



Macharia (Suing as the Legal Representative of the Estate of Macharia Kagio (Deceased)) v Kuria (Environment & Land Case E003 of 2024) [2024] KEELC 7219 (KLR) (31 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7219 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE E003 OF 2024
LA OMOLLO, J
OCTOBER 31, 2024**

BETWEEN

**JOHN MBUGUA MACHARIA PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MACHARIA
KAGIO (DECEASED)**

AND

ELIJAH KARIUKI KURIA DEFENDANT

RULING

1. This ruling is in respect of the Plaintiff/Applicant's Notice of Motion application dated 19th February, 2024. The said application is expressed to be brought under Sections 1A, 1B and 3A of the Civil Procedure Act and Order 40 Rule 1 & 10 of the Civil Procedure Rules.
2. The application seeks the following orders;
 - a. Spent
 - b. Spent
 - c. That this Honourable Court do issue a temporary injunction restraining the Respondent whether by himself, his agents, servant and/or employees from interfering, cultivating and/or farming, transferring, disposing of or dealing in any manner prejudicial to the Applicant's interests in the suit properties pending the hearing and determination of the main suit.
 - d. That this Honourable Court do issue a temporary injunction restraining the Respondent whether by himself, his agents, servant and/or employees from erecting semi-permanent and/or permanent structures on the suit properties pending the hearing and determination of the main suit.



- e. That upon grant of prayers (2), (3) and (4) above, the Officer Commanding Station (O.C.S) Girimori Police Station supervises execution of the said orders to maintain law and order.
 - f. That the cost of this application be in cause. (sic)
3. The application is based on the grounds on its face and the supporting affidavit of one John Mbugua Macharia sworn on 19th February, 2024.

Factual Background.

4. The Plaintiff/Applicant commenced the present proceedings by way of the Plaint dated 19th February, 2024. He seeks the following prayers;
- a. A declaration that parcels (sic) numbers Kericho/Chilchila/Kunyak Block 2 (Urafiki)/30 and 31 currently registered in the names of the 1st Defendant were fraudulently obtained and therefore illegal, null and void.
 - b. A declaration that all those parcels of land known as Kericho/Chilchila/Kunyak Block 2 (Urafiki) 30 and 31 lawfully belong to the estate of the late Macharia Kagio.
 - c. An order cancelling Title Deeds in respect to parcel numbers Kericho/ChilChila/Kunyak Block 2 (Urafiki) 30 and 31 currently registered in the names of the 1st Defendant and all entries made in the register.
 - d. An order compelling the Land Registrar Kericho, the 2nd Defendant herein, to rectify the respective registers to reflect the name of Macharia Kagio (Deceased) as the registered owner of parcel numbers Kericho/ChilChila/Kunyak Block 2 (Urafiki) 30 and 31 in lieu thereof.
 - e. A permanent injunction restraining the 1st Defendant from trespassing, farming, cultivating, constructing in or in any way interfering with the suit properties herein.
 - f. An order authorizing the Plaintiff to be at liberty to demolish structures planted around the suit properties at the 1st Defendant's expense and under the supervision of the OCS Girimori Police Station for purposes of maintaining peace and order.
 - g. Mesne profits.
 - h. General Damages.
 - i. Costs of the suit and interest thereon.
 - j. Any other or further relief as this Honourable Court may deem fit and just to grant.
5. The Defendant/Respondent entered appearance on 4th March, 2024 but is yet to file his Statement of Defence.
6. The application under consideration first came up for hearing on 21st February, 2024 when the Court gave directions that the suit properties should not be interfered with or disposed of pending further directions.
7. The application was mentioned on 9th May, 2024 when directions were issued that the application would be heard by way of written submissions.
8. The application was mentioned severally to confirm filing of submissions and was finally reserved for ruling on 18th July, 2024.



Plaintiff/Applicant's Contention.

