



**Kones v Sambut Tea Limited & another (Environmental and Land Originating Summons E007 of 2024) [2024] KEELC 6166 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6166 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E007 OF 2024  
LA OMOLLO, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**WILSON KIPLANGAT KONES ..... APPLICANT**

**AND**

**SAMBUT TEA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**PAULINE CHERONO KONES (SUED AS RHE ADMINISTRATORS  
OF THE ESTATE OF THE LATE KIPKALYA KIPRONO KONES  
(DECEASED) ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction.**

1. This ruling is in respect of the Applicant's Notice of Motion applications dated 20<sup>th</sup> March, 2024 and 29<sup>th</sup> April, 2024.
2. The application dated 20<sup>th</sup> March, 2024 is expressed to be brought under Order 51 Rule 1, Order 40 Rules 1, 2, 3 & 4 of the Civil Procedure Rules and Section 68 of the [Land Registration Act](#).
3. The application seeks the following orders;
  - a. Spent
  - b. Spent
  - c. Pending the hearing and determination of the Originating Summons, this Honourable Court be and is hereby pleased to issue an order of temporary injunction restraining and/or prohibiting the Respondents herein either by themselves, their agents, employees and/or servants from trespassing, entering, subdividing, allocating, occupying, selling, leasing, charging, transferring, fencing, erecting any structures, or dealing in any way with all that



portion of land measuring 116 acres or thereabouts hived off LR No. 9932/3 occupied by the Plaintiff.

- d. That costs of this application be provided for.
4. The application is based on the grounds on its face and the supporting affidavit of one Wilson Kiplangat Kones sworn on 20<sup>th</sup> March, 2024.
5. The application dated 29<sup>th</sup> April, 2024 is expressed to be brought under Order 51 Rule 1 of the Civil Procedure Rules and direction 32 of the Environment and Land Court Practice Directions 2014.
6. The application seeks the following orders;
  - a. Spent
  - b. Spent
  - c. That the Honourable Court be pleased to order the Officers Commanding Londiani Police Division and Brooke Police Post respectively to ensure compliance of the orders of the Court.
  - d. Spent
  - e. That costs of this application be provided for.
7. The application is based on the grounds on its face and the supporting affidavit of one Wilson Kiplangat Kones sworn on 29<sup>th</sup> April, 2024.

#### **Factual Background.**

8. The Applicant commenced the present proceedings vide the Originating Summons dated 20<sup>th</sup> March, 2024.
9. The Applicant seeks the following orders;
  - a. That the Applicant has become entitled by adverse possession to all that piece of land measuring 116 acres hived off LR No. 9932/3.
  - b. That the Applicant be registered as the proprietor of the said piece of land measuring 116 acres hived off LR No. 9932/3.
  - c. That the Deputy Registrar of the Honourable Court does execute all necessary documents to facilitate registration of the Applicant as the proprietor of land parcel measuring 116 acres hived off LR No. 9932/3.
  - d. That costs of this application be provided for.
10. The 1<sup>st</sup> Respondent filed a Replying Affidavit sworn by one Sammy Chepkwony its director on 17<sup>th</sup> May, 2024 in response to the Originating Summons and the applications under consideration.
11. The applications under consideration came up for directions on 6<sup>th</sup> May, 2024 when the Respondents were granted more time to file their responses.
12. The applications were mentioned on 23<sup>rd</sup> May, 2024 to confirm filing of responses and submissions and both reserved for ruling on 3<sup>rd</sup> June, 2024.

The Applicant's Contention in the application dated 20<sup>th</sup> March, 2024.



13. The Applicant contends that the 1<sup>st</sup> Respondent is the registered owner of L.R No. 9932/3 measuring about 500 acres.
14. The Applicant also contends that the 2<sup>nd</sup> Respondents are the Administrators of the Estate of the late Kipkalya Kones (deceased), who is alleged to be a beneficial 4<sup>th</sup> shareholder of the 1<sup>st</sup> Respondent.
15. The Applicant further contends that the suit property was subdivided into four portions of 125 acres each.
16. It is his contention that on 7<sup>th</sup> March, 2024 a survey was done and after taking into consideration the road reserve and the riparian area, it was determined that each shareholder was entitled to 125 acres.
17. It is also his contention that in the year 1997 he entered into a portion of the suit property measuring 125 acres, cleared the bushes and started carrying out farming activities.
18. It is further his contention that he planted trees on the suit property which have matured, put up permanent and semi-permanent structures, planted tea and has over fifty heads of cattle and 100 goats.
19. He contends that he has been in uninterrupted and continuous occupation of the said portion of land measuring 125 acres and upon survey now measuring 116 acres from the year 1997 to date.
20. He also contends that none of the Respondents have been in possession and/or use of the suit property.
21. He further contends that the Respondents have threatened to evict him from the suit property claiming that the land belongs to the late Kipkalya Kones (deceased) by virtue of being a beneficial shareholder.
22. It is his contention that Kipngetich Kalya Kones who was a son to the late Kipkalya Kones had filed Kericho ELC Case No. 34 of 2019 against him. The suit was filed in the year 2019 after the statutory period of twelve years had lapsed.
23. It is also his contention that he filed an objection to the said suit on the ground that the Plaintiff did not have the requisite locus standi to institute it and the Court in its ruling delivered on 16<sup>th</sup> December, 2021 struck it out.
24. It is further his contention that the late Kipkalya Kones did not at any time lay claim to the suit property or even file a suit to have him evicted from the land.
25. He contends that neither the 1<sup>st</sup> Respondent nor the family of the late Kipkalya Kones attempted to evict him from the suit property during the lifetime of Kipkalya Kones.
26. He also contends that as per the pleadings filed in Kericho ELC No. 34 of 2019, the suit property is registered in the name of the 1<sup>st</sup> Respondent even though the family of the late Kipkalya Kones believes that the suit property belongs to his estate.
27. He further contends that he has occupied the suit property as his own and has a suit for adverse possession.
28. It is his contention that his entry to the suit property was without the permission of the 1<sup>st</sup> Respondent and the late Kipkalya Kones.
29. It is also his contention that it is trite that for a claim of adverse possession to succeed, the Claimant must demonstrate that the occupation was non-permissive and non-consensual. That he has demonstrated that he was not permitted or licensed to enter the suit property.



