



REPUBLIC OF KENYA



**Ronoh & 26 others v Mbugua & 7 others (Environment & Land Case E190 of 2022) [2024] KEELC 250 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 250 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E190 OF 2022  
OA ANGOTE, J  
JANUARY 25, 2024**

**BETWEEN**

**JOSEPH KIPKOECH RONOH ..... 1<sup>ST</sup> PLAINTIFF**  
**CHARLES KARUITHI NJEHIA ..... 2<sup>ND</sup> PLAINTIFF**  
**JOHN NGIGI ..... 3<sup>RD</sup> PLAINTIFF**  
**DAVID MUASYA NZUVE & NANCY NDINDA KAMAU ..... 4<sup>TH</sup> PLAINTIFF**  
**JAMES KANGETHE KAMAU & VIRGINIA MUTHONI NJAGI. 5<sup>TH</sup> PLAINTIFF**  
**JOB IHRIMI NYAGA ..... 6<sup>TH</sup> PLAINTIFF**  
**SAMMY MALONZA MBUVI ..... 7<sup>TH</sup> PLAINTIFF**  
**FREDRICK NALIANYA ..... 8<sup>TH</sup> PLAINTIFF**  
**GETRUDE NABVIRE ODHIAMBO ..... 9<sup>TH</sup> PLAINTIFF**  
**VIRGINIA WAIHERERO MAINA ..... 10<sup>TH</sup> PLAINTIFF**  
**MICHAEL KAMAU EVAN & SUSAN MBAIRE NJAU ..... 11<sup>TH</sup> PLAINTIFF**  
**JOHN MWANGI MUGO ..... 12<sup>TH</sup> PLAINTIFF**  
**JAMES HAMALA WAMBUDO ..... 13<sup>TH</sup> PLAINTIFF**  
**VICTORIA MUNE KAVINYA ..... 14<sup>TH</sup> PLAINTIFF**  
**KISAKA LUSWETI MUFUTU ..... 15<sup>TH</sup> PLAINTIFF**  
**PETER GICHUKI KARUGU ..... 16<sup>TH</sup> PLAINTIFF**  
**BERNARD OTIENO CHOI & VICTORIA MUTINDI MUSYOKA .... 17<sup>TH</sup>  
PLAINTIFF**  
**PETERSON NJOMO MIKORI ..... 18<sup>TH</sup> PLAINTIFF**



JUMA MOHAMMED .....	19 <sup>TH</sup> PLAINTIFF
LILIAN MVIKALI MWALAMOKO .....	20 <sup>TH</sup> PLAINTIFF
FELIX OTIENO KASSUMS .....	21 <sup>ST</sup> PLAINTIFF
SARA WANGARE DAVID .....	22 <sup>ND</sup> PLAINTIFF
CHRISTOPHER ABIB MWINAMO .....	23 <sup>RD</sup> PLAINTIFF
SAMWUEL MWANGI WANDU .....	24 <sup>TH</sup> PLAINTIFF
ADIJAI ABASAI ALI .....	25 <sup>TH</sup> PLAINTIFF
ENOCK CHERUIYOT NGETICH & IRENE CHELANGAT .....	26 <sup>TH</sup> PLAINTIFF
WANAMITI CO-OPERATIVE SAVINGS & CREDIT SOCIETY LIMITED .....	27 <sup>TH</sup> PLAINTIFF

**AND**

NICHOLAS THUNGU MBUGUA .....	1 <sup>ST</sup> DEFENDANT
GEORGE KANGETHE MBUGUA .....	2 <sup>ND</sup> DEFENDANT
DAVIS THUNGU MBUGUA .....	3 <sup>RD</sup> DEFENDANT
MONICAH MUTHONI MBUGUA .....	4 <sup>TH</sup> DEFENDANT
JAMES MUBIA GITUNDU .....	5 <sup>TH</sup> DEFENDANT
NAIROBI COUNTY GOVERNMENT .....	6 <sup>TH</sup> DEFENDANT
REGISTRAR OF TITLES, ARDHI HOUSE .....	7 <sup>TH</sup> DEFENDANT
ATTORNEY GENERAL .....	8 <sup>TH</sup> DEFENDANT

