



Yator & 2 others (Suing for and on behalf of themselves & Keres Self Help Group) v Moi & another (Environment & Land Case 27 of 2022) [2023] KEELC 133 (KLR) (19 January 2023) (Ruling)

Neutral citation: [2023] KEELC 133 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 27 OF 2022
LA OMOLLO, J
JANUARY 19, 2023**

BETWEEN

**SIMON KIPSANG YATOR 1ST PLAINTIFF
MICHAEL CHEBON 2ND PLAINTIFF
MICHAEL CHIRCHIR KORIR 3RD PLAINTIFF
SUING FOR AND ON BEHALF OF THEMSELVES & KERES SELF HELP
GROUP**

AND

**GIDEON KIPSIELEI TOWETT MOI 1ST DEFENDANT
NAKURU DISTRICT LAND REGISTRAR 2ND DEFENDANT**

RULING

1. This ruling is in respect of the Plaintiffs/Applicants Notice of Motion application dated May 23, 2022. It is expressed as being brought under the provisions of Section 1A, 1B, 3, 3A and 63(e) of the [Civil Procedure Act](#), Order 40 of the Civil Procedure Rules, Section 13 and 19 of the Environment and [Land Act 2012](#).
2. The application seeks the following orders:
 - a. Spent
 - b. Spent
 - c. That the Honorable court be pleased to stop and injunct the Respondents by themselves, their agents, employees, representatives, servants, assigns from continuing with the process of subdividing, mutating, processing title deeds, selling, alienating, disposing off and or



interfering with the applicants peaceful, quiet possession and use of their identified, subdivided and occupied land parcel measuring approximately 40 acres out of LR No. 10978/8 now subdivided and registered by the respondents as Rongai/Rongai Block 6/2 in the 1st respondent's name in any manner whatsoever pending the hearing and determination of this suit.

- d. That the costs herein be provided for.
3. The application is based on the grounds on its face and supported by the affidavit sworn on May 23, 2022 by one Simon Kipsang Yator.

Factual Background

4. The Plaintiffs/Applicants commenced the present suit vide a Plaint dated May 23, 2022. In the Plaint, they pray for judgement against the Defendants/Respondents for:
 - a. A declaration that the Plaintiffs are the legal owners of all that identified, subdivided and occupied land parcel measuring approximately 40 acres out of LR No. 10978/8 now subdivided and registered by the Defendants as Rongai/Rongai Block 6/2 in the 1st Defendant's name belongs to the Plaintiffs.
 - b. A mandatory order to the Defendants to register and issue title to the said land parcel to the Plaintiffs in the name Simon Kipsang Yator.
 - c. Costs of the suit and interests.
 - d. Any other and or further relief as the Honorable Court may deem fit and just to grant.
5. The 2nd Defendant filed a Statement of Defence dated June 10, 2022 on June 14, 2022 wherein all the allegations in the Plaint are denied.
6. The 1st Defendant filed a Statement of Defence dated June 14, 2022 and filed on June 23, 2022 wherein he denies all the allegations in the Plaint.
7. The application came up for hearing on May 24, 2022 and the court directed that the Defendants/ Respondents be served with the application. The hearing of the Application was rescheduled to June 30, 2022.
8. On June 30, 2022 the court granted the Defendants/Respondents more time to file their responses to the application and complementary leave was granted to the Plaintiff/Applicant to file a Further Affidavit. A further mention dated was slated for July 25, 2022.
9. On July 25, 2022, the 2nd Defendant/Respondent stated that he was not opposing the application while the Plaintiff/Applicant and the 1st Defendant/Respondent confirmed that they had filed their submissions. The matter was reserved for ruling.

Plaintiffs/applicant S Contention.

10. The Plaintiffs/Applicants contend that they are registered as a self-help group and are comprised of fifty-six members.
11. The Plaintiffs/Applicants further contend that they registered themselves as Keres Self Help Group being members of the same Kipchekeres clan with the major objective of assisting themselves as a group to obtain land for settlement of their members.



