



REPUBLIC OF KENYA



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**Bhogal v Bhogal (Environment & Land Case E014 of 2023)  
[2024] KEELC 1749 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 1749 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE E014 OF 2023**

**LA OMOLLO, J  
APRIL 11, 2024**

**BETWEEN**

**PARAMJIT SINGH BHOGAL ..... PLAINTIFF**

**AND**

**HARBINDER SINGH BHOGAL ..... DEFENDANT**

**RULING**

**Introduction.**

1. This ruling is in respect of the Plaintiff's Notice of Motion application dated 15<sup>th</sup> August, 2023 and the Defendants Preliminary Objection dated 6<sup>th</sup> September, 2023.
2. The Notice of Motion application dated 15<sup>th</sup> August, 2023 is expressed to be brought under Section 1A, 1B, 3A of the Civil Procedure Act, Section 91 (4a) of the Land Registration Act, Order 40 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the Law.
3. The Application seeks the following orders:
  - a. Spent
  - b. That pending the hearing and determination of this application, the court do grant a temporary injunction restraining the Defendant, his servants, agents and/or employees from entering, developing, wasting, transferring, offering for sale, leasing or in any manner disposing of the suit property without the express consent of the Plaintiff/ Applicant.
  - c. That pending the hearing and determination of the main suit the court do grant a temporary injunction restraining the Defendant, his servants, agents and/or employees from entering, developing, wasting, transferring, offering for sale, leasing or in any manner disposing of the suit property without the express consent of the Plaintiff/Applicant.



- d. That this Honourable Court do issue an order compelling the defendant/respondent to grant the Plaintiff herein access to the suit property as the joint proprietor.
  - e. That the Officer-in charge of Nakuru Central Police Station does ensure peaceful enforcement of this order where necessary.
  - f. That the Chief Lands Registrar, Nairobi Lands Registry be compelled to produce copies of the records of the suit property in its custody.
  - g. That the costs of this application be provided for.
4. The application is based on the grounds on its face and supported by the affidavit sworn on 15<sup>th</sup> August 2023 by one Paramjit Singh Bhogal, the Plaintiff/Applicant.
  5. The Defendant filed a Notice of Preliminary Objection dated 6<sup>th</sup> September, 2023 which is on the following grounds:
    - a. That the issues canvassed in support of this suit and the said application are sub judice under Section 6 of the *Civil Procedure Act* as the issue of the Parties' proprietary rights over the suit land is in Nakuru High Court Succession Cause Case No E034/2023 which is currently pending before the Honourable Court.
    - b. That the Application and suit herein is frivolous, vexatious and an abuse of the Court process and should be dismissed with costs in limine.

#### **Factual Background.**

6. The Plaintiff instituted this suit vide the Plaint dated 15<sup>th</sup> August, 2023 and filed on 17<sup>th</sup> August, 2023.
7. The Plaintiff seeks the following prayers:
  - a. A permanent injunction be issued against the Defendant restraining him, his agents and/or any other person claiming through him dealing, entering, occupying in any way and/or disposing land parcel number Nakuru Municipality Block 12944 without the prior written consent of the plaintiff.
  - b. A permanent mandatory injunction directed to the Defendant to give vacant possession of the land parcel Nakuru Municipality Block 12944, in default, eviction orders to issue.
  - c. That an order issue directing the Land Registrar to produce the documents with regards to the suit property and issue an official search on the same.
  - d. General damages.
  - e. Interest at a court rates.
  - f. Costs of this suit.
  - g. Any other or further relief which this Honourable Court may deem fit to grant.
8. The Defendant also filed a Statement of Defence and a Replying Affidavit on 11<sup>th</sup> September, 2023. In the statement of defence, he denies the averments in the Plaint.
9. The matter came up on 2<sup>nd</sup> October, 2023 and the court directed that the Application and the Preliminary Objection shall be canvassed by way of written submissions and the matter was scheduled for mention on 6<sup>th</sup> November, 2023 to confirm filing of submissions.



10. On 6<sup>th</sup> November, 2023, counsel for the Plaintiff confirmed filing submissions and court scheduled the matter for ruling on 7<sup>th</sup> March, 2024.