30. It is further his contention that he has lived on the suit property for a period of twenty-seven years which is in excess of the twelve years required in law. His occupation has been open, continuous and exclusive with the intention to own the land.
31. He contends that as at the time he was taking possession, the 1<sup>st</sup> Respondent had already been registered as the owner and therefore for purposes of adverse possession the time begun to run immediately after he gained entry in the year 1997.
32. He also contends that the twenty-seven-year period has been uninterrupted as the Respondents have never tried to evict him. The only case that was filed in Court was Kericho ELC No. 34 of 2019 which was struck out.
33. He further contends that in a claim of adverse possession the land claimed must be clearly identified.
34. It is his contention that the land he is claiming measures 125 acres and upon survey and planning now measures 116 acres which he is in occupation of.
35. The Applicant contends that he has established a claim for adverse possession. For the purposes of his prayer for an injunction, he also contends that has also established a prima facie case with high chances of success as he is in possession of the suit property.
36. It is his contention that he has demonstrated that he has extensively developed the suit property and therefore the balance of convenience tilts in his favour.
37. He ends his deposition by stating that the Respondents will not suffer any damage as they have never been in possession of the suit property and that since he has been in possession for a period of over twenty-seven years, he stands to suffer irreparable damage if the orders of an injunction are not granted pending the hearing and determination of the Originating Summons.  
The Applicant's Contention in his application dated 29<sup>th</sup> April, 2024.
38. The Applicant contends that his application dated 20<sup>th</sup> March, 2024 filed under certificate of urgency was placed before this Court on 12<sup>th</sup> April, 2024. The Court did not certify it urgent but directed it to be heard inter partes on 6<sup>th</sup> May, 2024.
39. The Applicant also contends that his advocates on record instructed a process server to serve the Respondents herein with all the pleadings and the directions of the Court issued on 12<sup>th</sup> April, 2024.
40. The Applicant further contends that on 26<sup>th</sup> April, 2024 the Respondents together with Kevin Kones and Yvonne Chepkirui accompanied by Hon. Nelson Koech the member of parliament for Belgut Constituency sent more than seventeen goons, agents and/or employees to the suit property.
41. It is his contention that Hon. Nelson Koech is the Chairperson of the National Assembly's Departmental Committee on Defence, intelligence and foreign relations. He is also the son in law to Pauline Cherono Kones one of the Respondents in the present matter as he is married to Yvonne Chepkirui.
42. It is also his contention that Hon. Nelson Koech is using his position in parliament to frustrate him as the police have refused to provide him and his properties security.
43. It is further his contention that the said goons, agents and/or employees of the Respondents who went to the suit property were armed with bows and arrows. They confiscated the mobile phones that belong to his farm manager & employees and destroyed two sim cards that belong to two of his employees and directed them to vacate the suit property immediately.



44. He contends that the said men cut down trees that he had planted and used them to construct a fence at the entrance of the farm that is near a river.
45. He also contends that the said men additionally destroyed a bridge that he uses with his employees to gain access to the suit property and that they have refused to give his employees their beddings, utensils and personal effects.
46. He further contends that he reported the matter at Brooke Police Station under OB No. 12/26/4/24 and went to the suit property in the company of police officers and upon interrogation reached an agreement that the men sent by the Respondents could stay the night and leave the following day.
47. It is his contention that in the same evening, he received a call from his farm manager who informed him that they had been chased away by the said goons.
48. It is also his contention that on 27<sup>th</sup> April, 2024 he went to the farm and found his livestock being driven towards Brooke by the men hired by the Respondents. One cow was injured.
49. It is further his contention that he reported the issue at Londiani Police Station under OB No. 13/27/4/2024 and that his livestock and employees are currently in the government forest land having been removed by the Respondents from the suit property.
50. He contends that there has been breach of peace on the suit property and the police have refused to give him security due to the influence of Hon. Nelson Koech.
51. He also contends that the police are cautious to act unless there is a Court order in his favor because the 2<sup>nd</sup> Respondent is related to Hon. Nelson Koech who is a close friend to Senator Cheruiyot who 'calls the shots'.
52. He further contends that it is in the interest of justice that status quo ante 12<sup>th</sup> April, 2024 be granted to preserve the subject matter.
53. The applicant also contends that he is advised by his Advocates on record that the Court is empowered by Practice Direction 32 of the ELC practice directions to make an order of status quo.
54. He ends his deposition by stating that the matter herein requires urgent intervention of the Court and reiterates that the Respondents have never been in possession of the suit property.

