference Numbers Kwale/Ramisi/Phase II S.S/940 into two portions being 4488 and 4489 respectively. These sub – divided parcels belonged to the Plaintiff/Applicant and the Defendant/Respondent. The Defendant/Respondent denied any involvement in alleged fraud of the sub - division and maintained that the Plaintiff/Applicant purchased 0.2 Ha and not an acre as he alleged. The Defendant/Respondent maintained that a prima facie case was yet to be established.

14. The Learned Counsel contended that the Defendant/Respondent was the lawful registered owner of the sub – divided suit land Kwale/Ramisi/Phase II S.S/4488 having purchased it from the Vendor - Saidi Ferusi Mwavumbaji. Hence, the allegations of having stolen from the Plaintiff/Applicant ought to be proved before any orders were granted by the court. However, from what had been presented before court, there was no evidence of irreparable loss and damage as alleged.

15. Additionally, the Defendant/Respondent submitted that the Plaintiff/Applicant had failed to prove that he would suffer any harm if the orders were not granted. That granting the orders sought would cause the Defendant/Respondent harm as she was already in occupation of the contested property and had even developed it. It was submitted that the Plaintiff/Applicant had failed to meet the threshold for grant of the orders sought and the application dated 5th February 2025 was to be dismissed.

III. Analysis and Determination

16. I have keenly considered the filed Notice of Motion application dated 5th February 2025 by the Plaintiff/Applicant herein, the response to it, the affidavit evidence adduced, comprehensive written submissions, the authorities cited by the Learned Counsels, the appropriate and relevant provisions of the *Constitution* of Kenya, 2010 and statures.

17. For the Honorable Court to reach an informed, reasonable, Just, equitable and fair decision, the Honourable Court has condensed the subject matter into the following three (3) salient issues for its determination. These are:

    a. Whether the Notice of Motion application dated 5th February, 2025 met the threshold of granting the temporary injunctive orders.

    b. Whether the parties herein were entitled to the reliefs sought herein.

    c. Who bears the costs of the application?

Issue No. a). Whether the Notice of Motion application dated 5th February, 2025 met the threshold of granting the temporary injunctive orders.

18. Under this Sub – title the Honourable Court will critically examine the considerations for granting an interim injunctive orders. The application herein is premised under the provision of Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst other provisions of the law. Order 40 provides as follows: -

    Order 40, Rule 1

    Where in any suit it is proved by affidavit or otherwise—

    a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

    b) that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

19. Fundamentally, as a quick follow up to the above provision of the law the principles applicable in an application for an injunction were laid out in the celebrated "locus classicus" case of "Giella – Versus - Cassman Brown & Co Limited (1973) EA 358", where it was stated: -

> " First an applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

20. These three conditions set out in this case of "Giella (supra)", need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of "Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others [2014] eKLR": -,

> " These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Limited - Versus - Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between".

21. It is also trite law that an application for injunction can only be issued where there is a substantive suit in place otherwise the injunction will be in vain and it cannot stand in law. This was the position held by the court in the case of "Cresta Investments Limited – Versus - Gulf African Bank Limited & Another [2020] eKLR" which held:-

> " Moreover, an application for injunction under Order 40 of the Civil Procedure Rules is predicated on a suit filed by the party seeking the injunction. An injunction without a substantive claim is a plea in vain and cannot lie in law or at all."

22. From the court record, this suit was instituted vide a Plaint dated 5th February 2025 on which date the application subject of this ruling was also presented before this court. It is therefore confirmed that there exists a substantive suit in place and the orders of injunction can hence be issued if the required threshold is met.

23. Different courts have laboured on what constitutes a prima facie case. In dealing with the first condition of "prima facie case", the Honorable Court guided by the definition melted down in the famous case "MRAO Limited – Versus - First American Bank of Kenya Limited & 2 others (2003) KLR 125" of: -,

> " So, what is a prima facie case, I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself would conclude that there exists a

right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter"

24. Additionally, in the case of "Nguruman Limited – Versus - Jan Bonde Nielsen (Supra)", the court of Appeal, indicated the following in regard to what constitutes a prima facie case: -"We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

25. In the case of "Mbuthia – Versus - Jimba credit Corporation Ltd 988 KLR 1", the court held that:-

> " In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the party's cases."

26. Similarly, in the case of "Edwin Kamau Muniu – Versus - Barclays Bank of Kenya Limited" the court held that;

> " In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria."