**RULING**

1. The Plaintiffs approached this court by way of an Amended Notice of Motion dated 6<sup>th</sup> June, 2022 filed pursuant to Order 8 Rule 1, Order 40 Rules (1), (2), (3) and 50 (1), (4) of the Civil Procedure Rules, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Article 40 of *the Constitution* of Kenya and all other enabling provisions of law. The Plaintiffs are seeking for the following orders:
  - i. That a temporary injunction do issue restraining the 6<sup>th</sup> Defendant from receiving any documents for approval, delineation for approval or dealing in whichever manner with L.R. No. 6854/109 (Orig. No. 6845/16/77) pending the hearing and determination of the Plaintiff's application.
  - ii. That an order do issue compelling the 7<sup>th</sup> Defendant to cancel the Certificate of Title of L.R. No. 6854/109 (Orig. No. 6845/16/77) registered in the name of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants pending hearing and determination of the suit.
  - iii. That a permanent injunction do issue restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants from illegally, irregularly and forcefully entering L.R. No. 6854/109 (Orig. No. 6845/16/77) pending the hearing and determination of the suit.



- iv. That costs be provided for
2. The Plaintiffs' application is supported by the Affidavit of the 17<sup>th</sup> Plaintiff, who swore the Affidavit with the authority of all the Plaintiffs. The 17<sup>th</sup> Plaintiff deponed that he is one of the people who bought a plot after subdivision of L.R. No. 6854/109 (Orig. No. 6845/16/77), the suit property, from James Muiba Gitundu, the 5<sup>th</sup> Defendant herein, vide a Sale Agreement dated 28<sup>th</sup> August, 2003.
  3. It was deponed by the 17<sup>th</sup> Plaintiff that the other Plaintiffs also bought plots of land after subdivision of the suit property either directly from the 5<sup>th</sup> Defendant or from persons to whom the 5<sup>th</sup> Defendant had sold the plots to and that some purchasers who were issued with Certificates of Ownership from Custom Home Limited, a company which the 5<sup>th</sup> Defendant is a Director, were forced to pay for the transfer and cancellation fees from the previous owners in cases where these documents had already been issued.
  4. It is the Plaintiffs' case that they were members of Wanamiti Co-operative Savings & Credit Society Limited (the Society), the 27<sup>th</sup> Plaintiff herein, and purchased the plots through loans offered by the Society, which loans were to be repaid with interest; that the society visited the suit property, where they found some plots were already developed, and satisfied with the state of the property, purchased 16 plots which were allocated to its members upon payment.
  5. According to the Plaintiffs, the suit property had been bought by the 5<sup>th</sup> Defendant from the widows and administrators of the Estate of the late J.M. Mbugua; that the transaction between the said widows and the 5<sup>th</sup> Defendant as well as the transaction between the 5<sup>th</sup> Defendant and the Plaintiffs were all conducted by the firm of Nancy Warigia & Company Advocates and that the payments were channelled through the said firm's client account.
  6. It was further deponed that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who are children of the late J.M. Mbugua, with full knowledge that their mothers had sold the suit property, misrepresented facts to the 7<sup>th</sup> Defendants by which misrepresentation they obtained a Certificate of Title over the suit property issued on 17<sup>th</sup> July, 2015 in their three names and that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have illegally and un-procedurally applied for and obtained approval to undertake a subdivision of the suit property, and have even lodged their subdivision scheme with the Survey of Kenya.
  7. It is the Plaintiffs' case that they bought their plots from the 5<sup>th</sup> Defendant and paid the purchase price in full and were issued with Certificates of Ownerships and receipts; that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are now taking advantage of the fact that the 5<sup>th</sup> Defendant did not obtain a Certificate of Title after purchasing from the administrators of the estate and that some of the Plaintiff's have already developed their plots by building their family homes thereon but are now being threatened with evictions if they do not re-purchase their plots.
  8. On his part and on behalf of the 1<sup>st</sup> and 4<sup>th</sup> Defendants, the 3<sup>rd</sup> Defendant, Davis Thungu Mbugua, deponed that the pleadings and the amended Supporting Affidavit to the application sworn by Bernard Ochoi Otieno all dated 6<sup>th</sup> June, 2022 are incurably defective and ought to be struck off; that the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are strangers to the alleged sale of the suit property between the Plaintiffs and the 5<sup>th</sup> Defendant as they were not involved or aware of it and that the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants never attended the firm of Nancy Warigia & Company Advocates or any other law firm for purposes of the sale of the suit property to the 5<sup>th</sup> Defendant or anyone else for that matter and further that the 5<sup>th</sup> Defendant was unknown to them.
  9. The 3<sup>rd</sup> Defendant deponed that the transactions they had undertaken at the lands office and at the Survey of Kenya were legally binding and within the premises of the law; that the suit property was



registered as L.R. No. 6845/109 (Orig. No. 6845/16/77 of I.R. 163957) vide entry No. 61 in the Land Titles Registry on 17<sup>th</sup> February, 2015 and that before this registration, the land was known as L.R. No. 6845/16 belonging to Githunguri Njiru Farm (1966) Ltd whose title was registered on 13<sup>th</sup> December, 2011.