#### **The 2<sup>nd</sup> Respondents Response.**

55. The 2<sup>nd</sup> Respondents filed a Replying Affidavit sworn by Hon. Pauline Cheron Kones on 14<sup>th</sup> May, 2024.
56. She deposes that the Applicant is the brother of the late Kipkalya Kones who is intentionally misrepresenting facts with the intention of dispossessing his estate.
57. She also deposes that the Applicant's application is devoid of any merit as the Applicant has not been in possession of the suit land since December 2021 when they removed him after discovering his intention to unjustly claim the suit land.
58. She further deposes that the late Kipkalya Kones is a shareholder of the 1<sup>st</sup> Respondent and by virtue of the said shareholding, his estate is entitled to a share of the suit property measuring 125 acres which is an equal share as the other three shareholders of the 1<sup>st</sup> Respondent.
59. It is her deposition that in October 2001, her late husband Kipkalya Kones talked to the Applicant herein and they agreed that he would be his caretaker of the farm on the suit property. The Applicant



- was also allowed to keep livestock on the farm alongside their own livestock that included cattle, sheep and goats.
60. It is her deposition that the late Kipkalya Kones introduced the Applicant to the other shareholders of the 1<sup>st</sup> Respondent and the Applicant took occupation of the late Kipkalya Kones share of the suit property in December, 2001.
  61. It is also her deposition that the Applicant was facing financial challenges at that time and he was allowed by the late Kipkalya Kones to harvest trees and use the proceeds to support his school going children.
  62. It is further her deposition that the late Kipkalya Kones had prohibited the Applicant from putting up any permanent structures on the suit property as he had permanent houses at the Brooke area of Kericho County. The temporary wood and mabati structures on the suit property were sufficient.
  63. She deposes that at the time the Applicant was taking possession of the suit property, the land comprised of eucalyptus and cypress trees.
  64. She also deposes that the Applicant is not being truthful when he avers that he took occupation in the year 1997 and has misled the Court by stating that he planted the trees on the suit property.
  65. She further deposes that at the time the Applicant was taking possession, there were structures on the suit property and any new structures were put up on the late Kipkalya Kones's instructions with the assistance of the Applicant.
  66. It is her deposition that during the lifetime of the late Kipkalya Kones, the Applicant was in good terms with him and did not raise any claim to the suit property until he died on 10<sup>th</sup> June, 2008.
  67. It is also her deposition that after the demise of the late Kipkalya Kones, the Applicant continued to take care of the farm and that they would occasionally visit to check whether the farm was in good condition adding that at that point their relationship was warm and good.
  68. It is further her deposition that they filed Nairobi Probate and Administration Cause No. 2923 of 2008 in the year 2008 and that after succession was completed, it was agreed that the suit property would be distributed to the beneficiaries of the estate of the late Kipkalya Kones but they requested the Applicant to continue using the land to keep livestock as per the previous arrangement.
  69. She deposes that in the year 2018, it came to their attention that the Applicant had begun to plant tea on the suit property and after they made inquiries from him, he turned hostile and told them that the land belonged to him.
  70. She also deposes that her son Kipngetich Kalya Kones filed Kericho ELC No. 34 of 2019 seeking to safeguard the interests of the estate but the Applicant proceeded to plant tea contrary to the terms of his license.
  71. She further deposes that the said suit was dismissed on a point of law and did not proceed to final determination.
  72. It is her deposition that the photographs annexed by the Applicant are misleading as they do not differentiate which cattle and goats belong to their family. She adds that the structures on the land belong to them as they supplied the materials and the structures were constructed under the supervision of the Applicant who was the caretaker.



73. It is also her deposition that the tea shown in the photograph was planted in the year 2019 without their consent when they told the Applicant that he had overstayed his welcome. The 2<sup>nd</sup> Respondent explains that this conversation happened during the pendency of Kericho ELC No. 34 of 2019.
74. It is further her deposition that she has been advised by her Advocates on record that the claim of adverse possession that the Applicant is relying on is unsustainable and that the entire suit is misconceived.
75. She reiterates that the Applicant is a mere licensee on the suit property and as such does not meet the requirements of adverse possession.
76. She deposes that the Applicant's case is full of inconsistencies and is baseless as in his Statement of Defence filed in Kericho ELC No. 34 of 2019, he stated at paragraphs 4 and 7 that he was a shareholder of the 1<sup>st</sup> Respondent and was therefore the owner of the suit land and yet in the present suit he claims that the suit land measuring 125 acres belongs to the late Kipkalya Kones.
77. She also deposes that the Applicant also claimed in his Statement of Defence filed in Kericho ELC No. 34 of 2019 at paragraphs 7A, B and C that there was a family arrangement in the year 1997 between the late Kipkalya Kones and himself that the suit property was exchanged with ten acres of ancestral land in Longisa and adds that these claims do not feature in the present suit.
78. She further deposes that in Kericho ELC No. 34 of 2019 the Applicant did not claim adverse possession.
79. It is her deposition that the Applicant's case is full of inconsistencies as he did not explain how he came to know of the existence of the suit property.
80. It is also her deposition that it is curious as it is interesting that the Applicant expects the Court to believe that he was idling around, saw some uncleared land which he knew belonged to the 1<sup>st</sup> Respondent and took occupation adversely which coincidentally turned out to be a share belonging to his late younger brother the late Kipkalya Kones.
81. It is further her deposition that since it was the late Kipkalya Kones who entrusted to the Applicant the suit property as a licensee, the Applicant's application dated 20<sup>th</sup> May, 2024 and the Originating Summons lack a legal and factual basis and are incapable of surviving upon being heard on merit.
82. She reiterates that the Applicant was removed from the suit property together with his employees and livestock in December 2021 and they have on the farm their own cattle, sheep and goats.
83. She deposes that the Applicant's prayer for an interlocutory injunction restraining them from evicting him does not meet the threshold for grant of temporary injunction as it does not disclose a prima facie case.
84. She also deposes that the Applicant's application dated 29<sup>th</sup> April, 2024 contains wild allegations as it imputes involvement of her son in law Hon. Nelson Koech and Hon. Senator Aaron Cheruiyot without any substantial evidence.
85. She further deposes that they were not aware of the allegations set out in the said application until the Applicant involved the press.
86. She denies that the acts alleged in the Applicant's supporting Affidavit happened on 26<sup>th</sup> April, 2024.
87. She ends her deposition by stating that it is in the interest of justice that the Applicant's applications be dismissed and the matter be allowed to proceed to a full hearing.