9. The Plaintiff/Applicant contends that land parcel No's Kericho/ChilChila/Kunyak Block 2 (Urafiki) 30 and 31 were registered in the names of Macharia Kagio (Deceased).
10. The Plaintiff/Applicant also contends that he is one of the beneficiaries of the Estate of the late Macharia Kagio as he is his son.
11. The Plaintiff/Applicant further contends that his father passed away on 22nd May, 2022 and at the time of his death, the suit properties were registered in his name.
12. It is his contention that after the death of Macharia Kagio, the Defendant/Respondent fraudulently transferred the suit properties to his name without the consent of the beneficiaries of his late father's estate.
13. It is also his contention that the other beneficiaries have commenced various succession proceedings at the High Court of Kenya in Nairobi which are "HCFP & A /E3183/2022" and HCFP & A/ E550/2023" that are still pending before the Court.
14. It is further his contention that the Defendant/Respondent has continued to farm, cultivate and intermeddle with land parcel No's Kericho/Chilchila/Kunyak Block 2 (Urafiki)/30, 31, 66, 102 & 106 without the consent of the beneficiaries of his late father's estate.
15. He contends that since his father's demise the Defendant/Respondent has been farming and cultivating the suit properties without forwarding the proceeds to the beneficiaries of his late father's estate.
16. He also contends that the beneficiaries of his late father's estate stand to suffer irreparable damage as the Defendant/Respondent has declared an intention to offer for sale the suit properties with the intention to defeat this suit and the cause of justice.
17. He further contends that the Defendant/Respondent is erecting permanent and semi-permanent structures on the suit properties.
18. He prays that this Court issues an order restraining the Respondent from farming, cultivating, erecting any structures and or interfering with the suit properties in any manner prejudicial to the interests of the beneficiaries of the estate of his late father.
19. He ends his deposition by stating that he stands to suffer irreparable damage if the orders sought are not granted.

Defendant/Respondent's Response.

20. The Defendant/Respondent filed a Replying Affidavit sworn on 7th March, 2024.
21. He deposes that the allegations made against him are misleading and inaccurate.
22. He also deposes that the Plaintiff/Applicant's application is unmerited, an abuse of the Court process and should be dismissed with costs.
23. He further deposes that sometime in the month of May, 2013, the late Macharia Kagio informed him that he was relocating to Nairobi and was therefore selling his properties in Urafiki farm. The said properties were land parcel No's Kericho/Chilchila/ Kunyak/Block 2 (Urafiki) 30, 31, 66, 102 and 106 all measuring about twenty-eight acres.



24. It is his deposition that he was interested in sugarcane farming and so he decided to purchase the said properties.
25. It is also his deposition that on 31st May, 2013 he discussed with Macharia Kagio (deceased) the terms of sale and they agreed on the purchase price of Kshs. 170,000/= per acre making the total cost Kshs. 4,760,000/=.
26. It is further his deposition that the late Macharia Kagio requested for a deposit of the purchase price and on 27th August, 2013 he paid him Kshs. 400,000/= by way of banker's cheque No. 021963 issued by Family Bank Limited bearing the same date and that upon payment, they signed an acknowledgement of payment also dated 27th August, 2013.
27. He deposes that after he paid the deposit, he approached the National Bank of Kenya for a loan of Kshs. 2,080,000/= which he was granted and the said amounts deposited in his bank account No. 01245091505300 on 16th September, 2013.
28. He also deposes that on 19th September, 2013 he paid the late Macharia Kagio Kshs. 1,985,000/= vide two banker's cheques. He paid Kshs. 990,000/= vide bankers cheque No. 000606 and Kshs. 995,000/= vide bankers cheque No. 000607.
29. He further deposes that the said payments can be discerned from his account statement dated 26th February, 2024 and that the late Macharia Kagio did not raise any issue with respect to the said payments during his lifetime.
30. It is his deposition that he made a further payment of Kshs. 335,000/= on 2nd October, 2013 vide banker's cheque No. 000811 which amount was debited on 2nd October, 2013.
31. It is also his deposition that he made another payment of Kshs. 70,000/= vide bankers cheque No. 022413 dated 11th October, 2013 issued to him by Family Bank Limited wherein he holds account No. 035000006407.
32. It is further his deposition that the said payment is reflected on his statement of account dated 26th February, 2024 where Kshs. 70,000/= is indicated as money out and the banker's cheque number reflected.
33. He deposes that on 6th November, 2013 he made a further payment of Kshs. 100,000/= to the late Macharia Kagio vide banker's cheque No. 013089 issued by Family Bank Limited which payment is reflected in his statement of account as a debit on 6th November, 2013.
34. He also deposes that on the same date he and the late Macharia Kagio signed an acknowledgement of payment of all the monies paid between 19th September, 2013 and 6th November, 2013 amounting to Kshs. 2,490,000/= in the presence of a witness known as Erick Siele.
35. He further deposes that the late Macharia Kagio also acknowledged the payment of Kshs. 2,890,000/= which was part of the purchase price leaving a balance of Kshs. 1,870,000/=.
36. It is his deposition that he wanted to take a further loan of Kshs. 1,870,000/= from his bank to clear the balance and to pay for stamp duty among other expenses but when he approached the bank he was advised to avail a sale agreement showing the payments already made.
37. It is also his deposition that he approached the late Kagio who was also his guardian and they signed a land sale agreement dated 6th November, 2013 that was witnessed by Erick Siele for the sole purpose of getting the loan.