### **The Plaintiff's/Applicant's Contention.**

11. The Plaintiff/Applicant contends that he is a tenant in common in the suit property situated in Nakuru town together with one Narwar Singh Bhogal who is now deceased.
12. He contends that the estate of Narwar Singh Bhogal (deceased) who is the only other registered co-owner of the suit land is undergoing contested probate, where no grant has been issued and the distribution of the assets/ shares has not been determined.
13. He also contends that following the death of Narwar Singh Bhogal, his son, Harbinder Singh Bhogal, fraudulently misrepresenting himself as the personal representative and administrator of the estate of the deceased took illegal occupation of the suit property whilst denying him access to the same.
14. It is his further contention that despite requesting the Defendant to vacate the property and/or allow him access to the same, he was met with untold hostility and threats of violence. He further contends that sometime in the year 2023, he was informed that some unknown people had begun erecting a boundary around the said parcel of land and are in the process of putting up structures within the land which he promptly reported to the police.
15. He deposes that his attempts to now obtain a recent official search from the Land Registry has borne no fruit as the said requests were blatantly refused and he is now informed that the file is missing.
16. He further disposes that his request to be given a digital search was also refused and he was informed that the property has not been linked to the online system despite his previous ability to obtain digital official searches from E-citizen in 2021.
17. The Applicant contends that this is indicative of fraudulent collusion to defeat his interest and ownership in the suit property. He contends that he is highly apprehensive that unless the Defendant is restrained, he will continue to assert his trespass, alienate the property from its rightful owners, and worse dispose of or irreversibly devalue the property through the unsanctioned developments thereupon.

### **The Defendant's /Respondent's Response.**

18. The Defendant/Respondent filed a Replying Affidavit sworn by Harbinder Singh Bhogal, the Defendant, on 6<sup>th</sup> September, 2023.
19. He contends that the application is vexatious, lacks merit and intended to waste this honorable court's time. He contends that the application and the suit herein are sub judice under Section 6 of the *Civil Procedure Act* as the issue of the Parties' proprietary rights over the suit land is in Nakuru High Court Succession Cause Case No E034/ 2023 which is currently pending before the Honourable Court.
20. The Defendant/Respondent states that he is a son to the late Narwar Singh Bhogal and the appointed sole executor of his entire estate vide his last will and testament dated 2<sup>nd</sup> September, 2019.
21. He further contends that the suit property was purchased by his late father the late Narwar Singh Bhogal who was jointly registered as proprietor of property L.R No 12944 together with the Plaintiff as tenants in common. He contends that the late Narwar Singh Bhogal paid for the property on his own and took possession on or about the year 1998.



22. He deposes that the Plaintiff/Applicant never reimbursed the late Narwar Singh Bhogal his portion of the purchase price. He contends that shortly after the purchase of the suit property, the Plaintiff was forced to leave Kenya for the United Kingdom and since then, he has been the one looking after the property with his late father.
23. It is also his contention that he made improvements on the suit property by repairing the perimeter fence around the property, building sheds, staff houses, water tanks, and constructing a borehole. He contends that the Plaintiff never participated nor made any monetary contributions towards the developments on the land. He contends that the Plaintiff never entered the suit property to discuss the maintenance and upkeep of the same and the Plaintiff has made it obvious on numerous occasions that he detests farm life.
24. The Defendant/Respondent contends that before his demise, the late Narwar Singh Bhogal appointed him to be his attorney to take care of his affairs and his estate. He contends that as such, he was authorized to oversee any development on the property and to make any decisions regarding the welfare and upkeep of the suit property on behalf of his father who by then, was bedridden.
25. He further contends that he has employed security guards to guard the property at his cost and he has been paying all the outgoings on the property with no contribution by the Plaintiff. He contends that at no point in time has he ever denied the Plaintiff access to the suit land. He contends that the security guards maintain a visitor register for the suit property and there is no entry or evidence that the Plaintiff/Applicant had visited the property or was denied access or chased away as alleged by him.
26. He deposes that on 21<sup>st</sup> October, 2020, the Plaintiff's lawyers at that time, Ms Nzei & Co. Advocates, wrote to him proposing that the property be subdivided and he agreed to the proposal on condition that the costs thereof are borne by the Plaintiff and the developments made on the property by the Plaintiff be left on his late father's side of the property.
27. He further deposes that again on 29<sup>th</sup> March, 2021, the Plaintiff's lawyers (another firm of advocates- Maiyo & Mbugua Co. Advocates) wrote to his lawyers indicating that the subdivision would be done by cutting the property through the middle denying that he had put any developments thereon.
28. He contends that in preparation of the intended subdivision, he appointed a lands surveyor at his cost to identify the property beacons. He contends that on or about 2<sup>nd</sup> April, 2021, the Plaintiff went to the property in the evening in the company of a gang armed with crude weapons and started destroying the fence to the property and threatened to harm the staff and their families (women and children) with the crude weapons and wooden batons. He contends that his guards called the police who came by nightfall and the Plaintiff and his gang fled by then. He contends that the matter was reported to the police under occurrence book number 08/02/04/2021.
29. The Defendant/Respondent contends that on or about 3<sup>rd</sup> April, 2021, the Plaintiff returned to the property at around 11:00 am with his gang of goons armed with crude weapons and once again started destroying the fence to the property to gain forceful entry. He contends that his guards called the police who came and persuaded the Plaintiff and his gang to leave and the matter was reported to the police under occurrence book number 09/04/04/2021.
30. The Defendant/Respondent's contention is that the Plaintiff made further threats on 24<sup>th</sup> March, 2023 to forcefully take over a family property Nakuru Municipality/ Block 455/21, where he has no ownership interest at all, with a security team with dogs. He contends that he reported the Plaintiff's intention of unlawful actions to the Directorate of Criminal Organization (herein after referred to as DCIO) at Keptembo Police Station under occurrence book number 48 of 24/03/2023.