12. It is their contention that they regularly hold their meetings at Olo-ika Hotel Nakuru where they put their minds and money together and identified the parcels of land available for sale.
13. It is their further contention that they identified a 100-acre piece of land adjacent to Kabarak Farm belonging to a company known as Rift Valley Hatcheries Ltd that was owned by Hon. Daniel Toroitich Arap Moi (Deceased).
14. It was also their contention that they approached Hon. Daniel Toroitich Arap Moi (Deceased) and informed him of their registration as a self-help group and its purposes and he agreed to assist the group ventures.
15. The Plaintiffs/Applicants contend that they informed Hon. Daniel Toroitich Arap Moi (Deceased) of the land they had identified which he was using to grow hay for his cows.
16. It is their contention that they further informed him that they had collected about eighteen million and needed not less than forty acres to enable them settle all the members. He indicated that the said amount was not enough to buy the land around that area but he accepted their proposal and the Plaintiffs/Applicants accepted his offer as a gift or grant.
17. They contend that in their negotiations, the 1st Defendant/Respondent was always present and he did not object to the transaction save that they were to bring the amount in cash. They were also instructed to get a surveyor to subdivide the land which was 100 acres into two parcels of land; them receiving forty acres while sixty acres was for one Henry Kiptiony Kiplang'at.
18. It is also their contention that they got a surveyor known as Caleb Kotut and took him to the late Hon. Daniel Toroitich Arap Moi in the presence of the 1st Defendant/Respondent where he was given instructions to move into the land and effect the subdivisions.
19. The Plaintiffs/Applicants contend that they went on the ground with the surveyor and while he was subdividing the land, the said Henry Kiptiony Kiplang'at who apparently wanted the entire parcel of land reported to Hon. Daniel Toroitich Arap Moi (Deceased) that someone was interfering with the parcel of land. They were summoned but when they showed up, Hon. Daniel Toroitich Arap Moi (Deceased). confirmed it was them and told the surveyor to continue with the work.
20. It was their contention that at that point the 1st Defendant/Respondent also sought a portion of the land and Hon. Daniel Toroitich Arap Moi (Deceased) informed him to talk to Henry Kiptiony Kiplang'at.
21. It was further their contention that the two agreed and land parcel No. 10978/8 was subdivided into three portions that is 10978/8 A, 10978/8 B and 10978/8C being approximately 40 acres for the Plaintiffs/Applicants and 30 acres each for the 1st Defendant/Respondent and the said Henry Kiptiony Kiplangat.
22. It was also their contention that thereafter they withdrew 18 million in cash from their account and informed Hon. Daniel Toroitich Arap Moi (Deceased) that they were ready to pay him the money and when they went to his residence they were directed to pay the same to the 1st Defendant/Respondent.
23. They contend that at the time the 1st Defendant/Respondent was rushing out for some urgent business so they were informed to meet up with him at their Kabarnet Gardens home where the 1st Defendant/Respondent gave them his bank account and they deposited the said sum in two tranches and on two days; by depositing Kshs. 9 million on each day.