### **The 1<sup>st</sup> Respondent's Response.**

88. The 1<sup>st</sup> Respondent filed a Replying Affidavit sworn by Sammy Chepkwony its director.
89. He deposes that the 1<sup>st</sup> Respondent is the registered owner of LR No. 9932/3 measuring 500 acres.
90. He also deposes that the 1<sup>st</sup> Respondent was incorporated on 27<sup>th</sup> November, 1996 by Mr. Jinaro Kibet on behalf of four beneficial shareholders.
91. He further deposes that the four shareholders were Mr. Kiprono Kipkalya Kones (deceased), Mr. Franklin Kipngetich Arap Bett, Mr. Reuben Yegon and himself adding that the 1<sup>st</sup> Respondent was incorporated as a special purpose vehicle to give effect to their intention to undertake joint investments.
92. It is his deposition that sometime in mid-1998, the 1<sup>st</sup> Respondent purchased the suit property from the Settlement Fund Trustees and took possession.
93. It is also his deposition that at that time the land was vacant and largely comprised of a mature eucalyptus plantation with pockets of indigenous trees.
94. It is further his deposition that the Applicant's contention that he took possession of the suit property in the year 1997 before the 1<sup>st</sup> Respondent acquired the land, is not true and is aimed at misleading this Court.
95. He deposes that between the years 1998 and 2001 the four beneficial shareholders held several meetings with the view of pooling resources to develop the farm jointly but this did not materialize.
96. He also deposes that they undertook a preliminary survey and curved out four portions comprising approximately 125 acres each. The said portions were apportioned to the four shareholders sometime in June 2001 and further deposes that they took possession of their respective portions and have progressively developed them.
97. It is his deposition that around that time the late Kipkalya Kones introduced his brother (the Applicant herein) to them and informed them that he had granted him permission and/or license to clear his portion and utilize it to educate his children.
98. It is also his deposition that the Applicant took possession of the suit property in December, 2001 and that the Applicant had a cordial relationship with the late Kipkalya Kones.
99. It is further his deposition that between the year 1998 and 2008 when Kipkalya Kones died, the four beneficial owners had several deliberations regarding the suit property specifically whether they could still make joint investments including setting up a tea processing factory.
100. He deposes that it is inconceivable that the late Kipkalya Kones would have engaged them in deliberations over the suit property if he had surrendered his portion to the Applicant.
101. He also deposes that they never held any joint survey or discussions with the Applicant over the suit property and they have at all times engaged the late Kipkalya Kones and after his demise, his personal representatives over the suit property.
102. He further deposes that they have always been aware that the Applicant was a licensee of the estate of the late Kipkalya Kones.
103. It is his deposition that the Applicant has never lived on the suit property or put up any permanent structures save for the tea that he planted in the year 2019 after which the beneficiaries of the estate of Kipkalya Kones sued him.



104. It is also his deposition that even though the Applicant claims that he undertook permanent developments on the suit property, no evidence has been produced for consideration by the Court.
105. It is further his deposition that prior to the year 2019, the Applicant had never approached the 1<sup>st</sup> Respondent laying any claim to the suit property.
106. He deposes that the Applicant failed to disclose to the Court the circumstances surrounding his entry and subsequent occupation of the suit property.
107. He also deposes that in the previous suit, the Applicant had averred that he was one of the founding shareholders of the 1<sup>st</sup> Respondent which was not true.
108. He further deposes that he is advised by his Advocates on record that the Applicant has approbated and reprobated on his claim noting that he has since changed tact and now claims that he is entitled to a portion of the suit property by way of adverse possession.
109. It is his deposition that given the foregoing, the Applicant has not established a prima facie case for grant of injunctive reliefs.
110. It is also his deposition that the Applicant has also not proved that he stands to suffer irreparable harm which cannot be remedied by an award of damages in the unlikely event his claim succeeds.
111. It is further his deposition that the balance of convenience is not in his favour as he has admitted that he is no longer in possession of the suit property.
112. He deposes that the orders sought by the Applicant in the application dated 29<sup>th</sup> April, 2024 are in the form of a mandatory injunction which orders are ordinarily granted upon hearing the parties and at the determination of the suit.
113. He ends his deposition by urging this Court to dismiss the Applicant's claim and the accompanying applications as he has not proved that he has been in an uninterrupted occupation of a portion of the suit property measuring 116 acres.  
The Applicant's Response to the Respondents Replying Affidavits.
114. The Applicant filed a Supplementary Affidavit sworn on 17<sup>th</sup> May, 2024 on 18<sup>th</sup> May, 2024.
115. He deposes that in response to the replying affidavit sworn by Pauline Cheron Kones, he reiterates that he has been in occupation of the suit property from the year 1997 to 26<sup>th</sup> April, 2024 when the Respondents conspired with Hon. Nelson Koech to kick him out.
116. He also deposes that the allegations that his brother the late Kipkalya Kones licensed him to use the suit property and introduced him to the other shareholders are baseless and misconceived.
117. He further deposes that the late Kipkalya Kones was not a shareholder and/or director of the 1<sup>st</sup> Respondent as the 1<sup>st</sup> Respondent's directors are Jinaro Kipkemoi Kibet and Mary Karen Chesang Kigen.
118. It is his deposition that all the pleadings in the present suit were served upon Mr. Jinaro Kibet who is the secretary of the 1<sup>st</sup> Respondent.
119. It is also his deposition that he is at a loss given that Mrs. Kones deposes that her late husband was a shareholder of the 1<sup>st</sup> Respondent.