31. He contends that the Plaintiff was called in for questioning by the DCIO and he presented himself with his lawyer Adams Maiyo (of Maiyo, Mbugua & Cheruiyot) on 25<sup>th</sup> March, 2023. He contends that the Plaintiff was cautioned about his threatening email and was advised that he would be arrested if he forcefully entered the property as he threatened. He contends that the DCIO also suggested that he would be willing to mediate between parties, and the Plaintiff blatantly refused this offer as he did not want to meet with him.
32. He deposes that to his surprise, on 6<sup>th</sup> December, 2019, the Plaintiff's lawyers (another firm of advocates- Harit Sheth Advocates) wrote an email to him requesting a meeting between his late father Narwar Singh Bhogal, the Plaintiff's father Gurbakash Singh Bhogal (brother to Narwar Singh Bhogal), the Plaintiff and himself, to discuss and agree on family asset distribution. He contends that asset distribution had already been agreed between Narwar Singh Bhogal and Gurbakash Singh Bhogal but the Plaintiff's greed rescinded the agreement between the brothers. He contends that they agreed to the meeting which took place on 10<sup>th</sup> December, 2019 at 11:00 am at Harit Sheth Advocates offices, with his lawyer Ms. Njeri Mucheru being present.
33. He also deposes that the meeting was sadly just a platform for the Plaintiff to abuse his late father and himself and the meeting ended with no agreement. He contends that after lengthy correspondence, it became evident that the Plaintiff did not want to reach an amicable agreement between the parties. He contends that on 13<sup>th</sup> May, 2021, his lawyer wrote to the Plaintiff's lawyer suggesting that the matter be resolved through mediation. He contends that the Plaintiff instructed his lawyers to refuse the mediation route.
34. The Defendant/Respondent contends that the Plaintiff has demonstrated from his conduct in the recent past that he is not interested in having an amicable solution to this matter despite several proposals of subdivision of the land from him. He contends that the Plaintiff has hidden from this Honorable Court material facts and pertinent truths and the alleged claims of trespass, fraud and misrepresentation as espoused in the application are just mere attempts to mislead this Honourable Court. He contends that these are frivolous attempts by the Plaintiff/Applicant to malign his name in bad faith.
35. He also contends that he is ready and willing to assist in the subdivision of the property to ensure that the Plaintiff gets his share of 50% save for the fact that he would wish to retain the sections upon which he has made the constructions and developments. He contends that the Plaintiff should be the one to pay the costs of subdivision as he has never paid anything for the purchase or upkeep of the property.
36. It is his deposition that the attempt to seek vacant possession of the property is a direct violation of his proprietary rights as he was rightfully bequeathed 50% shares of the land as per his father's will. He contends that he is not interested in disposing of his share of the suit property through sale or any means whatsoever to anyone including the Plaintiff/Applicant and any allegations in respect to that are baseless.
37. The Defendant/Respondent contends that the Plaintiff is a very violent individual and he would not hesitate to resort to violence to achieve his objectives. He contends that his aged and unwell father Gurbakash Singh Bhogal lives in fear of the Plaintiff's retribution for earlier parental discipline against him, continuous abuse and fear of being thrown out if he speaks against the Plaintiff.