24. It is their contention that after the agreement and the payment of the money, Hon. Daniel Toroitich Arap Moi (Deceased) informed them to get an advocate to draw all the necessary documents which they did in conjunction with the surveyor and the 1st Defendant/Respondent and the documents were drawn to subdivide and transfer the 100-acre portion of land to the Plaintiffs/Applicants, the 1st Defendant/Respondent and Henry Kiptiony Kiplang'at.
25. It is also their contention that they took possession of the 40 acres and engaged the same surveyor known as Caleb Kotut who surveyed, planned and subdivided the 40-acre portion into smaller subdivisions of $\frac{1}{4}$ acre each and created roads to facilitate their use on the parcel of land.
26. It is further their contention as they waited for the title to be issued in the name of their chairman who is the 1st Plaintiff/Applicant, the members were allocated their relevant portions and proceeded to develop them, adding that the same are now in different stages of development being residential and commercial and the members reside on them.
27. It is also their contention that they have comprehensively developed the land, used a lot of money to grade the roads and also dug up two boreholes to supply themselves with water at the cost over Kshs. 10,000,000 and that the entire land parcel was fenced into a gated community namely Keres Farm.
28. The Plaintiffs/ Applicants also contend that Hon. Daniel Toroitich Arap Moi (Deceased) died after they had fully agreed on the transaction and what was remaining was for the 1st Defendant/Respondent to transfer their portion measuring approximately 40.47 hectares to them and have a title issued.
29. It is also their contention that the process took long and they constantly inquired from the 1st Defendant/Respondent what was causing the delay and that sometime in March, 2022 the 1st Defendant/Respondent called them to his residence at Kabarak farm and told them that Kabarak University was undergoing some financial constraints which would force him to make some adjustments to their transaction to accommodate Kabarak institution and therefore their agreed parcel of land would be less than 40 acres.
30. It further their contention that the 1st Defendant/Respondent curtly informed them that he had made a decision to reduce their agreed land parcel by about 4 acres before he could give them their title to the land. He later told them that he wanted to change the whole transaction, which had been completed by the late Daniel Arap Moi, to ensure that all the parties obtained equal portions of land.
31. It was their contention that they attempted to reason and negotiate with him and informed him that the reduction of the land parcel would not be possible as they were many and that they had already allocated portions of land, taken possession and developed the same.
32. The Plaintiffs/Applicants reiterate that they are the legal owners of a portion of land parcel measuring approximately 40 acres hived out of LR No. 10978/8 having bought it if from the late Daniel Arap Moi through his company Rift Valley Hatcheries Limited. That he had signed all the relevant documents to grant them a title but after his demise, the 1st Defendant/Respondent has sought to wrongfully back track on the transaction and fraudulently transferred the entire parcel of land of about 100 acres to his name.
33. It is their contention that the 1st and 2nd Defendants/Respondents have wrongfully registered the suit property in the name of the 1st Defendant/Respondent and have subdivided the land into three portions and registered their portion of the land as Rongai/Rongai Block 6/2.
34. It is also their contention that the Defendants/Respondents have proceeded to make further subdivisions and have hived off 8 acres from the land parcel and are now in the process of further



subdividing the 8-acre portions into subdivisions of approximately ¼ of an acre each in order to process title deeds and sell off the same to third parties.

35. They further contend that the property does not belong to the 1st Defendant/Respondent. Despite being the patron of their group and having full knowledge of the transaction, the 1st Defendant/Respondent has blatantly and arrogantly informed the Plaintiffs/Applicants that he will reverse the transaction as he wishes and will in the first instance hive off 4 acres out of their land before he grants them a title.
36. The Plaintiffs/Applicants contend that they tried to obtain a search on the land parcel and even restrict the parcel of land and the activities of the 1st Defendant/Respondent at the offices of the 2nd Defendant/Respondent but were informed that it was not possible due to the circumstances and influence of the 1st Defendant/Respondent.
37. It is their contention that they are prejudiced by the Defendants/Respondents actions and stand to suffer undue and irreparable loss of use of their parcel of land. They contended that they stand to suffer anguish of eviction and several Court cases with the Defendants/Respondents and other possible third parties and purchasers unless the Honorable Court intervenes.
38. They end their deposition by stating that they held a meeting and resolved to reject the 1st Defendant/Respondent's proposals and pursue their title deed and pray for the intervention of the court to stop and injunct the Defendants/Respondents from their said activities concerning their parcel of land to enable the court to determine this matter.

1st Defendant/respondent's Response.