10. According to the Defendants, the land was subdivided into 240 plots which were given to the members of Githunguri Njiru Farm (1966) Ltd; that there is no agreement produced in support of the alleged sale between the administrators of the Estate of the late J.M. Mbugua and the 5<sup>th</sup> Defendant and that the Plaintiffs are trespassers who may have been duped by the 5<sup>th</sup> Defendant into believing that he was the owner of the suit property or alternatively colluded with him to grab the suit property.
11. The 3<sup>rd</sup> Defendant deponed that the property has never been on sale and they intend to develop it for family use; that the proceedings herein are meant to coerce the Mbugua family into surrendering or disposing of the suit property to the Plaintiffs irregularly; that the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants have lodged a complaint with the Directorate of Criminal Investigation (DCI), Land Fraud Unit against the Plaintiffs' illegal and irregular encroachment onto the suit property and that this suit is aimed at stopping the real owners of the suit property from pursuing their interest in the suit property, stop them from developing the land and derail the investigations at the DCI against them.
12. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants also filed a Notice of Preliminary Objection dated 12<sup>th</sup> January, 2023 raising two points that: (i) the Plaintiff instituted a suit against a deceased person in the name of George Kangethe Mbugua, the 2<sup>nd</sup> Defendant; and (ii) at the time of filing the suit, the suit property had already changed hands having been transferred on 5<sup>th</sup> October, 2020 to Mideast Plains Enterprise Limited, which company is now the registered owner, and the suit herein is therefore an exercise in futility.
13. The 5<sup>th</sup> Defendant filed a Replying Affidavit dated 7<sup>th</sup> November, 2022 opposing the Application, where he deponed that the Plaintiffs do not disclose any cause of action against him; that he is neither a necessary or proper party to this suit; that the Plaintiffs do not seek any contribution or indemnity from him and they are entitled to none; that the Applicants have no claim whatsoever against him in relation to the suit; and that the suit as against him should be struck out without costs.
14. On its part, the Nairobi County Government registered its opposition to the application by filing a Notice of Preliminary Objection dated 26<sup>th</sup> July, 2022 together with Grounds of Opposition of the same date, both raising two issues: (i) that the Plaintiffs' suit discloses no cause of action against it; and (ii) that the suit against the Nairobi County Government is bad in law and an abuse of the court process
15. There is a second Notice of Motion Application dated 1<sup>st</sup> August, 2023 filed by the 3<sup>rd</sup> Defendant's Legal Representative and seeking the following orders:
  - a. That Andrew Mbugua Thungu be substituted for Davis Mbugua Thungu (deceased), the 3<sup>rd</sup> Defendant.
  - b. Costs be in the cause.
16. This application is supported by the Affidavit of one Andrew Mbugua Thungu, the Administrator of the Estate of the deceased 3<sup>rd</sup> Defendant, who deponed that the 3<sup>rd</sup> Defendant, Davis Thungu Mbugua passed away on 14<sup>th</sup> January, 2023; that he obtained a Limited Grant of Administration through Nairobi HC Succession Cause No. E466 of 2023 and that it was in the interest of justice that he be substituted for the 3<sup>rd</sup> Defendant in the matter.