### **Issues for Determination.**

38. The Plaintiff/Applicant filed his submissions on 3<sup>rd</sup> November, 2023. He identified the following issues for determination:



- a. Whether the suit instituted is sub-judice the succession suit?
  - b. Whether the Plaintiff is a joint proprietor in the suit property?
  - c. Whether the Defendant/ Respondent has any right to the suit property and to its access and development?
  - d. Whether the Plaintiff's application is merited?
39. The Plaintiff/Applicant relies on the judicial decision of Kinatwa Co-operative Savings & Credit Society Limited v Kinatwa Prestige Ltd [2021] eKLR. He submits that for a matter to be declared sub judice, the person alleging so must demonstrate that there is a similar matter with similar issues, previously instituted between the same parties, before the same court or another court with competent jurisdiction.
  40. He submits that from the face of the record itself, it is evident that he is not even a party to the succession suit. He contends that the objectors to the succession suit are Gurbakash Singh Bhogal, Onkar Singh Bhogal, Ranjit Singh Bhogal and Jaspal Singh Bhogal.
  41. He submits that this in itself defeats the claim that the matter is subjudice on the basis that the parties in the two matters are similar when evidently they are not. He submits that on the issue of the two cases raising similar issue, he has approached this Honorable court to claim his rights as a co-proprietor of the suit property and which proprietorship was in existence even before the death of the other proprietor.
  42. He submits that he is not seeking his rights as a beneficiary to any estate but as a right accrued upon him by virtue of his name appearing on the copy of the certificate of title as produced. He submits that the claims in the succession suit are tritely claims accrued to beneficiaries through their inheritance of the estate of the deceased whilst in this case, he is simply seeking his proprietary rights that accrued by virtue of his own acquisition of the suit property or a part thereof.
  43. He submits that this then disqualifies the claim of the matter being sub-judice based on the allegation that the two matters are of a similar nature or that they raise similar facts. He submits that in the event the Defendant still wishes to challenge the issues as to whether the facts of the two matters are the same, then it is clear that facts will have to be adduced through pleadings of both matters and other relevant documentation and each party shall be accorded an equal opportunity to prove their side.
  44. He submits that if the honorable court were to look at factual evidence, then the preliminary objection loses its essence given that the very instance that a court needs to investigate facts, then a matter cannot be raised as a preliminary point. Reliance is placed on the judicial decisions of Oraro vs Mbaja [2005] 1KLR 141 and Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Limited (1969) EA 696. He submits that the preliminary objection evidently stands to be struck out on the basis that the same has been improperly raised.
  45. The Plaintiff/Applicant submits that the fact that he is the co-proprietor of the suit property is not contested and in any event, the copy of the certificate of title produced before this honorable court clearly bears his names as a joint proprietor.
  46. He submits that the only issues that the Defendant is raising and alleging is that he never reimbursed the deceased his portion of the purchase price and that neither has he developed the suit property. He submits that these are secondary issues that do not concern the Defendant as he is not the co-proprietor and further, he has not procured any grants of letters of administration which would give him the mandate to raise these issues on behalf of the deceased.