39. In response to the application the 1st Defendant/Respondent filed a Replying Affidavit sworn on June 14, 2022.
40. The 1st Defendant/Respondent contends that the application is frivolous, vexatious and an abuse of the process of the court.
41. He further contends that the Plaintiffs/Applicants admit that the alleged transaction was between the Self-Help Group and a Company known as Rift Valley Hatcheries Limited and not him.
42. He also contends that he has been advised by his advocates on record which advise he verily believes to be true that by virtue of the doctrine of privity of contract, he cannot be sued in relation to a transaction he was not a party to.
43. It is his contention that the Plaintiffs/Applicants have annexed a Certificate of Title in the name of the said Limited liability Company and consequently, they ought to have sued the said limited liability company since it is a legal entity capable of being sued in its own name.
44. It is also his contention that the Plaintiffs/Applicants have not annexed any documents proving that he and his late father had shares or that they were directors in the said limited liability company.
45. It is his further his contention that there could be no way that he received the purchase price on behalf of the company which is a separate legal entity.
46. He also contends that as can be seen from the annexure marked SKY IV, the Plaintiffs/Applicants indicated that the purpose of the payment was 'transfer of funds' and not for purchase of the alleged parcel of land.



47. It is his further contention that the Plaintiffs/Applicants are contradicting themselves in paragraph 15 of their Supporting Affidavit where they claim they purchased 40 acres and later in paragraph 23 they claimed that 40.47 hectares was to be transferred to them and so they do not even know what they actually bought.
48. The 1st Defendant/Respondent contends that the Plaintiffs/Applicants claim that they were gifted 40 acres and yet they claim they paid him 18 million for the purchase of the said parcel of land is in itself a contradiction.
49. He contends that it is clear that the alleged transaction was supposed to be a sale and it involved land, and it ought to have been reduced in writing, signed by all parties and the signature of each party signing had to be attested by a witness who was present when the contract was signed by such party.
50. It was his further contention that he is advised by his advocates on record that pursuant to Section 3(3) of the *Law of Contract Act*, they are barred from bringing this suit since the same revolves around the disposition of an interest in land.
51. He contends that the transfers marked as annexure SKY V are suspicious since the limited liability company has not sealed the same and that they are trying to allege that his late father was transferring the said property in his personal capacity.
52. It was his contention that the Certificate of Title annexed as annexure SKY VII shows that his interest over LR 10978/8 was for 99 years from the 1st day of December, 1997.
53. The 1st Defendant/ Respondent contends that consequently, even if the title is dated August 5, 2019, he acquired interests over the said parcel of land long before the alleged transaction.
54. He ends his deposition by stating that the Plaintiffs/Applicants are nothing but busy bodies trying to vex him.

Plaintiffs/applicants Response To The 1st Defendant/respondent's Replying Affidavit.

55. In response to the 1st Defendant/Respondent's Replying Affidavit, the Plaintiffs/Applicants filed a Further Affidavit sworn by the 3rd Plaintiff/Applicant one Michael Chirchir Korir on July 21, 2022.
56. It is his contention that the Defence and Replying Affidavit contents are mere denials, shallow and not backed up by any witness or even a single document.
57. It was also his contention that in contrast to the 1st Defendant/Respondent's reply to their application, their supporting affidavit is fully backed by documents, photographs and witnesses to the transaction including payment of money.
58. It is further his contention that the 1st Defendant/Respondent purports that they do not know the difference between a purchase and a gift when they have stated that even though the late Daniel Arap Moi thought that the money they gave him was not enough to purchase the suit land, he accepted it anyway.
59. It was his contention that the 1st Defendant/Respondent claims that he does not have power or role to issue the title deed which role nobody proposed to him as the late Daniel Arap Moi who was the vendor charged him as his son with the responsibility to ensure they obtain a title deed to their parcel of land.
60. The 3rd Plaintiff/Applicant deposes that the 1st Defendant/Respondent alleges that the parcel of land was in the name of a limited liability company which is a separate legal entity from the late Daniel



Toroitich Arap Moi and yet he does not explain why the late Daniel Toroitich Arap Moi signed documents on behalf of the company and how he became the registered owner of the property.