## Submissions

17. The Plaintiffs' counsel submitted that the Plaintiffs bought the plots which were all hived off the suit property from the 5<sup>th</sup> Defendant, either directly or indirectly, who sold some of them in his personal capacity and some through Custom Homes Limited, a company where he was a director and shareholder.
18. Counsel submitted that the Plaintiffs were bonafide purchasers for value and without notice and should not be punished for buying the plots when there was an advocate on record for the transaction; that the Plaintiffs paid in full for their plots and some have constructed permanent houses thereon which they use as their family homes and that some Plaintiffs were issued with plot Ownership Certificates by Customs Homes Limited.
19. Calling into question the genuineness of the entries in the Certificate of Title and in particular the entries alleged to relate to the suit premises, the Plaintiff's counsel submitted that the registered owner ought to have obtained separate titles for the various plots; that it is unseemly that the various buyers would hold only one title over the mother title and that the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants did not annex sale agreements or transfers, approvals, consents and/or clearance for the alleged sale and transfer thereto.
20. It is the Plaintiffs' counsel's submission that the Defendants' title is manufactured because it is unlikely that the said Defendants could have obtained approval to subdivide the land from the Nairobi City Commission yet it did not exist as at December, 2012 because of devolution and that the Nairobi City County was properly sued because it approved subdivisions of the suit property without visiting the site.
21. It was submitted by counsel that the Plaintiffs' application seeks to ensure that the suit property is not tampered with pending hearing and determination of the suit; that any other relief including compensation will be dealt with during the main hearing; that the 5<sup>th</sup> Defendant did not deny instructing the firm of Nancy Warigia to act for him in the sale of the plots to the Plaintiffs and that it is telling that the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants did not react to the information that the 5<sup>th</sup> Defendant sold the suit property to the Plaintiffs pointing to collusion to defraud the Plaintiffs.
22. It was submitted that the 5<sup>th</sup> Defendant did not shed light on how he managed to get the property from the Administrator's of the Estate of the late J.M. Mbugua or how he is connected to the suit property.
23. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' counsel submitted that there is no contractual relationship between the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants and the 5<sup>th</sup> Defendant; that the Plaintiffs have not demonstrated that they purchased the land from them or paid the purchase price to them; that at the time of the purported sale, no title had been issued over the suit property and that the suit property was first registered in the name of Githunguri Njiru Farm (1966) Ltd and thus at the time of the alleged sale, they did not have any transferrable interest in the suit property.
24. It was submitted that the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants denied ever selling plots to the Plaintiffs who confirm that they bought the property from the 5<sup>th</sup> Defendant and that the Plaintiffs have no locus standi because under Section 3(3) of the *Law of Contract Act* and Section 38(1) of the *Land Act*, contracts for the disposition of land must be in writing and signed by all the parties thereto and duly attested.
25. Counsel submitted that the suit property was only transferred to the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Defendants on 17<sup>th</sup> July, 2015 and thus the administrators of the Estate of J.M. Mbugua family had no interest to transfer



- the land prior to the said date and that the 4<sup>th</sup> Defendant is not one of the owners of the suit property and has no proprietary rights over the suit property, whereas the 2<sup>nd</sup> Defendant is deceased.
26. The 5<sup>th</sup> Defendant's counsel submitted that there are no particulars of fraud or misrepresentation listed against the 5<sup>th</sup> Defendant and that the suit is grossly incompetent in form and substance and is an abuse of the process of court and pleads no cause against the 5<sup>th</sup> Defendant.
27. It was submitted that the Plaintiffs are not entitled to any prayer or cause of action against the 5<sup>th</sup> Defendant; that having failed to demonstrate that they have a cause of action against the 5<sup>th</sup> Defendant, the suit ought to be struck out against him with costs and that the suit is founded on an alleged Agreement which he was not privy to and that a contract cannot be enforced against a non-party.