120. It is further his deposition that the late Kones did not have the capacity to license him to use the suit property as the only people who could do that are Mr. Jinaro Kibet and Ms. Mary Karen who are the directors of the 1<sup>st</sup> Respondent.
121. He deposes that he was never employed by his late brother as a caretaker of the suit property as he was not the registered owner or a shareholder of the 1<sup>st</sup> Respondent.
122. He also deposes that since the late Kipkalya Kones was not a shareholder of the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondents claim cannot stand.
123. He further deposes that from the affidavit of Mrs. Kones, he has been in occupation of the suit property for a long time which begun in 1997 and not 2001 as alleged.
124. It is his deposition that the 1<sup>st</sup> Respondent is the registered owner of the suit property and it is only the 1<sup>st</sup> Respondent through its shareholders who could grant a license to use the land.
125. He reiterates that Kericho ELC case No. 34 of 2019 was dismissed for want of locus standi on the part of the Plaintiff and deposes that there was no need for him to claim adverse possession against a party who was not the owner of the suit property given that the 1<sup>st</sup> Respondent was not a party to the suit.
126. It is also his deposition that contrary to Mrs. Kones claim that the suit property was part of the assets to be distributed in Nairobi Succession Case No. 2923 of 2008, the suit property was not listed as one of the assets of the deceased and neither were the alleged shares held by the deceased in the 1<sup>st</sup> Respondent disclosed.
127. It is further his deposition that he was not ejected from the suit property in December 2021 as alleged and reiterates that he was evicted on 26<sup>th</sup> April, 2024.
128. He deposes that he begun to plant tea on the suit property in the year 2018 and not 2019 as alleged and planted more tea in July to August 2022 after Kericho ELC Case No. 34 of 2019 was dismissed.
129. He also deposes that the tea has not been plucked since he was 'kicked out' and therefore the Respondents are not managing the tea.
130. He further deposes that he built all the structures on the suit property and that the late Kipkalya Kones has never set foot on the suit property.
131. It is his deposition that the Respondents have since destroyed some of the structures on the suit property.
132. It is also his deposition that from the year 2022 he has been selling green leaf from the tea bushes on the suit property to Kaisugu Limited who used to pick the green leaf from Sambret Tea Buying Center situated where the suit property is and that the annual statements of Kaisugu Limited show that the green leaf he was selling was from the suit property.
133. It is further his deposition that if at all he was ejected from the suit property in 2021, how would he be getting paid for sale of the green leaf to Kaisugu Tea Limited in the subsequent years?
134. He deposes that he has not appeared before any media outlet to address the present matter as it is pending before this Court and adds that if at all its true, Mrs. Kones ought to produce the evidence in Court.



135. He reiterates that Hon. Nelson Koech and Senator Aaron Cheruiyot who are leasing some of the properties next to the suit property have joined forces with the Respondents to frustrate him as Senator Cheruiyot now herds his cows on the suit property.
136. He also deposes that he has demonstrated that the affidavit sworn by Mrs. Kones is based on falsehoods and the Court should not therefore rely on it.
137. In response to Sammy Chepkwony's affidavit, the Applicant deposes that Sammy Chepkwony is not a shareholder and/or director of the 1<sup>st</sup> Respondent and further that he has not opposed his application dated 29<sup>th</sup> April, 2024.
138. He also deposes that even though Sammy Chepkwony has annexed to his affidavit minutes of meetings held on 15<sup>th</sup> January, 2021 and 30<sup>th</sup> April, 2024 where it is alleged that the two listed directors of the 1<sup>st</sup> Respondent are trustees holding the shares in trust for the four shareholders, no registered trust deed has been annexed signed by the four shareholders and the listed directors.
139. He further deposes that Sammy Chepkwony does not therefore have capacity to swear an affidavit on behalf of the 1<sup>st</sup> Respondent and consequently, there is no proper response filed by the 1<sup>st</sup> Respondent herein.
140. It is his deposition that in Kericho ELC No. 34 of 2019 he was asserting his rights to the property and that since one of the ingredients of adverse possession is to occupy the land openly with the intention to have the land, the averments in the said suit should be taken in the context that he had the intention to own and possess the land.
141. It is also his deposition that it was not true that he had changed tact by filing the present suit and that from the annexed receipts and annual statements, he has been in occupation of the suit property prior to filing the present suit.
142. It is further his deposition that he prays that the status quo ante be restored and in order to maintain the subject of the suit, prayer 3 of his application dated 20<sup>th</sup> March, 2024 should be granted.
143. He ends his deposition by stating that the Respondents admit in their affidavits that he has been in possession for a period of over twelve years assuming that time begun to run from December, 2001.

#### **Issues for Determination.**

144. The Applicant filed his submissions on 18<sup>th</sup> May, 2024, the 2<sup>nd</sup> Respondents filed their submissions on 22<sup>nd</sup> May, 2024 while the 1<sup>st</sup> Respondent filed its submissions on 23<sup>rd</sup> May, 2024.
145. The Applicant identifies the following issues for determination;
  - a. Whether the Court should grant interim injunction pending hearing and determination of the Originating Summons.
  - b. Whether Orders of status quo ante should issue.
  - c. Costs.
146. On the first issue the Applicant relies on Order 40 Rule 1(a) & (b) of the Civil Procedure Rules, *Giella v Cassman Brown & Company Limited (1973) EA 358*, *Mrao Ltd v First American Bank of Kenya Limited and 2 Others [2003] eKLR* and submits that he has produced evidence to show that he has been in possession of the suit property for a period of over twelve years until 26<sup>th</sup> April, 2024 and has therefore demonstrated a prima facie case for adverse possession.