61. It is his further contention that the 1st defendant/Respondent's response is an attempt to deny and evade and has not explained why he hived off a portion measuring approximately 8 acres from their portion of the property and is busy subdividing it into smaller portions to prepare title deeds and sell off the portions for personal gain.
62. He deposes that the 1st Defendant/Respondent's statement that under the doctrine of privity of contract, he owes no obligation to them as he was not a party to the transaction when it was clear that the late Daniel Arap Moi always called him and the purchase price was deposited in his account.
63. It is his deposition that the 1st Defendant/Respondent has not denied that the purchase price money was deposited into his account and that the signatures and personal documents of the late Daniel Toroitich Arap Moi are annexed to the various documents.
64. He further deposes that the 1st Defendant/Respondent alleges that the transaction was between themselves and a company known as Rift Valley Hatcheries Ltd and not himself but does not explain why he was interfering with them on their property.
65. It is his deposition that the 1st Defendant/Respondent alleges that they have not annexed documents proving that he and his late father had shares or were directors of the company and yet he does not explain why he signed together with his father for the company and that he is still transacting on property.
66. It is his deposition that they have not contradicted themselves in stating 40 acres or 40.47 hectares as the same was a typographical error adding that they purchased 40 acres out of LR No. 10978/8 which measured approximately 100 acres.
67. The 3rd Plaintiff/Applicant reiterate that they were involved in a land purchase transaction and all documents reduced in writing, signed and witnessed by many people and documents were given by the late Daniel Toroitich Arap Moi to the 1st Defendant/Respondent and Caleb Kotut who was to prepare a title deed for them in their name.
68. It is his contention that the 1st Defendant/Respondent is trying to renege on their agreement and has fraudulently acquired the title deed to the land that he has backdated and that it is necessary that the orders of injunction do issue against him and the matter proceeds to formal hearing.
69. He further contends that the 1st Defendant/Respondent cannot state that the parcel of land belonged to Rift Valley Hatcheries Ltd yet he now has title to the land parcel in his name.
70. The 3rd Plaintiff/Applicant reiterates the contents of the Supporting Affidavit and ends his deposition by seeking that the court intervenes and injuncts the Defendant/Respondents.

Issues For Determination.

71. The Plaintiffs/Applicants filed their submissions dated July 21, 2022, on July 22, 2022 where they reiterated the contents of their Supporting Affidavit and Further Affidavit. They submit that they have set out a prima facie case with high chances of success and also that the balance of convenience tilts in their favor. They concluded their submissions by seeking that their application be allowed with costs.
72. The 1st Defendant/Respondent filed his submissions on July 18, 2022 and identifies the following issues for determination:



- a. Whether the Plaintiff/Applicant has met the conditions requisite for the grant of the orders sought.
 - b. Whether the Plaintiff/Applicant is entitled to be granted the prayers sought herein.
73. On the first issue, the 1st Defendant/Respondent relied on Order 40 Rules 1, 2, 4 and 5 of the Civil Procedure Rules 2010 and the case of Giella Vs Cassman Brown & Co. Ltd [1973] E.A among other cases.
 74. He submits that the suit property belonged to Rift valley Hatcheries Limited which is a different legal entity from the 1st Defendant/Respondent and so the doctrine of privity of doctrine stops them from bringing a claim against him.
 75. He reiterated the contents of his Replying Affidavit and relied on the cases of Benson Wandera Okuku v Israel Were Wakho [2020] eKLR, Jennifer Nyambura Kamau Vs Humphrey Nandi [2013] eKLR, Koinange & 13 Others vs Nyati [1984] EA, Gudka Vs Dodhia C.A No. 21 of 1980, Richard Ekwesera Onditi Vs Kenya Commercial Finance Co. Ltd; CA no. 329 of 2009 Nairobi and submits that no documentation or evidence was placed before the court pointing to fraud on his part.
 76. On the second issue, the 1st Defendant/Respondent relies on the case of Waithaka Vs Industrial and Commercial Development Corporation [2001] eKLR and submits that the Plaintiffs/Applicants will not suffer irreparable damage if the court refuses to grant the temporary injunction.
 77. In my view, the following issues arise for determination:
 - a. Whether an interlocutory injunction should issue against the Defendants.
 - b. Who bears the costs of the application?