### **Analysis and Determination**

28. The court is required to determine whether the Plaintiffs are entitled to the orders sought in the application. From the Plaintiffs' pleadings, it would appear that through an agreement between Janet Kabui Mbugua, Monica Muthoni Mbugua and Nicholas Thungu Mbugua as the vendors, the entire suit property was sold to James Mubia Gitundu, the 5<sup>th</sup> Defendant.
29. According to the Plaintiffs, the 5<sup>th</sup> Defendant then subdivided the suit property into 44 plots and went ahead to sell the same to some of the Plaintiffs, and to other people, who then sold them to the remaining Plaintiffs. It was alleged that the 5<sup>th</sup> Defendant sold some other plots through a company known as Custom Homes Limited where he was a director.
30. According to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, they purchased the suit property from Githunguri Njiru Farm (1966) Limited and the land was transferred to them on 17<sup>th</sup> July, 2015; that they were issued with a Certificate of Title over the suit property in their name and that they also obtained approval to subdivide the property. They deny ever selling the suit property to the 5<sup>th</sup> Defendant.
31. The first Preliminary Objection was filed on 26<sup>th</sup> July, 2022 by the then 5<sup>th</sup> Defendant (the Nairobi County Government) who after amendment of the plaint appears as the 6<sup>th</sup> Defendant, on two grounds, that: the Plaintiffs' suit discloses no cause of action against it; and the suit against the 6<sup>th</sup> Defendant is bad in law and an abuse of the court process
32. A cause of action denotes a combination of facts which entitles a person to obtain a remedy in court from another person, and includes a right of a person violated or threatened violation of such right by another person (see definition in Black's Law Dictionary Ninth Edition). In the Court of Appeal case of Attorney General & another vs Andrew Maina Githinji & Another [2016] eKLR, the Court of Appeal held that:-
- “A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint.”
33. Under Order 2 Rule 15 of the Civil Procedure Rules, the court has the power to strike out pleadings on several grounds, which includes where the pleading in question does not disclose a reasonable cause of action or defence in law. Order 2 rule 15 (2) provides that the application seeking to strike out pleadings for not disclosing a reasonable cause of action or defence should not be supported by any evidence. The court is only required to look at the pleadings in order to ascertain whether the impugned pleadings



raise a reasonable cause of action or defence. In *Susan Rokih vs Joyce Kandie & 6 others* [2018] eKLR, the court held as follows:

“All an applicant needs to do is to state concisely the grounds on which the application is premised. In applications of this nature, the court only looks at the pleadings only and cannot go beyond them in order to establish whether the impugned pleading raises a reasonable cause of action or defence.”

34. A perusal of the Plaint as amended confirms that the Plaintiffs only mention the County Government of Nairobi at paragraph 5 where they are describing the parties. After the said paragraph, there is no other or further mention of the said 6<sup>th</sup> Defendant in the Plaint.
35. The court has also looked at the instant Notice of Motion where the only order sought therein against the County Government of Nairobi is at prayer No. 4, seeking a temporary injunction restraining the 6<sup>th</sup> Defendant from receiving any documents for approval, delineation for approval or dealing in whichever manner with the suit property pending the hearing and determination of the Plaintiff's application.
36. The County Government's only action with regards to the suit property was the approval of the proposed subdivision scheme submitted by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. That being the case, it will be important to hear the circumstances under which the County Government approved the sub division, and whether indeed there was a prior approved sub division scheme that gave rise to the plots that the Plaintiffs bought from the 5<sup>th</sup> Defendant. The objection by the Nairobi County Government therefore fails.
37. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed the second Preliminary Objection on 12<sup>th</sup> January, 2023 where they also raised two issues: that she Plaintiff instituted a suit against a deceased person in the name of George Kangethe Mbugua, the 2<sup>nd</sup> Defendant; and that at the time of filing the suit, the suit property had already changed hands having been transferred on 5<sup>th</sup> October, 2020 to Mideast Plains Enterprise Limited, which is now the registered owner.
38. Order 1 rule 3 of the Civil Procedure Rules, 2010 provides for who may be enjoined as a Defendant in a suit. It provides as follows:

“3. All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

39. In the case of *Ernest Ngugi Waithaka & 2 Others vs Peter Mutunga Gachigi* [2017] eKLR the court answered the question of who is a person capable of being sued as follows:

“The word ‘person’ can only refer to either a natural living person or a legal person. It follows therefore that a deceased person is not a person for purposes of Order 1 rule 3. When a suit is filed against a non-existent person, it is void ab initio. There is no suit.”

40. In *Viktar Maina Ngunjiri & 4 Others vs Attorney General & 6 Others*, High Court at Nairobi, Civil Suit No. 21 of 2016(2018) Eklr, the court cited an Indian case that dealt with the question of a deceased



Defendant, C. Muttu vs Bharath Match Works AIR 1964 Kant 293, where the judge observed as follows:

“If he (defendant) dies before the suit and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit by whomsoever accepted is also a nullity. Similarly, an order made in the suit allowing amendment of plaint by substituting the legal representative of the deceased as the defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought bona fide and in ignorance of the death of such a person.”