38. It is further his deposition that he took occupation of the said parcels of land in December, 2013 after the late Macharia Kagio arranged for the handover from the previous occupiers who were leasing the property.
39. He deposes that during the handover there was a complaint by the said lessees that John Mbugua, the Plaintiff/Applicant herein, had leased the said parcels to them and taken their money. The lessees demanded their money back since the suit properties had been sold.
40. He also deposes that the Plaintiff/Applicant advised his lessees to seek the assistance of the area Chief, Kapkoros Location who in his letter dated 5th February, 2024 gave a brief history of the matter and clarified the position on the ground.
41. He further deposes that the said lessees were dissatisfied with the Chief's advise and so they reported the matter at Kunyak Police Station before they went to the Deputy County Commissioner. The issue was resolved and the lessees advised to claim their money back from John Mbugua the Plaintiff/Applicant herein. He deposes that since then he has been using the suit property to date.
42. It is his deposition that he managed to obtain a loan of Kshs. 2,850,000/= from Family Bank to clear the balance of the purchase price and other related costs on 24th February, 2014 through his account No. 035000006407.
43. It is also his deposition that upon receipt of the loan, he paid the final instalment of the purchase price of Kshs. 1,870,000/= to the late Kagio on 25th February, 2014 through banking cheque No's 013532 and 013533 of Kshs. 935,000/= each which cheques were issued by Family Bank.
44. It is further his deposition that upon payment of the final instalment, the late Kagio signed a certificate of final payment in his presence and in the presence of Erick Siele on 25th February, 2014.
45. He deposes that transfers were done after following due process but the Plaintiff/Applicant registered a caution against land parcel No's Kericho/Chilchila/Kunyak/Urafiki Block 2/66, 102 and 106 even before the death of the deceased thereby frustrating the transfer process.
46. He also deposes that it is discernable from the certificates of search that the Plaintiff/Applicant registered cautions on the said properties on 19th May, 2022 ten years after he had purchased them and taken occupation.
47. He further deposes that the transfer process was therefore only successful with regard to land parcel No's Kericho/Chilchila/Kunyak Block 2 (Urafiki) 30 and 31.
48. It is his deposition that given the chronology of the said transactions, it is unfair for the Plaintiff/Applicant to state that that he fraudulently transferred the suit properties and yet he had purchased them and the transfer done after following due process.
49. It is also his deposition that even though the Plaintiff/Applicant argues that the transfer was done after the demise of his father, he has failed to demonstrate that he notified the registrar of his death.
50. It is further his deposition that the Land Registrar has the prerogative to effect transfer of land at any time.
51. He deposes that he takes strong reservations against the Plaintiff/Applicant's claims that he acquired the suit properties fraudulently and yet he had purchased them and paid the purchase price to the Plaintiff/Applicant's late father.