147. The Applicant submits that he will suffer irreparable harm which cannot be adequately compensated by way of damages if the injunction sought is not granted.
148. The Applicant relies on Pius Kipchirchir Kogo vs. Frank Kimeli Tenai [2018] eKLR and submits that he is fearful that the developments he has done on the suit property for more than two decades would be destroyed. The Applicant argues that the Respondents are likely to transfer the suit property to third parties if the injunction is not granted.
149. The Applicant relies on Pius Kipchirchir Kogo vs. Frank Kimeli Tenai (supra) and submits that the balance of convenience tilts in his favour because he will be more inconvenienced if the Court does not grant the interim injunction as compared to the Respondents who admit that they have never been in occupation of the suit property.
150. The Applicant also relies on the judicial decision of Amir Suleiman vs Amboseli Resort Limited [2004] eKLR and submits that there is a lower risk of injustice in granting orders of temporary injunction than in not granting them.
151. With regard to the second issue, the Applicant reiterates the averments in his supporting affidavit sworn on 29<sup>th</sup> April, 2024 and submits that the state of the subject matter has been interfered with and therefore in the absence of status quo orders further interference will continue and the suit property will be eroded.
152. The Applicant relies on the judicial decisions of Kenya Airline Pilots Association (KALPA) vs Co-operative Bank of Kenya Limited & another [2020] eKLR, Fatuma Abdi Jillo v Kuro Lengesen & another [2021] eKLR and seeks that orders of status quo do issue.
153. The 1<sup>st</sup> Respondent identifies the following issues for determination;
- a. Whether the Applicant has satisfied the conditions for grant of interlocutory orders of injunction.
  - b. Whether the order of “status quo” can issue in the circumstances of this case.
154. With regard to the first issue, the 1<sup>st</sup> Respondent relies on Giella vs Cassman Brown & Company Limited (1973) EA 358 and submits that the Applicant has to demonstrate that he has a prima facie case, that he will suffer irreparable harm if the injunction is not granted and that the balance of convenience tilts in his favour.
155. On whether the Applicant has established a prima facie case, the 1<sup>st</sup> Respondent relies on Mrao Ltd vs First American Bank of Kenya and 2 Others [2003] KLR 125, Gabriel Mbui v Mukindia Maranya [1993] eKLR and while reiterating the averments of its replying affidavit submits that the Applicant’s case has glaring inconsistencies as to the circumstances under which he took possession of the suit property and he has therefore not demonstrated a prima facie case.
156. The 1<sup>st</sup> Respondent also submits that Sammy Chepkwony is a duly appointed agent of the 1<sup>st</sup> Respondent and further that the Applicant is contesting the management of the 1<sup>st</sup> Respondent before this Court which does not have the jurisdiction to interrogate the management of the 1<sup>st</sup> Respondent’s affairs. The 1<sup>st</sup> Respondent relies on Gabriel Mbui vs Mukindia Maranya [1993] eKLR in support of its submissions.



157. It is the 1<sup>st</sup> Respondent's submissions that the Applicant admits that he is no longer in possession of the suit property and he cannot therefore be said to have proved to suffer irreparable harm. The 1<sup>st</sup> Respondent relies on Pius Kipchirchir Kogo versus Frank Kimeli Tenai [2018]eKLR in support of its arguments.
158. The 1<sup>st</sup> Respondent relies on Paul Gitonga Wanjau vs Gathuthi Tea Factory Company Limited & 2 Others [2016] eKLR and submits that the balance of convenience does not tilt in favour of the Applicant as he is no longer in possession of the suit property.
159. The 1<sup>st</sup> Respondent relies on the judicial decision of Hezron Kamau Gichuru v Kianjoya Enterprises Ltd & another [2022] eKLR and reiterates that the orders sought by the Applicant in his application dated 29<sup>th</sup> April, 2024 are in the form of a mandatory injunction which can only be granted upon hearing and at the determination of the suit.
160. The 1<sup>st</sup> Respondent in conclusion seeks that the Applicant's applications dated 20<sup>th</sup> March, 2024 and 29<sup>th</sup> April, 2024 be dismissed with costs.
161. The 2<sup>nd</sup> Respondent identifies the following issues for determination;
- a. Whether the Court should grant interim injunction pending hearing and determination of the Originating Summons.
  - b. Whether orders of status quo ante should issue.
  - c. Which party bears the costs of these applications.
162. With regard to the first issue, the 2<sup>nd</sup> Respondent relies on Order 40 Rule 1(a) and (b) of the Civil Procedure Rules, Giella versus Cassman Brown Co. Ltd (1973) EA 358 and submits that the Applicant has failed to demonstrate that the suit property is under any danger of being wasted or alienated by any party to the suit.
163. The 2<sup>nd</sup> Respondent submits that the Applicant has to demonstrate that he has a prima facie case, is likely to suffer irreparable loss not capable of being compensated by way of damages and that the balance of convenience tilts in his favour.
164. The 2<sup>nd</sup> Respondent relies on Peter Kariuki Njue v Severina Njira Kithumbu & another [2020] eKLR and submits that the Applicant has not demonstrated that he has a prima facie case capable of success.
165. The 2<sup>nd</sup> Respondent reiterates the averments in her replying affidavit and states that the late Kipkalya Kones is a beneficial shareholder of the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> Respondent submits that even though the Applicant argues he only recognizes the two directors of the 1<sup>st</sup> Respondent, the said directors attended meetings of the company and signed a resolution which stated that the 1<sup>st</sup> Respondent has four beneficial shareholders who are Hon. Franklin K. Bett, Sammy K. Chepkwony, Reuben K. Yegon and the late Hon. Kipkalya Kones.
166. The 2<sup>nd</sup> Respondent also relies on Peter Kariuki Njue vs Severina Njira Kithumbu & another [2020] eKLR, reiterates the averments in her replying affidavit and submits that since the Applicant has failed to demonstrate that he has a prima facie case, the Court should not consider the other two principles.
167. The 2<sup>nd</sup> Respondent submits that the Applicant has not demonstrated any irreparable loss that he stands to suffer if the orders sought are not granted.