Analysis And Determination.

78. I have taken into consideration the supporting affidavit, supplementary affidavit and the replying affidavit filed herein. I have also taken into consideration the documents annexed, the rival submissions filed by both parties and the judicial decision relied upon.

A. Whether an interlocutory injunction should issue against the Defendants.

79. In order to answer this question, I will consider whether the Plaintiffs/Applicants have met the criteria for the grant of an order of temporary injunction.
80. Order 40 Rule 1 provides that the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.
81. Section 1A of the Civil Procedure Rules is to provides for the overriding objectives of the *Civil Procedure Act* and Rules. They Act and the rules are meant to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
82. Section 1B of the Act spells out the duty of the court in furthering the overriding objectives of the Act. One of the aims of the court shall be the just determination of proceedings.
83. Section 63 (e) of the *Civil Procedure Act* also gives the court discretion to make such other interlocutory orders as may appear to the court to be just and convenient in order to prevent the ends of justice from being defeated.



84. The guiding principles for the grant of an order of temporary injunction are set out in the case of *Giella Versus Cassman Brown (Supra)* and reiterated by the Court of Appeal in the case of *Nguruman Limited Vs Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014) eKLR* as follows:

“in an interlocutory injunction application, the Applicant has to satisfy the triple requirements to a, establish his case only at a prima facie level, b, demonstrate irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

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

85. An analysis of this decision is that a person applying for an order of temporary injunction must demonstrate that he or she meets the three criteria. The meeting of only one or only two shall not be adequate for the grant of orders of temporary injunction.

86. The first criteria is that the applicant must establish a prima facie case. The learned Judge in the case of *Mrao Ltd Vs First American Bank Of Kenya Ltd (2003) eKLR* explains what constitutes a prima facie case as follows:

...in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

87. In the affidavit in support of their application, the Plaintiffs/Applicants contend that they bought a portion of land parcel No. 10978/8 measuring approximately 40 acres from the late Daniel Toroitich Arap Moi (Deceased) for a consideration of 18 million, which amount was paid to the 1st Defendant/Respondent.

88. The Plaintiffs/Applicants annexed certain documents to the affidavit in support of their application. They are:

- a. A Certificate of title of the suit property registered in the name of Rift Valley Hatcheries Limited.
- b. Applications of funds transfer dated November 13, 2014 and November 14, 2014 totaling to a sum of Ksh. 18 million from the Plaintiffs/Applicants to the 1st Defendant/Respondent.
- c. A copy of executed transfer forms from Rift Valley Hatcheries Limited to Simon Kipsang Yator date July 31, 2016 of a portion measuring 16.2 Hectares of land reference number 10978/8 as a gift and signed by the late Daniel Toroitich and Simon Kipsang Yator.
- d. A copy of a transfer form dated July 31, 2016 from Rift Valley Hatcheries Limited to Gideon Kipsiele Towett Moi the 1st Defendant/Respondent herein transferring a portion of land parcel No. 10978/8 measuring 12.14 Hectares signed by the late Daniel Toroitich and the 1st Defendant/Respondent herein.

89. The Plaintiffs/Applicants contend that after the late Daniel Arap Moi signed the transfer, he died before the property could be transferred to them and later the 1st Defendant/Respondent who was



involved in the transaction backtracked on the agreement and transferred the entire land to himself. They annexed;