27. In nutshell, the Honourable Court will indepth deliberate on the other two limbs – whether there is irreparable harm to be caused to the Applicant if the orders are not granted and the balance of convenience should the Court be in doubt in this Ruling herein below.

Issue No. b). Whether the parties herein were entitled to the reliefs sought.

28. Under this sub – heading, the Honourable Court will endeavour to deduce whether the parties herein were entitled to the reliefs sought. Mainly, the Plaintiff/Applicant sought to be granted injunctive orders, general damages and costs of the application. The Honourable Court has already expended adequate time on the issue of granting injunctive orders above.

29. I have critically perused the documents presented by the Plaintiff/Applicant herein in cementing the allegations raised in his pleadings. From a face value perception, the Plaintiff/Applicant appears to be alleging being short charged through fraudulent scheme perpetrated by the Defendant/Respondent. In all fairness, let the Court assess the pleadings filed herein. There are two (2) sale agreements with a lot of similarities in terms of the terms and conditions stipulated thereof. For instance both of them are dated 30th April 2024. One of them is executed between the Defendant/Respondent and the Vendor, one Saidi Ferusi Mwavumbaji. The other agreement is executed between the Plaintiff/Applicant and the Vendor. In both of them, it is stated that the Vendor is the registered owner of all that parcel known

as plot no Kwale/Ramisi Phase II S.S/940 measuring approximately 1.228Ha. From the recitals in both of them it states verbatim:

"

"a). The vendor named herein is the Registered Owner of all that parcel of land known as Plot No. Kwale/Ramisi Phase II S.S/940 measuring approximately 1.228 HA;

b). The vendor herein has agreed to sell and the Purchaser herein has agreed to purchase a portion measuring approximately 0.2 HA which is to be sub – divided from the above named plot and the Vendor undertakes to have it transferred to the Purchaser upon making the agreed payments'.

Indeed, it is evident that all the parties duly executed the sale agreements herein.

30. Justapose, the Plaintiff/Applicant maintains that this was not the sale agreement which was executed between him and the Defendant/Respondent who had helped him in sourcing for the property. According to him, he had paid a total of a sum of Kenya Shillings Three Million (Kshs. 3, 000, 000/-) with the belief that he was purchasing the whole property and not a sub - division of the suit land. He points out that he was short-changed in the whole transaction as it does not explain why the Defendant/Respondent got a similar portion of land at a lesser amount being a sum of Kenya Shillings Five Hundred Thousand (Kshs. 500,000/-). Therefore, it is unfair and an alleged fraudulent scheme against him and thus the need for him to be granted an injunctive orders to preserve the suit property thereof.

31. My understanding of the above sentiments is that the Plaintiff/Applicant is alluding to fraud on the part of the Defendant/Respondent. Based on the principles of the "Burden of Proof" as well stipulated under the provision of Sections 107, 108 and 109 of the *Evidence Act*, Cap. 80, provides that he who alleges has to proof. As things stand at the moment, I am yet to come across any empirical documentation confirming there was some kind of misrepresentation of facts to the Plaintiff/ Applicant on the purchase price and acreage to the purchased parcel. The transactions confirming the purchase have been availed, but communication prior to this transaction has not been attached for the court to get a clearer picture of what was presented to the Plaintiff/Applicant before exchange of the purchase price. Prior to hearing the case in a full trial, I am of the strong conviction that the evidence presented falls short of establishing "a prima facie case'.

32. Arising from the numerous authorities cited herein above, the three (3) conditions have to be in sequence and to be together. Should one of them fail, then all the others collapse. However, in all fairness and to give the Plaintiff/Applicant benefit of doubt, the Honourable Court has decided to deliberate on them briefly. As stated, for issuance of injunctive orders the Applicant has to show that he will suffer irreparable loss which cannot be adequately compensated for in damages if the orders are not granted. The judicial decision of:- "Pius Kipchirchir Kogo – Versus - 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."

33. The case of "Paul Gitonga Wanjau – Versus - Gathuthi Tea Factory Company Limited & 2 others [2016] eKLR," the Court, Justice John M. Mativo, as then he was stated as doth:

> "I stand guided by the said passage. Steven Mason & McCathy Tetraut in their well-researched article entitled "Interlocutory Injunctions: Practical Considerations"[9] have authoritatively stated as follows:-"With some exceptions, the first branch of the injunction test is a low threshold. As stated by the Supreme Court in R. J. R. Macdonald - Versus - Canada (Attorney General) [10]"Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the Applicant is unlikely to succeed at the trial. Justice Henegham of the Federal Court explained the review as being "on the basis of common sense and a limited review of the case on the merits."[11] It is usually a brief examination of the facts and law. In certain circumstances, the court will impose a more restrictive standard and require the moving party to demonstrate that it has a more strong prima facie case. If the injunction will likely end the dispute between the parties, then the court may hold the Applicant to this higher standard. Similarly, where the nature of the relief sought is mandatory, or when the question is a question of mere law alone, then this higher standard will apply..."