52. He also deposes that the Plaintiff/Applicant did not raise any issue for the entire period that he has been in occupation of the suit properties which is between December, 2013 and the date of demise of the late Macharia Kagio in May, 2022.
53. He further deposes that he obtained the late Kagio's will dated 1st June, 2021 and upon perusal, noted that the suit properties were not listed thereon which is an affirmation that the late Kagio had already sold the properties to him and removed them from his list of assets.
54. It is his deposition that the said properties were left out from the will because they had already been sold and they were therefore not available to be given to his children.
55. It is also his deposition that he obtained the succession documents filed by the executors of the said will and testament in Milimani Probate and Administration Cause Number E3183 of 2023. He observed that the executors of the will who are Edward Mwangi Macharia and James Irungu Macharia did not include the suit properties.
56. It is further his deposition that he has also managed to obtain copies of succession forms filed in Milimani Probate and Administration Cause No. E3183 of 2022 that was filed by Catherine Njeri Macharia and Teresia Wanjiru Macharia who are the daughters of the late Macharia Kagio and in the affidavit in support of the petition, the suit properties are not listed.
57. He deposes that it is questionable that the Plaintiff/Applicant is suing on behalf of the estate of the late Macharia Kagio and yet he has not filed any petition for grant of letters of administration and neither has he sought to be made an administrator or a co-administrator in the two succession causes.
58. He also deposes that the Plaintiff/Applicant has not challenged the two succession causes on account of failure to list the said properties.
59. He further deposes that the Plaintiff/Applicant is a pretender because he did not challenge his father at the time of the sale of the suit properties in the year 2013 and yet he was leasing the properties to third parties whom he had to refund after the sale.
60. It is his deposition that he instructed his Advocates on record to confirm if any objection to the appointment of administrators had been raised in the two succession causes and they informed him that none had been filed.
61. It is also his deposition that after he purchased the suit properties he invested millions of shillings to reclaim and develop the suit properties from their initial rough and rugged terrain to their current arable and habitable state.
62. It is further his deposition that he used to send his farm manager Joshua Nyotu to develop and maintain the said parcels of land.
63. He deposes that he has planted sugarcane on the suit properties among other crops and has annexed various delivery statements made to Muhoroni Sugar Company Limited from the year 2015.
64. He further deposes that he even took cane seed loans using land parcel No's Kericho/Chilchila/Kunyak/Urafiki Block 2/66 and 102 to plant the cane on the entire 28 acres and that he has annexed loan statements from Muhoroni Sugar Company Limited dated 7th March, 2024.
65. It is his deposition that due to other engagements he instructed his brother Joshua Nyotu to act as proxy and manager of his operations when he was not available and that he took over in the year 2021 and wrote letters on change of accounts before the area Chief after he discovered that his brother had embezzled funds, mismanaged the farms, acted fraudulently and tampered with his documents.



66. It is also his deposition that he opposes strongly the application seeking for an injunction to restrain him from using the suit properties as it will be an injustice since the late Macharia Kagio received all the payments in consideration of the sale of the suit properties.
67. It is further his deposition that he is advised by his Advocates on record that the scales of justice lean towards the status quo being maintained and that an injunction is unwarranted in the circumstances of this case.
68. He ends his deposition by stating that it is in the interest of fairness and justice that the Applicant's application dated 19th February, 2024 be struck out with costs.

Plaintiff/Applicant's Response to the Defendant/Respondent's Replying Affidavit.

69. The Plaintiff/Applicant filed a Further Affidavit sworn on 4th June, 2024.
70. He deposes that land parcel No's Kericho/Chilchila/Kunyak Block 2 (Urafiki) 30, 31, 66, 102 and 106 are registered in his late father's name and succession proceedings in respect of his estate are yet to be completed.
71. He also deposes that in the circumstances, any interference with the suit properties amounts to intermeddling and that the Defendant/Respondent is not a beneficiary of his late father's estate.
72. He further deposes that the ownership of the suit properties is contested because the Defendant/Respondent transferred the suit properties to his name after the demise of their late father.
73. It is his deposition that the Defendant/Respondent's actions amount to intermeddling and that he is therefore apprehensive that if the Court does not grant the orders sought, the Defendant/Respondent will continue intermeddling with the estate and possibly dispose of the suit properties thereby rendering the application nugatory.
74. It is also his deposition that he agrees with the Defendant/Respondent's averment that the Land Registrar has the prerogative to effect transfer of land at any time and without notice of the demise of the registered owner.
75. It is further his deposition that the Defendant/Respondent had full knowledge of the demise of his late father since he was his guardian and that concealment of this material fact from the Land Registrar can only be construed to be an act of fraud meant to aid his intermeddling activities.
76. He deposes that it is worth noting that the Defendant/Respondent claimed to have bought the suit properties in the year 2013 but only transferred them to his name long after his late father passed away and after a period of about ten years.
77. He also deposes that he did not raise any issue on the Defendant/Respondent's occupation of the suit properties because he believed that he had leased the land.
78. He further deposes that the Defendant/Respondent admits that even after leasing the suit properties, he did not get directly involved but instead left the land in the hands of one Joshua Nyotu.
79. It is his deposition that he refutes the Defendant/Respondent's averments that he purchased the suit properties and prays that this Court grants orders to preserve the land until the substantive suit is heard and determined.
80. It is also his deposition that the Defendant/Respondent is aware that the validity of the alleged will and testament of his late father dated 1st June, 2021 has been challenged in "HCFP&A/E. 3183/2022"



