



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kaingu v Ndoro & 2 others (Environment & Land Case  
E90 of 2024) [2025] KEELC 986 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 986 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE E90 OF 2024  
EK MAKORI, J  
FEBRUARY 27, 2025**

**BETWEEN**

**SAMMY KAZUNGU KAINGU ..... PLAINTIFF**

**AND**

**KATANA MUKONE NDORO ..... 1<sup>ST</sup> DEFENDANT**

**FRANCIS MURANGA MUKONE ..... 2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR - KILIFI ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. For determination, it is the Notice of Motion dated 3<sup>rd</sup> September 2024 and the Preliminary objection dated 30<sup>th</sup> September 2024. The Notice of Motion seeks the following orders:
  - a. Spent
  - b. That this honourable court be pleased to grant orders of injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/ Respondents, their servants, agents, employees or whosoever acting through them from conducting any distribution, transfer by transmission, subdividing, selling, alienating and/or carrying out any wanton works on that parcel of land known as Kilifi/Jimba/36 pending the hearing and determination of this application.
  - c. That this honourable court be pleased to grant orders of injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/ Respondents, their servants, agents, employees or whosoever acting through them from conducting any distribution, transfer by transmission, subdividing, selling, alienating and/or carrying out any wanton works on that parcel of land known as Kilifi/Jimba/36 pending the hearing and determination of this suit
  - d. That the OCS Watamu to effect the order.



- e. That the costs of the application be provided for.
2. The application is premised on the grounds set out on its face and on the supporting affidavit of Sammy Kazungu Kaingu who deponed that he is one of the legal heirs of the estate of the late Kaingu Mukone Muranga who was the legal owner of the parcel of land known as Kilifi/Jimba/36. He stated that the late Mukone Muranga was the husband to the late Nzingo Mukone and Kache Mukone Muranga. He added that when the adjudication process for the suit property commenced, Kache Mukone Muranga, the 2<sup>nd</sup> wife of the late Mukone Muranga, the suit property was registered in her name and not that of the 1<sup>st</sup> wife who knew the suit property as her home. It was stated that the suit property is ancestral land and Kache Mukone Muranga held it in trust for the family thus before her demise by a letter dated 2<sup>nd</sup> July 1996 instructed that the land be divided into two equal portions; half for the 1<sup>st</sup> wife and her children and the other half for the 2<sup>nd</sup> wife and her children. It was additionally stated that since 1996, his family has lived on their half but the Defendants are against them occupying that half. Further, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants applied for revocation of the grant of letters of administration intestate, which application was allowed, and fresh letters of administration were made to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
  3. The 1<sup>st</sup> Defendant filed Notice of P.O is crafted as follows:
    - i. The 1<sup>st</sup> Defendant maintains that this court lacks the jurisdiction to entertain the Plaintiff's claim in that the suit herein is res judicata, High Court Succession Cause No. E002 of 2021 - in the matter of the Estate of Kache Mukone given that the issues of the law raised in this suit were substantially raised, heard and determined with finality in the said succession cause and given Section 7 of the *Civil Procedure Act* Chapter 21 of the Laws of Kenya this court cannot revisit the same issues of law and;
    - ii. This suit is an abuse of the court process and should be struck out with costs.
  4. Further, the 1<sup>st</sup> Defendant filed a replying affidavit stating that the 2<sup>nd</sup> Defendant is deceased, a fact that the Plaintiff knew, as such the suit against the 2<sup>nd</sup> Defendant is not competent further, that the court lacks jurisdiction to entertain the suit given that the suit is res judicata to High Court Succession Cause No. E002 of 2021 and the issues raised herein were heard and determined with finality in the said Succession cause. He further stated that the suit land is not ancestral but was owned by his late mother Kache Mukone in her own capacity. Moreover, the suit land was registered under Kache Mukone, the sole indefeasible owner. He further stated that it was not true that the Plaintiff and his family lived on half of the land. Still, the Plaintiff's brother was given a portion by himself and the 2<sup>nd</sup> Defendant to erect a temporary house, thus the Plaintiff and his siblings are not entitled to the suit land or any part thereof.

#### **Submissions, analysis and determination.**

5. Both applications were disposed by way of written submission. I have meticulously considered the submissions by the parties as well as the authorities relied upon. The issues arising for determination are:
  - a. Whether the Preliminary Objection is valid and should be upheld.
  - b. Whether the injunctive orders sought are merited.



6. The starting point is the principles set in the leading decision in this realm - *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696, on what constitutes a preliminary objection. The court observed thus:

“.....a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.”

Sir Charles Newbold P. stated:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.”

7. Similarly, the Supreme Court in the case of *Hassan Ali Joho & another v Suleiman Said Shabal & 2 others* SCK Petition No 10 of 2013 [2014] eKLR held that:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.”

8. Further in the case of *Hassan Nyanje Charo v Khatib Mwashetani & 3 others*, [2014] eKLR the court held that:

“Thus, a preliminary objection may only be raised on a ‘pure question of law.’ To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

9. The Preliminary Objection herein is founded on the fact that this court has no jurisdiction to hear and entertain the instant suit as it is res judicata to High Court Succession Cause No. E002 of 2021. I have perused the judgment delivered on 2<sup>nd</sup> August 2024 (Githiji J.) in the succession cause. Before I even delve into the punchline, my first comment is that the suit in the High Court was a succession cause, thus a different jurisdiction to this court. Secondly, the issue dealt with was the revocation of the grant of letters of administration. The consequence is that the Preliminary Objection will be unable to summarily dispose of the instant suit which seeks this court to address issues of ownership rather than distribution of a deceased’s estate which falls within the purview of the Family Division of the High Court. Thus, the preliminary objection is dismissed with costs.

10. Whether the injunctive orders sought are merited. The law governing the granting of interlocutory injunctions is set out under Order 40(1) (a) and (b) of the Civil Procedure Rules 2010 which provides that:

“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”.

11. The conditions for consideration in granting an injunction were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* [1973] EA 368 where the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction as follows:

“Firstly, 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.”

12. The Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR further opined that:

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

13. The Court of Appeal in *Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others*, [2014] eKLR, defined a prima facie case as follows:

“A Prima facie case in a civil application includes but not confined to a genuine and 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.”

14. From the above definition, it is clear that a prima facie case means more than an arguable case, and in which the evidence must show an infringement of a right or the probability of success of the applicant’s case at the trial. Has the Plaintiff therefore demonstrated this?

15. Based on the evidence herein, and without doing a mini-trial at this stage, the issues raised by the applicant about the history of the suit property and its registration interest and holding can only be addressed at a hearing. If an injunction is not issued, none of the parties’ rights will be infringed more than the other. I think the Plaintiff has not established a prima facie case; thus, I find that the said orders should not be granted.



16. Having established that the plaintiff has not established a prima facie case, I need not delve into the two other pillars. This was well settled in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR the Court of Appeal restated the law as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level, (b) demonstrate irreparable injury if a temporary injunction is not granted, and (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

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. ... If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.” (emphasis mine).

17. Thus, the application dated 3<sup>rd</sup> September 2024 is hereby dismissed with costs.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 27<sup>TH</sup> DAY OF FEBRUARY 2025.**

**E. K. MAKORI**

**JUDGE**

In the Presence of:

Mr. Nyaega for the Plaintiff

Mr. Shujaa for the 1<sup>st</sup> & 2<sup>nd</sup> Defendants

Happy: Court Assistant