168. The 2<sup>nd</sup> Respondent submits that the Applicant does not live on the suit property and even though he claims that he has been harvesting tea, the documents annexed to his supplementary affidavit do not contain the parcel number.
169. The 2<sup>nd</sup> Respondent relies on the judicial decision of South Imenti Bar Owners S.H.G through its Chairman James Gikunda Ntaragwi v County Government of Meru [2018] eKLR and submits that the lesser risk of injustice lies in having the status quo remain rather than having the 2<sup>nd</sup> Respondent removed from the suit property and the Applicant allowed to take possession.
170. The 2<sup>nd</sup> Respondent submits that the orders of status quo ante cannot issue as they are akin to having the 2<sup>nd</sup> Respondent evicted from the suit property. The 2<sup>nd</sup> Respondent prays that the status quo remains pending the hearing and determination of the suit.
171. The 2<sup>nd</sup> Respondent seeks that the Applicant's applications be dismissed with costs.

### **Analysis and Determination.**

172. I have considered the applications, the responses thereto and the submissions.
173. The issues that arise for determination are;
- a. Whether the Applicant has met the threshold for grant of temporary injunction pending hearing and determination of the Originating Summons herein.
  - b. Whether orders of status quo ante should issue.
  - c. Who should bear costs of the application.

### **A. Whether the Applicant has met the threshold for grant of temporary injunction pending hearing and determination of the Originating Summons herein.**

174. 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.” (Emphasis Mine)
175. It follows that the Applicant has to first establish a prima facie case. A prima facie case was defined in Mrao Limited vs. First American Bank of Kenya & 2 Others [2003] eKLR as follows;
- “A prima facie case in a civil case include but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the Court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.” (Emphasis Mine)
176. The Applicant contends that he has been in occupation of a portion of LR No. 9932/3 measuring 116 acres which is registered in the name of the 1<sup>st</sup> Respondent.



177. The Applicant also contends that he has been in peaceful possession of the suit property since the year 1997 up to 26<sup>th</sup> April, 2024 when he was forcefully ejected from the land by the Respondents. He further contends that he has for that reason acquired the suit property by way of adverse possession.
178. The Applicant is therefore seeking that a temporary injunction do issue pending the hearing and determination of the Originating Summons restraining the Respondents from dealing in any way with the suit property.
179. In response, the 1<sup>st</sup> Respondent alleges that the Applicant took possession of the suit property with the consent of the late Kipkalya Kones who is one of its beneficial shareholders and therefore his claim of adverse possession lacks merit.
180. The 1<sup>st</sup> Respondent also argues that since the Applicant admits that he is no longer in possession of the suit property, he does not therefore have a prima facie case.
181. The 2<sup>nd</sup> Respondent on the other hand also alleges that the Applicant took possession of the suit property as a caretaker of the late Kipkalya Kones sometime in the year 2001.
182. The 2<sup>nd</sup> Respondent contends that the Applicant does not live on the suit property but was allowed to take care of livestock on the land which he did until the year 2018 when he started to plant tea.
183. The 2<sup>nd</sup> Respondent also contends the Applicant was removed from the suit property in December, 2021.
184. It is not disputed that the Applicant was in possession of the suit land before he was removed from it. What is disputed is when the Applicant took possession of the suit property, the circumstances under which the Applicant took possession, how long he stayed on the land and when he left. It is evident that there exists a right which has been infringed by the Respondents and this calls for an explanation or rebuttal from them. See *Mrao Limited vs. First American Bank of Kenya & 2 Others* (Supra)
185. The explanation and/or rebuttal will be heard and determined at the hearing of the Originating Summons.
186. Considering the totality of the circumstances in the present case, it is my view that the Applicant has demonstrated a prima facie case.
187. Secondly, the Applicant must demonstrate that he will suffer irreparable injury that would not be adequately compensated by way of damages. 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 facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the Applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.” (Emphasis mine)



188. The judicial decision of Pius Kipchirchir Kogo vs Frank Kimeli Tenai [2018] eKLR provides a further explanation for what is meant by irreparable injury and states;

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.” (Emphasis mine)

189. The Applicant argues that he will suffer irreparable harm which cannot be adequately compensated by way of damages as he is fearful that the developments on the suit property which he has built for more than two decades would be destroyed.

190. The 1<sup>st</sup> Respondent argues that since the Applicant is no longer in possession of the suit property, he cannot be said to have proven that he stands to suffer irreparable harm.

191. The 2<sup>nd</sup> Respondent contends that the Applicant does not live on the suit property and since he alleges that he planted tea on the land, the alleged earnings from the tea can be calculated. Therefore, a monetary award of damages is possible in the unlikely event that the suit succeeds. That being the case, the Applicant has not demonstrated that he is likely to suffer irreparable harm not capable of being compensated by way of damages.