filed in the High Court of Kenya in Nairobi which matter is still pending as parties are waiting for the Court's directions.

81. It is further his deposition that since the said succession matter is yet to be concluded, he has a right as a beneficiary to be joined at any time in the course of the proceedings to defend his beneficial claim to his late father's estate.
82. He deposes that it is in the interest of justice and fairness that the orders sought in his application be granted to preserve the suit properties pending the hearing and determination of the substantive suit.
83. He also deposes that the Defendant/Respondent will not suffer any harm or loss if the orders sought are granted given that he is already benefitting from intermeddling with the property of deceased to the detriment of the rightful beneficiaries of the estate.
84. He further deposes that the Court issued orders on 21st February, 2024 which the Defendant/Respondent has continued to disregard by erecting both permanent and semi-permanent structures on the suit properties which went against the orders of the Court.
85. It is his deposition that the Defendant/Respondent has also moved the original beacons of land parcel No's Kericho/Chilchila/Kunyak Block 2 (Urafiki) 66, 102 and 106.
86. He ends his deposition by stating that it is in the interest of justice that the orders issued on 21st February, 2024 be extended and the OCS Girimori police station be ordered to enforce them.

Issues for Determination .

87. The Plaintiff/Applicant and the Defendant/Respondent's submissions are dated 4th June, 2024.
88. The Plaintiff/Applicant submits on the following issues;
 - a. Whether the Applicant is suitable to file this application. (sic)
 - b. Whether the application meets the threshold of granting an injunction.
 - c. Who should bear the costs of the suit.
89. With regard to the first issue, the Plaintiff/Applicant submits that he attached to his supporting affidavit a copy of Letters of Administration Ad Litem that were issued to him on 25th July, 2023 and he therefore has capacity commenced the present proceedings.
90. The Plaintiff/Applicant also submits that the Defendant/Respondent has raised the issue as to why he (the Plaintiff/Applicant) did not apply to be an administrator or co-administrator in the two succession causes filed in Nairobi with regard to the estate of his late father.
91. The Plaintiff/Applicant further submits that when he made the application for grant of letters of administration ad litem, neither of his family members objected and therefore he has properly brought the present suit on behalf of the estate of Macharia Kagio.
92. With regard to the second issue, it is the Plaintiff/Applicant's submissions that he filed the application under consideration under Order 40 Rule 1 of the Civil Procedure Rules which requires proof that any property in dispute is in danger of being wasted, damaged or alienated.
93. It is also the Plaintiff/Applicant's submissions that the suit properties were registered in his late father's name until 22nd June, 2022 when the Defendant/Respondent transferred the suit properties to his name after the demise of his late father.