41. In *Pratap Chand Mehta vs Chrisna Devi Meuta* AIR 1988 Delhi 267, the court observed as follows;

“if a suit is filed against a dead person then it is a nullity and we cannot join any legal representative; you cannot even join any other party, because, it is just as if no suit had been filed. On the other hand, if a suit has been filed against a number of persons one of whom happens to be dead when the proceedings were instituted, then the proceedings are not null and void but the court has to strike out the name of the party who has been wrongly joined. If the case has been instituted against a dead person and that person happened to be the only person then the proceedings are a nullity and even Order 1 Rule 10 or Order 6 Rule 17 cannot be availed of to bring about amendment.”

42. For this court to find that the suit against the 2<sup>nd</sup> Defendant does not lie for reason that the 2<sup>nd</sup> Defendant was deceased at the time the suit was instituted, it must see proof of that fact. Whereas the death of the 2<sup>nd</sup> Defendant was first raised in the 3<sup>rd</sup> Defendant’s Replying Affidavit dated 28<sup>th</sup> June, 2022, he did not annex a copy of the Death Certificate. This court cannot speculate on whether the 2<sup>nd</sup> Defendant died before the suit was filed or after.

43. On the second ground of the Preliminary Objection, in the 3<sup>rd</sup> Defendant’s Replying Affidavit sworn on 28<sup>th</sup> June, 2022, the issue of the suit property changing hands was never brought up. Indeed, there is neither proof of the alleged transfer to a third party nor proof of any registration to that effect.

44. It is trite that a Preliminary Objection must be a matter of pure law from the very beginning, and not a matter of fact. The transfer of the suit property does not in and of itself, constitute a preliminary point. It is a fact for which the court would need to delve into the evidence provided to determine. The Preliminary Objection therefore fails.

45. In any event, by this suit, the court has been called upon to determine the issue of the ownership of the suit property, at which point the issue of the alleged transfer will be dealt with.

46. While this suit was pending in court, the 3<sup>rd</sup> Defendant died on 14<sup>th</sup> January, 2023. One Andrew Mbugua Thungu, the Administrator of the Estate of the deceased Davis Thungu Mbugua vide a Limited Grant of Letters of Administration issued in Nairobi. HC Succession Cause E466 of 2023, moved to court seeking to be substituted in place of the 3<sup>rd</sup> Defendant.

47. Order 24 Rule 4 (4) of the Civil Procedure Rules provides as follows;

“4. Where one of two or more Defendants dies and the cause of action does not survive or continue against the surviving Defendant or Defendants alone, or a sole Defendant or sole surviving Defendant dies and the cause of action survives or continues, the Court, on an application made in that behalf, shall



cause the legal representative of the deceased Defendant to be made a party and shall proceed with the suit.”

48. The applicant is seeking to be substituted in place of the 3<sup>rd</sup> Defendant. He claims to be the legal representative of the estate of the 3<sup>rd</sup> Defendant. The rule envisages substitution of a Defendant with a party clothed with legal representation. Section 2 of the [Civil Procedure Act](#) defines legal representative to mean:

“A person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued”

49. At the moment, although the said Andrew Mbugua Thungu states that he obtained a Limited Grant of Administration, and his Affidavit claims to have annexed a copy of the said document, the same appears not to have been uploaded onto the e-filing platform together with the application for substitution.

50. The application for substitution of the 3<sup>rd</sup> Defendant is not opposed. Consequently, the Court will allow the application only on condition that the said Andrew Mbugua Thungu will avail a copy of the Limited Grant of Administration before trial.

51. This court has also been asked to determine whether the Plaintiffs have satisfied the test for the grant of a temporary injunction. The conditions to be fulfilled before the court can exercise its discretion to grant a temporary injunction were well laid out in *Giella vs Cassman Brown & Co Ltd* (1973) EA 358 as follows:

“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 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. (*EA Industries v Trufoods*, [1972] EA 420.)”

52. The first hurdle for the Plaintiffs is whether they have established a prima facie case before an order of temporary injunction can be issued. What amounts to a prima facie case was explained in *Mrao vs First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125 as follows:-

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

53. Again, in *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* (2014) eKLR, the Court of Appeal agreed with the definition of a prima facie case in the *Mrao* case and stated as follows:

“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.”

54. Therefore, the court needs to investigate the facts and affidavit evidence on record to determine if a prima facie case has been established.