192. As aforementioned, the Applicant admits that he is no longer in occupation of the suit property. He alleges that his livestock and employees were evicted from the suit property and what is remaining on the land are tea bushes that he had planted.

193. I am inclined to agree with the submissions of the 2<sup>nd</sup> Respondent that the Applicant has not demonstrated that he is likely to suffer irreparable damage which cannot be compensated with damages.

194. Thirdly, The Applicant has to demonstrate that the balance of convenience tilts in his favour. In Pius Kipchirchir Kogo vs Frank Kimeli Tenai (supra) the Court held as follows;

“The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer. In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting it” (Emphasis Mine)

195. Regrettably, the balance of convenience does not tilt in favour of the Applicant. The Applicant, by his own admission, is no longer in possession of the suit land. There is no evidence or submission on what inconvenience may be suffered by him and/or that the inconvenience suffered by him is greater than that which will be suffered by the Respondents.



196. In Jonathan Cheruiyot & Another V Esther Mishack [2013] eKLR the Court held as follows;

“Where there is doubt as to the Applicant's case, the principles direct me to decide such an application on a balance of convenience. The balance of convenience in this regard is to have the suit land remain in the status that it is currently. I also have in mind that the objective of an injunction is to preserve the subject matter of the suit pending the hearing on merits of the case. In our case, I think it is best if the suit land is retained in the status that it presently is until the determination of this suit. It is regretful that I am unable to accurately define that status but whatever the status may be, let the same remain until this suit is finally disposed of.” [Emphasis Mine]

197. I find that the Applicant has failed to meet the threshold for the grant of an order of temporary injunction.

### **B. Whether orders of status quo ante should issue.**

198. The Applicant in his application dated 29<sup>th</sup> April, 2024 seeks the following orders;

- a. That the application herein be certified as urgent, heard on a priority basis and service of the same be dispensed with in the first instance.
- b. That pending the inter-partes hearing of the application herein, the Honourable Court be and is hereby pleased to issue an order of status quo ante-that the Applicant be restored into, to remain in possession and use of all that portion of land measuring 116 acres or thereabouts hived off LR No. 9932/3 occupied by the Applicant/Plaintiff.
- c. That the Honourable Court be pleased to order the Officers Commanding Londiani Police Division and Brooke Police Post respectively to ensure compliance of the orders of the Court.
- d. That pending the hearing and determination of the application dated 20<sup>th</sup> March ,2024, the Honourable Court be and is hereby pleased to issue an order of status quo ante- that the Applicant to remain in possession and use of all that portion of land measuring 116 acres or thereabouts hived off LR No. 9932/3 occupied by the Applicant/Plaintiff.
- e. That costs of this application be provided for.

199. It is important to note that the Applicant sought that the court issues an order of status quo ante pending the hearing and determination of the applications dated 29<sup>th</sup> April, 2024 and 20<sup>th</sup> March, 2024.

200. It is my view that the appropriate relief would have been for the Applicant to seek for issuance of orders of status quo ante pending the hearing and determination of the Originating Summons.

201. In the judicial decision of Issa Ahmed & 15 others vs Mohamed Al-Sawae [2021] eKLR the Court held as follows;

“The object and purpose of pleadings is to ensure that litigants come to Court with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the Court for its consideration. The pleadings are meant to give each side intimation of the case of the other so that it may be met, to enable Courts to determine what is really at issue between the parties, and to prevent any deviation from the course which litigation on particular causes must take. A Court cannot assume or infer a



case by referring to a stray sentence here and a stray sentence there in the pleading. A Court cannot exercise its judicial position to grant a relief which is not even sought by parties in their pleadings as granting the same would lead to a miscarriage of justice.” [Emphasis Mine]

202. Although parties herein have extensively submitted on whether or not an order of status quo ante should be issued, the same cannot be granted because the said orders were sought pending the hearing and determination of the applications under consideration.

203. It is important to mention that an issue was raised as to who the shareholders of the 1<sup>st</sup> Respondent are and whether the person who swore an affidavit on its behalf is a director.

These issues, if they continue to be important and/or relevant to the Applicant, shall be addressed at the hearing of this suit.

### **Disposition.**

204. The upshot of the foregoing is that the Applications dated 20<sup>th</sup> March, 2024 and 29<sup>th</sup> April, 2024 lack merit and both are hereby dismissed with costs.

205. However, noting that it may be important to preserve the subject matter of any suit pending hearing and determination, and further noting that Section 3A of the *Civil Procedure Act*, Section 13 of the *Environment and Land Court Act* and Practice Direction No. 28(k) of the Practice directions of this Court contained in Gazette Notice No. 5178 dated 25<sup>th</sup> July, 2014 give powers to this court generally and specifically to make orders for the preservation of the subject matter of any suit, I hereby issue orders as follows;

- a. The status quo obtaining as at the date of this ruling shall be maintained pending the hearing and determination of this suit.
- b. For the avoidance of doubt, parties herein are prohibited from cultivation, harvesting, charging and/or transferring the suit property and/or doing all and any activities whose effect shall be to alter the physical or legal status of the suit land pending the hearing and determination of the Originating Summons.

206. It is so ordered

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**L. A. OMOLLO**

**JUDGE.**

In the presence of: -

Mr. Langat for the Plaintiff/Applicant.

Mr. Koech for the 1<sup>st</sup> Defendant/Respondent.

Mr. Kirui for the 2<sup>nd</sup> Defendant/Respondent.

Court Assistant; Mr. Joseph Makori.