94. It is further the Plaintiff/Applicant's submissions that he has annexed certificates of official search to demonstrate the same and therefore an injunction order should issue.
95. The Plaintiff/Applicant relies on the judicial decision of *Giella vs Cassman Brown and another* (1973) EA 358 and submits that he has demonstrated that he has a prima facie case and reiterates that land parcel No's Kericho/Chilchila/Kunyak Block 2(Urafiki)/30 and 31 were owned by his late father and that they were transferred to the name of the Defendant/Respondent after his death.
96. The Plaintiff/Applicant relies on the judicial decisions of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* Civil Appeal No. 39 of 2002, *Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & another* [2019] eKLR and submits that since the suit properties were registered in his late father's name, they are entitled to be protected under the *Law of Succession Act*.
97. The Plaintiff/Applicant relies on Section 26 of the *Land Act* and submits that the Defendant/Respondent alleges that he purchased the suit properties.
98. The Plaintiff/Applicant submits that the issue of whether the sale and transfer of the suit properties was genuine or not can only be dealt with during the trial and it is therefore prudent that orders of injunction do issue at this stage for purposes of preserving the suit properties.
99. The Plaintiff/Applicant also submits that a temporary injunction does not represent a final and irrevocable judgement as it is a measure adopted to safeguard the existing rights of an Applicant with regard to property.
100. The Plaintiff/Applicant further submits that the Defendant/Respondent admits to intermeddling with the properties of a deceased person and he is likely to sell, transfer and/or deal with the suit properties in a manner that is detrimental to the deceased's estate thereby occasioning irreparable damage.
101. The Plaintiff/Applicant relies on the judicial decisions of *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* [2018]eKLR, *Paul Gitonga Wanjau vs Gathuthis Tea Factor Company Ltd & 2 Others* [2016] eKLR, *Amir Suleiman vs Amboseli Resort Limited* [2004] eKLR and submits that the balance of convenience tilts in his favour.
102. The Plaintiff/Applicant therefore seeks that his application be allowed as prayed.
103. The Defendant/Respondent submits on the following issues;
 - a. Whether the Court should grant an interim injunction pending hearing and determination of the suit.
 - b. Which party bears the costs of the application.
104. On the first issue the Defendant/Respondent relies on Order 40 Rule 1(a) and (b) of the Civil Procedure Rules and submits that the Plaintiff/Applicant has not demonstrated that the suit properties are in any danger of being wasted, damaged or alienated and neither has he demonstrated that he (Defendant/Respondent) intends to dispose of the suit properties.
105. The Defendant/Respondent relies on the decision in *Giella vs Cassman Brown Co. Ltd* 1973, EA 358 and submits that the Plaintiff/Applicant has to first demonstrate that he has a prima facie case with a probability of success, that secondly, he has to demonstrate the real likelihood of occurrence of irreparable loss that would not be adequately compensated by an award of damages and if in doubt the Court will consider where the balance of convenience lies.



106. The Defendant/Respondent submits that the Plaintiff/Applicant has not demonstrated that he has a prima facie case with a probability of success as he has not responded to the issues raised in his replying affidavit to wit whether or not the late Macharia Kagio sold the suit properties to him and/or the huge amounts of money he (Defendant/Respondent) paid to the late Macharia Kagio among other issues.
107. The Defendant/Respondent further relies on the decision in Peter Kariuki Njue vs Severina Njira Kithumbu & another [2020] eKLR in support of his submissions.
108. The Defendant/Respondent submits that since the Plaintiff/Applicant has failed to establish a prima facie case, the Court should not consider the other two principles.
109. The Defendant/Respondent nonetheless submits that the Plaintiff/Applicant has also failed to demonstrate that he will suffer irreparable loss and further submits that it is only logical that he continues to be in occupation and use of the properties pending the hearing and determination of the suit.
110. The Defendant/Respondent relies on the decision in South Imenti Bar Owners S.H.G through its Chairman James Gikunda Ntaragwi vs County Government of Meru [2018] eKLR and submits that the lesser risk of injustice lies with having the status quo of the suit being maintained and he remains in occupation of the suit properties.

Analysis and Determination.

111. After considering the application, the response thereto, the further affidavit and the rival submissions filed herein, my view is that following issues arise for determination;
 - a. Whether the Plaintiff/Applicant has met the threshold for grant of temporary injunction pending hearing and determination of this suit.
 - b. Who should bear costs of the application.

A. Whether the Plaintiff/Applicant has met the threshold for grant of an order of temporary injunction pending hearing and determination of this suit.

112. 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.”