55. The Plaintiffs have deponed that they purchased their respective plots from the 5<sup>th</sup> Defendant, or his nominee. The Plaintiffs have annexed copies of their individual Sale Agreements together with receipts issued by the firm of Nancy Warigia & Company Advocates as proof of the purchase.
56. The Plaintiffs also averred that the 5<sup>th</sup> Defendant purchased the suit property from the widows and administrators of the Estate of J.M. Mbugua, who they allege was the owner of the suit property. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants, have denied ever participating in the transaction. They stated that their intention was to develop the property for the family.
57. This court has not seen, among documents exhibited, any agreement for sale or other document evidencing the alleged sale of the suit property from the Estate of J.M. Mbugua to the 5<sup>th</sup> Defendant.
58. This court has also compared the two copies of the title annexed by the parties. On the one hand, the Plaintiffs at paragraph 8 of the Supporting Affidavit annexed a copy of one page of the Certificate of Title No. IR 163957 for L.R. No. 6845/109, the suit property herein. The Certificate of Title is dated 17<sup>th</sup> July, 2015 and shows that the suit property was registered in the names of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
59. On the other hand, the 3<sup>rd</sup> Defendant in his Affidavit annexed a copy of the Grant No. IR 134320 over L.R. No. 6845/16, the Mother Title. This court has had a glance at the entries on the said Grant and notes that the first entry is a sub-division Certificate showing that the suit property was sub divided into 240 plots, which entry was made on 13<sup>th</sup> December, 2011.
60. The suit property was indeed part of the parcel of land known as L.R. No. 6845/16 measuring approximately 552.9 Hectares registered in the name of Githunguri Njiru Farm (1966) Limited on 17<sup>th</sup> November, 2015.
61. There is a total of 117 entries on the Certificate of Title. None of those entries shows that the suit property at any one point belonged to J.M. Mbugua. However, at entry No. 61 on the Certificate of Title, a portion off the mother title being L.R. No. 6845/109 measuring approximately 2.221Ha was transferred to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
62. The Estate of the late J.M Mbugua, according to the entries on the title, and on a prima facie basis, has never at any point held any interest in the suit property capable of being transferred to the 5<sup>th</sup> Defendant. The alleged Administrators who purportedly sold the suit property to the 5<sup>th</sup> Defendant, prima facie, could not therefore sell or transfer the property to the 5<sup>th</sup> Defendant.
63. This court has also taken time to investigate the Plaintiffs' allegations of abnormal and illegal entries on the Certificate of Title. The Plaintiffs alleged that at entry No. 2, the suit property was transferred to one Duncan Gakiha Kiongo on 20<sup>th</sup> January, 2014 and on 14<sup>th</sup> February, 2014, only two weeks after, the same suit property was transferred to Francis Kaigua Karitu. It has also been alleged that at entry No. 5 and 6, the suit property was transferred to different individuals on the same day, that is 6<sup>th</sup> March, 2014.
64. The court would like to point out that this is an erroneous way of interpreting the entries on the title. For the avoidance of doubt, entry No. 2 relates to a plot known as L.R. No. 6845/73; entry No. 4 relates to a portion known as L.R. No. 6845/67; entry No. 5 relates to transfer of a portion known as L.R. No. 6845/65 and finally, entry No. 6 is an endorsement for the transfer of L.R. No. 6845/70.
65. These appear to be endorsements for the transfer of 4 different subdivisions hived of the mother title and not the transfer of the entire suit property herein.



66. From the Plaintiff and documents filed, there is no nexus between the Plaintiffs and the registered owners of the suit property. There is no agreement to show that the 5<sup>th</sup> Defendant indeed purchased the suit property from the registered owners, and most importantly the Administrators of the estate of J.M. Mbugua, prima facie, had no interest capable of being transferred since the suit property has never been registered in the name of the deceased, J.M. Mbugua.
67. From the foregoing, it is clear that the Plaintiffs have not established a prima facie case to entitle them to the grant of an injunction pending the hearing and determination of the suit. In the case of Naftali Ruthi Kinyua vs Patrick Thuita Gachure & Another (2015) eKLR the Court of Appeal held that:
- “With reference to the establishment of a prima facie case, Lord Diplock in the case of American Cyanamid vs Ethicon Limited [1975] AC 396 stated thus,
- “If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant’s proposed activities that is the end of any claim to interlocutory relief.”
68. The Plaintiffs have stated that the Defendants have obtained approval to subdivide the suit property. They allege that they have been given two options, to either re-purchase the land or face evictions. Either way, they are in a disadvantaged position, some of them having built their family homes on the plots they purportedly bought from the 5<sup>th</sup> Defendant, believing him to be the owner thereof.
69. The Plaintiffs stand to either lose their properties which they bought through savings or loans, or be forced to buy the properties again, both options will no doubt occasion harm on the Defendants.
70. However, for the court to issue an order for injunction, it must be satisfied that the applicants have met the two limbs of the test set out in *Giella vs Cassman Borwn Co. Ltd* (supra). Where one limb fails, then the Court cannot exercise its discretion and grant the injunction. In *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* (supra), the court held that:
- “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. Ltd V. 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. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.”
71. Consequently, having failed to establish the first limb, this court finds that the Plaintiffs have failed to prove their entitlement to the order for a temporary injunction as prayed for in the application.
72. Concerning prayer No. 5 seeking for an order compelling the 7<sup>th</sup> Defendant to cancel the Certificate of Title of L.R. No. 6854/109 (Orig. No. 6845/16/77) registered in the name of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup>