34. An extract from Halsbury's laws of England vol 21 paragraph 7392, comes in handy:

> "It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the Applicant may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if this rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question."

35. Guided by the above sound legal principles, it behoves the court to ask the pertinent question of how irreparable harm and damage has been proved in the instant case. Outrightly, I find that this has not been demonstrated. The terms of the sale agreement are rather straightforward and no form of ambiguity can be alluded to as, at this stage it has not been demonstrated. The purchase price was stated and paid, the acreage also stated and the title deed proves that fact. The Plaintiff/Applicant signed the agreement in the presence of a Counsel and no form of fraud or coercion or intimidation has been alluded to or proved. Thus, on this limb, the application cannot succeed.

36. Thirdly, the Applicants have to demonstrate that the balance of convenience tilts in their favour. In the case of "Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (Supra)" 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".

37. In the case of "Paul Gitonga Wanjau (Supra)", 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."

38. The decision of "Amir Suleiman – Versus - 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."

39. I need not go on and on as to why the court is not convinced that a case has been made for grant of orders sought. The first two grounds as illustrated in Giella Versus Cassman Brown have not been met. It will be an exercise in futility discussing the third ground as clearly the application is not merited and has no feet upon which it can stand on.

40. Suffice to say, there will be need for the Court to have an opportunity to critically interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the claim by the Applicants during a full trial.

41. In the case of:- "Robert Mugo wa Karanja – Versus - 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 a grant a temporary injunction to restrain such acts..."

42. I am not convinced that if orders of temporary injunction are not granted in this suit, the property in dispute might be in danger of being dealt in the manner set out in the application and apprehended by the Plaintiffs/Applicants. In view of the foregoing, I strongly find that the Plaintiffs/Applicants have not met the criteria for grant of orders of temporary injunction.

Issue No. c). Who will bear the cost of the application

43. On the second issue for determination and which was on costs. It is now well established that costs was at the discretion of the Court. Costs mean the award that is granted to a party at the conclusion of a legal action and/or proceedings in any litigation.

44. Under the provision of Section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya provide that costs follow the events unless for good cause the court directs otherwise. By event means the result or outcome of the said legal action. In the case of "Party of Independent Candidate of Kenya – Versus - Mutula Kilonzo & 2 others", the court cited two leading decisions on the subject and held, among other things, that; "It was clear from the authorities that the fundamental principle underlying the award of costs is two-fold. Firstly, the award of costs is a matter in which the trial Judge is given discretion. However, this is a judicial discretion and must be exercised upon grounds on which a reasonable person could come to the conclusion arrived at. Secondly, the general rule is that costs should be awarded to the successful party, and this rule should not be departed from without the exercise of good grounds for doing so."'

45. In this matter, the court finds no reasons not to follow the principle that costs follow the event. The costs in the application are awarded to the Defendant/Respondent herein.

III. Conclusion and Final Orders

46. Ultimately, having caused an indepth analysis of the framed issues herein based on the principles of Preponderance of Probabilities and the balance of convenience. In view of the forgoing, the court proceeds to make the following orders as follows:-

    a. That the Notice of Motion application dated 5th February 2025 has no merit and thus be and is hereby dismissed.

    b. That all parties be granted 21 days to fully comply with the provision of Orders 7 and 11 of the Civil Procedure Rules, 2010.

    c. That for expediency sake the matter to be 29th October, 2025 for purposes of holding a Pre – Trial Conference pursuant to the provision of Order 11 of Civil Procedure Rules, 2010. There shall be a hearing on 22nd January, 2026.

d. That the costs of the application to be awarded to the Defendant/Respondent to be borne by the Plaintiff/Applicant herein.

It is ordered accordingly.

RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS 17TH DAY OF JULY 2025.

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HON. MR. JUSTICE L.L NAIKUNI,

ENVIRONMENT & LAND COURT AT KWALE.

Ruling delivered in the presence of: -

a. Mr. Daniel Disii, the Court Assistant.

b. M/s. Chepkemoi Advocate holding brief for Mr. Metto Advocate for the Plaintiff/Applicant.

c. M/s. Ogoti Advocate for the Defendant/Respondent.