47. He submits that the Defendant is a trespasser on the suit property as he has no valid justification of his presence therein and his denial of access to him. He submits that the only justification offered by the Defendant is that he was the holder of a power of attorney of the deceased prior to his death. He submits that it is trite that a power of attorney terminates with operation of law such as for incapacity or death. He relies on the judicial decision of CCB v MIB & Another [2014] eKLR.
48. He submits that the power of attorney also lapsed with the death of the co-proprietor being the 2<sup>nd</sup> day of August, 2022 and in the absence of any valid grants of letters of administration, the Defendant herein lacks locus to raise these issues.
49. He submits that the Defendant has also admitted to being privy to discussions between the deceased and the Plaintiff on sub-division of the suit property thus further verifying the fact that he was at all times a co-proprietor and the only issue pending was for the two proprietors to separate their interests through sub-division.
50. He submits that it is the Defendant who should be adducing proof as to the justification of his existence on the suit property and the mandate under which he is developing the suit property and worse off, denying him access to the suit property.
51. He submits that in as much as the Defendant alleges that he has not denied him access, evidence has been adduced that the Defendant has unlawfully appointed security guards to man the premises and further deny him access by keeping the gates locked at all times.
52. The Plaintiff/Applicant submits that that the application is merited as he has adequately proven his proprietary rights over the suit property and adds that he is simply seeking to enforce his rights in this capacity.
53. He submits that the application seeks to allow him access to the suit property and further deny access to the Defendant, a trespasser to the suit property who is continuously developing and deteriorating the suit property to his detriment.
54. He submits that owing to the threats previously issued to him by the Defendant, he seeks the assistance of the Officer- in charge of Nakuru Central Police Station to ensure peaceful enforcement of this order where necessary.
55. He submits that he seeks orders that the Chief Lands Registrar, Nairobi Lands Registry be compelled to produce copies of the records of the suit property in its custody which will further prove the current status of the property.
56. He submits that prayers sought are not in vain but are being sought by an innocent party trying to protect his own property. He submits that the occurrence book number produced is inadequate proof of the nature of the complaint and further denoted that a complaint, whose nature is unknown was made in Pakawa Police Station which lacks the territorial jurisdiction to deal with issues within Pipeline area where the suit property is located.
57. He submits that he has established a prima facie case by proving the existence of his proprietary rights which are being outrightly infringed by the Defendant herein and to his detriment given that he cannot access his own property.
58. He submits that the Defendant having denied him access to the suit property and continues to develop the suit property, he has established irreparable harm that cannot be compensated adequately by an award of damages. He submits that he is not aware of the exact developments and the damages likely to be caused.



59. He further submits that he is being restrained from developing portions of the suit property and making an earning from the same which earning would be impossible to compute, at this time, a claim of damages at a later stage. He questions how one makes a computation of the time lost and the psychological and mental stress he has undergone in simply trying to assert his legal rights.
60. The Plaintiff/Applicant submits that the Defendant lacks the locus to raise certain issues pertaining to the deceased and the Plaintiff herein. He submits assuming that it is the deceased who paid for the property, then does that automatically entitle the Defendant herein to the rights over the property despite the fact that the deceased and him are registered as co proprietors of the suit land?
61. He submits that the arrangement between the deceased and him was only privy to them and the only fact that matters is that he is the sole surviving proprietor of the suit property whereas the Defendant is simply a trespasser. He submits that he has always been interested in the suit property. He submits that it is not in the Defendant's position to dictate to him what he should or should not do with his portion of the suit property.
62. He submits that it is evident that he indeed has a solid basis for this suit and that his application raises substantial merited issues that ought to be strongly considered on merit by this honorable court. He prays that the preliminary objection raised by the Defendant be dismissed with costs and his application be allowed with costs.
63. The Defendant/Respondent filed his submissions on 27<sup>th</sup> October, 2023 and he identifies the following issues for determination:
  - a. Whether the preliminary objection on the ground of sub judice is merited?
  - b. Whether this Honourable Court should grant the Plaintiff the injunctive orders sought in his Application?
64. He relies on section 6 of the *Civil Procedure Act* and submits that the Plaintiff has filed the suit herein whose subject matter is land LR No 129444 which is part of the assets in dispute in Nakuru High Court Succession Cause No E034 of 2023.
65. He submits that the matter is still pending in the High Court and the Court has not pronounced itself over the ownership rights of the suit property. He submits that the invitation of this Court by the Applicant/Plaintiff to address substantive issues surrounding the said property amounts to sub judice and should be declined prima facie as the matter is already in the hands of a competent court with requisite jurisdiction.
66. The Defendant/Respondent relies on the judicial decisions of Kenya National Commission on Human Rights v Attorney General: Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR and Daniel Kipkemoi Bett & another v Joseph Rono [2022] eKLR.
67. He submits that the parties in all the two suits are the same, the property over which a declaration of proprietorship is sought is the same in the two suits and the case Nakuru High Court Succession Cause Case No. E034 of 2023: In the Matter of the Estate of Narwar Singh Bhogal (Deceased) was filed before this suit and the issues addressed are substantively similar and relate to the same property.
68. He submits that it would be prejudicial for this Honourable Court to entertain this matter yet it is pending in another court on the same issue. He submits that this suit is a recipe for confusion and chaos in the legal system and greatly offends the principle of sub judice and this only leaves the court with one option which is to strike it out instantly with costs to be borne by the Plaintiff.