Defendants pending hearing and determination of the suit, it is not in dispute that the suit is yet to be heard on merit.

73. This court is of the opinion that it would be premature to grant the said prayer at this stage and the same can only be done after hearing and taking the evidence of the parties into consideration.
74. The upshot is that the court finds that an injunction cannot issue. However, the Plaintiffs have since developed the suit properties and are in occupation. It is not clear to this court how the Plaintiffs got to where they are at this stage considering that the 5<sup>th</sup> Defendant did not exhibit the requisite documents.
75. Indeed, although the Plaintiffs annexed a bundle of Agreements for Sale purported to have been made between them and the said 5<sup>th</sup> Defendant, the 5<sup>th</sup> Defendant denies that he is a party to any such contract that gave rights or imposed obligations on him. It is noteworthy that the 5<sup>th</sup> Defendant has not denied that the signature in those Agreements belongs to him, yet he claims that he is not privy to the said agreements.
76. It is not possible for the court to determine the architect of this scheme at this stage without hearing the parties on the merits of their respective cases. Nevertheless, the court is alive to the harm that will come to about 26 individuals as well as their families if the Defendants proceed to subdivide the property and evict the Plaintiffs, and the need to balance the interests of the Plaintiffs as against the rights of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to peaceably enjoy and utilise their property.
77. Considering also the allegations that the property may have changed hands and been sold to a third party, in the interest of justice, the court is of the opinion that there is need to preserve the suit property from wastage, disposition or any further/other changes of ownership which events are likely to affect the outcome of this case, until the matter is fully heard and determined.
78. For the foregoing reasons and findings, the court makes the following orders:
  - a. The Preliminary Objection dated 26<sup>th</sup> July, 2022 is dismissed with no order as to costs.
  - b. Andrew Mbugua Thungu be substituted for Davis Mbugua Thungu (deceased), the 3<sup>rd</sup> Defendant.
  - c. An order that the status quo prevailing as at the date of delivery of this ruling be maintained, which order, for the avoidance of doubt shall entail the following:
    - i. There shall be no eviction of any of the Plaintiffs from the suit property pending the hearing and determination of the suit.
    - ii. There shall be no subdividing, advertising for sale, selling, charging, transferring or in any way disposing of any portion of the suit property pending the hearing and determination of the suit.
    - iii. There shall be no further construction or development on any portion of the suit property and any ongoing construction to cease pending the hearing and determination of the suit.
    - iv. The 7<sup>th</sup> Defendant, the Chief Lands Registrar, shall not approve any application for delineation or dealing in whichever manner with Land Reference No. 6854/109 (Orig. No. 6845/16/77) pending the hearing and determination of the suit.
  - d. The above orders shall apply to all the parties herein and their agents and servants, including Mideast Plains Enterprises Limited, the alleged current registered owner of the suit property



and the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants and/or their Counsel shall ensure service of the order on the said Mideast Plains Enterprises Limited.

e. The costs of the applications shall be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 25<sup>TH</sup> DAY OF JANUARY, 2024.**

**O. A. ANGOTE**

**JUDGE**

**In the presence of;**

**Ms Kamuyu for 1<sup>st</sup> – 4<sup>th</sup> Defendants**

**Mr. Sausi for Plaintiff's**

**Ms Abok for 5<sup>th</sup> Defendant**

**Mr. Adipo for 6<sup>th</sup> Defendant**

**Court Assistant - Tracy**