- a. A Certificate of title for land reference No. 10978/8 dated August 5, 2019 measuring 40.47 Hectares in the name of the 1st Defendant/Respondent.
 - b. A Lease of the parcel of land No. 10978/8 registered in the name of the 1st defendant/Respondent and a Mutation form showing the intended subdivisions of a portion of the property which the Plaintiffs/Applicants claim measures around 8 acres which the 1st Defendant/Respondent further intends to subdivide into ¼ acre plots for sale to third parties.
90. The 1st Defendant/Respondent on the other hand deny the contentions of the Plaintiffs/Applicants, states that the property belonged to Rift Valley Hatcheries Limited who the Plaintiffs/Applicants ought to have sued instead of suing him. He, however, offers no explanation on the application for funds transfer and/ or whether the said funds were received or not.
91. What is clear, is that there exists a legal right which has apparently been infringed by the 1st Defendant/Respondent and this calls for an explanation or rebuttal from him. Essentially, the plaintiff has established the existence of a prima facie case.
92. Secondly the Plaintiffs/Applicants have to demonstrate that irreparable injury will be occasioned to them if the order of temporary injunction is not granted. The Court in the case of Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) eKLR explained irreparable injury 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.”
93. The Plaintiffs/Applicants depose that the 1st Defendant/Respondent has hived off a portion of their parcel of land measuring about 8 acres which he intends to subdivide into portions of about ¼ an acre each and transfer the same to third parties. In support of their allegations they have annexed a mutation form of the suit property dated April 19, 2022.
94. The Plaintiffs/Applicant also content that they had already sub-divided the 40 acres of land, taken occupation and have commenced the process of putting up of residential and commercial buildings. They have further shown the likelihood of sale of the suit land by attaching a mutation form. This is adequate demonstration that they are bound to suffer irreparable injury if the orders of temporary injunction are not granted.
95. The third criterion is that the applicant must allay any doubts as to irreparable injury being occasioned to him/ her / it by further showing that the balance of convenience is in his/her/its favour. The learned Judge in Pius Kipchirchir Kogo Vs Frank Kimeli Tenai [2018] eKLR explains the meaning of balance of convenience thus:

‘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.”

96. In the case of Paul Gitonga Wanjau Vs. Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR, the court 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”

97. In Amir Suleiman Vs Amboseli Resort Limited [2004] eKLR the learned judge offered further elaboration on what is meant by “balance of convenience” and stated

“The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”

98. Based on the facts which have been deposed and remain unchallenged, such as the fact of occupation and development of the suit land by the Plaintiffs/Applicants and the imminent sub-division of the suit land, I find that the balance of convenience tilts in favour of the Plaintiffs/Applicants. This means that the plaintiffs/Applicants have been able to demonstrate that the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting it. There is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. I also note that I have not had the opportunity to hear from the 2nd Defendant/ Respondent.

99. The decision in Robert Mugo Wa Karanja Vs Ecobank (Kenya) Limited & Another [2019] eKLR offers further useful insights. The Learned Judge in deciding on an injunction application stated;

“circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to grant a temporary injunction to restrain such acts.....”

100. I am persuaded that if orders of temporary injunction are not granted in this suit, the property in dispute is in danger of being wasted, damaged or alienated.



B. Who shall bear the costs of this application?

101. Section 27 of the *Civil Procedure Act* provides that costs shall follow the event. The successful party shall ordinarily have costs.

Disposition.

102. In view of the foregoing, I find that the Plaintiff/Applicant has met the criteria for grant of orders of temporary injunction. Consequently, I issue the following orders:

- a. An order of temporary injunction is hereby granted against the Defendants/Respondents by themselves, their agents, employees, representatives, servants, assigns from continuing with the process of subdividing, mutating, processing title deeds, selling, alienating, disposing off and or interfering with the Plaintiffs/Applicants peaceful, quiet possession and use of their identified, subdivided and occupied land parcel measuring approximately 40 acres out of LR No. 10978/8, now subdivided and registered by the 2nd Defendant/Respondent as Rongai/Rongai Block 6/2 in the 1st Defendant/Respondent's name, in any manner whatsoever pending the hearing and determination of this suit.
- b. The cost of the Application shall abide the outcome of the suit.

103. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 19TH DAY OF JANUARY, 2023.

L. A. OMOLLO

JUDGE.

In the presence of: -

for the Plaintiffs/Applicants.

for the 1st Defendant/ Respondent.

for the 2nd Defendant/ Respondent.

Court Assistant; Ms. Monica Wanjohi

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