69. The Defendant/Respondent submits that granting the Plaintiff the injunctive orders sought in his Application would amount to sub judice as the matter is before another court with competent jurisdiction. He submits that in the event this court would wish to consider the Plaintiff's Application, he prays that the court be guided by the judicial decision of Samuel Nyamori v Francis Abuya [2020] eKLR where the Court referred to the principles for determining whether to grant an interlocutory injunction which was laid out in Giella v Cassman Brown.
70. He submits that these principles demand that; the applicant must show a prima facie case with a probability of success; that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury and finally where the court is in doubt, it will decide the application on a balance of convenience.
71. The Defendant respondent relies on the judicial decision of Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR and submits that this suit does not demonstrate a prima facie case. He submits that this suit offends the principle of subjudice and does not raise any triable issues. Reliance is placed on Section 6 of the Civil Procedure Act.
72. He submits that this suit ought not to be entertained by this Court as the issues are already before a competent court. He submits that he has not infringed on any right of the Applicant that may warrant redress by this Court. He avers that he has no interest in disposing of the suit property or any part thereof and would not do so more so at this time when the proprietorship issue is before another court.
73. He submits that the Applicant has not demonstrated to this Court how and when he was denied access into the suit property by the Respondent. He submits that the attempt by the Applicant to seek a vacant possession of a property that is subject to succession dispute is malicious bearing in mind that the Applicant has never been interested in the affairs of the property since it was purchased by his late father.
74. He prays that this Court finds that this suit is anchored on concealed truths which raises no prima facie case. He also prays that this Court also confirms that a Preliminary Objection well-grounded on law has been raised and since the Plaintiff's rights have not been infringed in any way whatsoever in regards to the suit property, the Application fails the test.
75. The Defendant/Respondent submits that with regards to the principle of irreparable harm, he would like to submit that the Plaintiff will not suffer any irreparable harm. He submits that that he is not interested in disposing of the suit property of the suit property and could not do so in any case, due to the pending High Court Succession Cause.
76. He also submits that he has never denied the Plaintiff access to the land in question. He submits that he has stated severally that he is willing to assist in the subdivision of the said land to ensure the Plaintiff gets his share of 50% save for the fact he wishes to retain the sections he has made developments and constructions.
77. The Defendant/Respondent submits that there is no threat to the suit property as the same is preserved similar to other substrata of his father's estates.
78. He submits that it is evident that the balance of probabilities tilts in his favour. He submits that his late father is the one who paid for the suit land. He submits that the Plaintiff/Applicant herein has never been interested in the affairs and management of the property and has always left that burden on the Respondent and his late father.



79. The Defendant/Respondent submits that the Plaintiff ought to have disclosed all the material facts to the court in order to benefit from the injunction. He relies on the judicial decision of *Banis Africa Ventures Limited v National Land Commission* [2021] eKLR.
80. He submits that the Plaintiff has not disclosed all the material facts including the fact that he did not contribute to the said land and neither did he compensate his late father for purchasing the land. He submits that he has also not informed the court that he has never been denied access to the land and him and late father have always been willing to subdivide the land to ensure that the Plaintiff gets his share.
81. The Defendant/Respondent submits that in the most unlikely event that this suit proceeds to hearing, this court will be shocked to learn that the Applicant has never contributed to any outgoings on the property. He submits that the court will further be stupefied to learn that the Plaintiff has on numerous occasions sent goons and armed gang to destroy the property. He submits that the court will be astonished to learn that during the lifetime of his father, this Plaintiff stalled, frustrated and literally declined any attempts to have the property subdivided.
82. He submits that upon consideration of the above facts, the court will be persuaded to find that the balance of convenience tilts in his favour. The Defendant/Respondent ends by submitting that the Application dated 15<sup>th</sup> August, 2023 is unmerited as it does not meet the threshold for grant of injunctive orders against him and the application ought to be dismissed with costs.

#### **Analysis and Determination.**

83. I have considered the application, the affidavit in support of the application, the preliminary objection, the replying affidavit and the rival submissions filed.
84. In my view, the questions that arise for determination are:
- a. Whether the preliminary objection dated 6<sup>th</sup> September, 2023 is merited.
  - b. Whether the orders sought in the Notice of Motion application dated 15<sup>th</sup> August should be granted.

#### **A. Whether the preliminary objection dated 6<sup>th</sup> September, 2023 is merited.**

85. A preliminary objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained. Further, a preliminary objection must stem from the proceedings and raise pure points of law and should not deal with disputed facts nor should it derive its foundation from factual information.
86. In the judicial decision of *Oraro vs Mbaja* 2005 1 KLR 141 the court said:
- “A ‘Preliminary Objection’, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection and yet it bears factual aspects calling for proof, or seek to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.”
87. Before the court is a preliminary objection by the Defendant where he states that this suit and application is sub judice and reliance is placed on Section 6 of the *Civil Procedure Act*.