113. The Plaintiff/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.”



114. The Plaintiff/Applicant contends that his late father Macharia Kagio was the registered owner of land parcel No's Kericho/Chilchila/Kunyak/Block 2 (Urafiki) 30 and 31.
115. The Plaintiff/Applicant also contends that his late father died on 22nd May, 2022 and at the time of his death, he was still the registered owner of the suit properties.
116. The Plaintiff/Applicant further contends that on 22nd June, 2023 the Defendant/Respondent illegally transferred the suit properties to his name and begun erecting permanent and semi-permanent structures on the land.
117. The Plaintiff/Applicant therefore seeks that an injunction be issued restraining the Defendant/Respondent from farming, constructing structures, transferring and/or dealing in any manner with the suit properties pending the hearing and determination of the suit.
118. Among the documents annexed to the Plaintiff/Applicant's supporting affidavit is a copy of a Limited Grant of Letters of Administration ad litem issued in Ad Litem Case No. E046 of 2023 in the matter of the estate of the late Macharia Kagio on 25th July, 2023.
119. The said grant states that the late Macharia Kagio died on 23rd May, 2022.
120. The Plaintiff/Applicant also annexed copies of certificates of official search for land parcel No's Kericho/Chilchila/Kunyak/Block 2 (Urafiki)/66, 102, 106, 30 and 31 which show that the late Macharia Kagio was registered as the owner of the said properties on 6th August, 1992 and was issued with title deeds on the same day.
121. The Certificates of Official Search for land parcel No's Kericho/Chilchila/Kunyak/Block 2 (Urafiki)/66, 102 and 106 show that on 19th May, 2022 the Plaintiff/Applicant registered a caution claiming beneficiary interest.
122. The Plaintiff/Applicant also annexed a copy of the Certificate of death for Macharia Kagio which shows that he died on 23rd May, 2022. The Certificate of Death was issued on 9th December, 2022.
123. Copies of the green cards for land parcel No's Kericho/Chilchila/ Kunyak Block 2/ (Urafiki) 30 and 31 are also annexed.
124. Entries No. 2 on both green cards show that on 6th August, 1992 the late Macharia Kagio was registered as the owner of the said parcels of land while Entries No. 4 on both green cards show that on 22nd June, 2022 the Defendant/Respondent was registered as the owner.
125. The Defendant/Respondent on the other hand contends that he purchased land parcel No's Kericho/Chilchila/Kunyak/Block 2 (Urafiki)/66, 102, 106, 30 and 31 from the late Macharia Kagio for a consideration of Kshs. 4,760,000/= which amount he alleges he paid in full.
126. The Defendant/Respondent also contends that he paid the entire purchase price on 25th February, 2014 after which the Plaintiff/Applicant registered cautions on land parcel No's Kericho/Chilchila/Kunyak/Block 2 (Urafiki)/66, 102 and 106. Therefore, transfers were only effected on land parcel No's Kericho/Chilchila/ Kunyak Block 2/ (Urafiki) 30 and 31.
127. The Defendant/Respondent further contends that he has always been in occupation of the said parcels of land and that the Land Registrar has the prerogative to effect transfer at any time.
128. It is the Defendant/Respondent's contention that the Plaintiff/Applicant did not demonstrate that he had notified the Land Registrar that Macharia Kagio was deceased.



129. Among the documents annexed to the Defendant/Respondent's Replying Affidavit is a copy of a Cheque issued on 27th August, 2013 to Macharia Kagio for Kshs. 400,000/= and a copy of an 'Acknowledgement of Payment' dated 27th August, 2013 allegedly signed by the late Macharia Kagio and Elijah Kariuki.
130. The Acknowledgement of payment states that Kshs. 400,000/= had been paid as a deposit for the sale of land parcel No's Kericho/Chilchila/Kunyak/Block 2 (Urafiki)/30, 31, 102, 106 and 65 while the balance of Kshs. 4,560,000/= was to be paid not later than May 2014.
131. The Defendant/Respondent also annexed copies of his account statements and copies of cheques intended to demonstrate payment of the purchase price.
132. It is not disputed that the suit properties were initially registered in the name of Macharia Kagio (deceased). It is also not disputed that the late Macharia Kagio died on 23rd May, 2022. It is further not disputed that the Defendant/Respondent was registered as the owner of the suit properties on 22nd June, 2022 after the death of Macharia Kagio.
133. No explanation has been offered as to why registration of the suit parcels into the name of the Defendant/Respondent took over 9 years and why registration was only effected after the demise of Macharia Kagio.
134. As was held in the decision of Mrao Limited vs. First American Bank of Kenya & 2 Others (Supra), on an initial analysis of the material presented to this Court it is evident that there exists a right, the right to have property of a deceased person protected which has apparently been infringed by the Defendant/Respondent and it calls for an explanation from the Defendant/Respondent. This can only happen during a hearing.
135. In the circumstances of this case, it is my view that the Plaintiff/Applicant has established a prima facie case.
136. The second condition for grant of orders of an order of temporary injunction is that the Plaintiff/Applicant must demonstrate that he will suffer irreparable injury that would not be adequately compensated by way of damages.
137. In 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.”