88. Section 6 of the *Civil Procedure Act* provides as follows:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

89. In the judicial decision of *Margaret Wachu Karuri v John Waweru Ribiro* [2021] eKLR, the Court was faced with a similar question whether sub-judice can be raised as a preliminary point and held as follows;

“For the Court to determine whether the issues herein were directly and substantially in issue with the other suit, it is this court’s considered view that it will have to ascertain facts and probe evidence by ascertaining whether the issues raised in the instant suit are the same as the ones in the Appeal aforesaid and further interrogate the prayers sought whether they are the same and relate to the same issues. On whether or not the same is sub-judice, facts have to be ascertained and a preliminary objection cannot be raised on disputed facts. Therefore, this court holds and finds what has been raised by defendant/objector does not amount to a preliminary objection, and thus the preliminary objection is not merited....”

90. Flowing from the above judicial pronouncements, in order to determine whether a matter is sub judice, it involves ascertainment of facts and a preliminary objection cannot be raised on disputed facts. This court finds and holds that the Notice of Preliminary Objection dated 6<sup>th</sup> September 2023, by the Defendant is not merited and the same is dismissed.

**B. Whether the orders sought in the Notice of Motion application dated 15<sup>th</sup> August should be granted.**

91. The Plaintiff’s/Applicant’s application is seeking injunctive reliefs from this Honourable court. In the judicial decision of *Giella vs. Cassman Brown* [1973] EA 358, the court stated the conditions for grant of interlocutory injunctions as follows;

“The conditions for the grant of interlocutory injunction are now I think well settled in East Africa. First an Applicant must show a prima facie case with probability of success. Secondly an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt it will decide an application on the balance of convenience.”

92. A prima facie case was defined in the judicial decision of *Mrao Limited vs. First American Bank of Kenya & 2 Others* [2003] e KLR as follows;

“A prima facie case in a civil case include but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”

93. The Plaintiff in his supporting affidavit to the application has attached a copy of the title and a certificate of official search dated 16<sup>th</sup> March, 2021 showing he is a tenant in common in the suit



property. This court finds that the Plaintiff/Applicant has interest in the suit property and he has a right which has apparently been infringed.

94. The Plaintiff/Applicant in support of the proposition that he has suffered irreparable harm that cannot be adequately compensated by damages submits that his denied access to develop the suit property has caused him psychological and mental stress and further he has lost time that cannot be compensated.
95. In the judicial decision of Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR, the Court of Appeal pronounced itself as follows:

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

96. In my estimation the fact that a co-tenant has been locked out of his property is evidence of irreparable injury. The applicant also states that the actions of the defendant have caused him mental anguish. This is another instance of irreparable injury. What amount of money is sufficient to compensate stress and mental anguish?
97. The third condition is that when the court is in doubt, it shall determine the application on a balance of convenience. i.e the court must establish whether the balance of convenience tilts in favour of granting the injunctive relief.
98. The Plaintiff/Applicant has also asked the court to compel the Defendant/Respondent to grant him access to the suit property as a co-owner. This prayer, in my view would have the effect of determining the suit at a preliminary stage. I find that this order can only be granted after hearing of the main suit.

### **Disposition.**

99. Consequently, I make the following orders in respect of the application dated 15<sup>th</sup> August, 2023 and the Defendants Preliminary Objection dated 6<sup>th</sup> September, 2023:
  - a. The Preliminary Objection dated 6<sup>th</sup> September, 2023 is hereby dismissed.
  - b. Pending the hearing and determination of the main suit, a temporary injunction is hereby granted restraining the Defendant, his servants, agents and/or employees from entering, developing, wasting, transferring, offering for sale, leasing or in any manner disposing of the suit property without the express consent of the Plaintiff/Applicant.
  - c. The cost of the application dated 15<sup>th</sup> August, 2023 and the Preliminary Objection dated 6<sup>th</sup> September, 2023 shall be in the cause.
100. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 11<sup>TH</sup> DAY OF APRIL, 2024**



**L. A. OMOLLO**

**JUDGE**

In the presence of:

Mr. Deenambo for Kimuge for the Plaintiff/Applicant.

No appearance for the Defendant/Respondent.

Court Assistant: Mr. Joseph Makori.