138. The decision in *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* [2018] eKLR provides an explanation of what is meant by irreparable injury. It is as follows;

“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.”

139. The Plaintiff/Applicant submits that the Defendant/Respondent admits to intermeddling with the property of his late father and therefore there is a likelihood of him selling the suit properties thereby occasioning irreparable loss.

140. The Defendant/Respondent on the other hand submits that the Plaintiff/Applicant failed to demonstrate the irreparable loss that the estate of the deceased is likely to suffer that cannot be compensated by an award of damages.

141. The Defendant/Respondent’s deposition is that he has been in occupation of the suit parcels from the time he purchased them in 2013. It is his further deposition that he has been growing sugarcane on the suit parcels. The Plaintiff/Applicant does not deny the fact of occupation but contends that the Defendant/Respondent came into occupation as a lessee. The applicant further complains that the Defendant/Respondent while using the suit parcels is not making any payments to his father’s estate.

142. Taking into consideration the circumstances of this case, it is my view that the Plaintiff/Applicant has not demonstrated that the estate of the late Macharia Kagio is likely to suffer irreparable loss which cannot be compensated by way of damages if the Respondent continues his use and occupation of the suit parcels. His apprehension seems to be a probable transfer and/or sale by the Defendant/Respondent. I also note that the Plaintiff/Applicant has, in his plaint, made a prayer for mesne profits. This should be adequate compensation for use should the court determine the suit in his favour.

143. The third condition is that the Plaintiff/Applicant must 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”

144. In *Paul Gitonga Wanjau vs Gathuthis Tea Factor Company Ltd & 2 others* [2016] eKLR the Court while dealing with the issue of balance of convenience expressed itself thus;

“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the Court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was



granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the Court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The Court will seek to maintain the status quo in determining where the balance of convenience lies.” [Emphasis Mine]

145. As was held in the above cited judicial decisions, the Courts in considering the balance of convenience have to consider the route that bears the lower risk. In the present matter, there is no denial that the Defendant/Respondent is in occupation and use of the suit parcels. It is also not denied that he has sugarcane growing on the suit parcels. What is denied is that his occupation is as owner. The Plaintiff/Applicant states that he is in occupation as a lessee.
146. My view is that the balance of convenience tilts in favour of the Defendant/Respondent in respect of his use and occupation. The grant of an order of injunction poses a greater risk to the Defendant/Respondent than to the Plaintiff/Applicant. The sugarcane growing on the suit parcels may waste away if this court grants orders prohibiting the Defendant/ Respondent from continuing with his occupation and use whether as owner or lessee which is a question that shall be determined during trial.

B. Who should bear costs of this application?

147. On the question of costs of the application, the general rule is that cost shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court for good reason, directs otherwise.

Disposition.

148. Considering that it is not disputed that the Defendant/Respondent has been and continues to be in occupation and use of land parcel No’s Kericho/Chilchila/Kunyak/Block 2 (Urafiki)/30 and 31 since the year 2013, the application dated 9th February, 2024 partially succeeds and I allow it in the following terms:
- a. An order of temporary injunction is hereby issued restraining the Respondent whether by himself, his agents, servant and/or employees from transferring and/ or disposing the suit parcels i.e. Kericho/Chilchila/Kunyak/Block 2 (Urafiki)/30 and 31 pending the hearing and determination of the suit.
 - b. An order of temporary injunction is hereby issued restraining the Respondent whether by himself, his agents, servant and/or employees from erecting permanent structures on the suit parcels i.e. Kericho/Chilchila/Kunyak/Block 2 (Urafiki)/30 and 31 pending the hearing and determination of the suit.
 - c. The cost of this application shall abide the outcome of the suit.

149. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 31ST DAY OF OCTOBER, 2024.

L. A. OMOLLO

JUDGE



In the presence of: -

Mr. Mutai Mwangi for the Plaintiff/Applicant.

Mr. Kirui Evanson for the Defendant/Respondent.

Court Assistant; Mr. Joseph Makori.

