Welime (Suing as the legal representative of the Estate of the Late David Wanjala Welime) v Iraru (aka) Kenyatta & 7 others (Land Case E018 of 2024) [2024] KEELC 13943 (KLR) (11 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13943 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

LAND CASE E018 OF 2024

EC CHERONO, J

DECEMBER 11, 2024

BETWEEN

NICHOLAS SITATI WELIME (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE DAVID WANJALA WELIME) ..... PLAINTIFF

AND

GEORGE OKIMARU IRARU (AKA) KENYATTA ..... 1ST DEFENDANT

WILLYSHARE IRARU ..... 2ND DEFENDANT

ELLY EPALA ..... 3RD DEFENDANT

DAVID OSIRU ..... 4TH DEFENDANT

JULIUS NYONGESA WANYONYI ..... 5TH DEFENDANT

GEOFFREY IRARU JUMA ..... 6TH DEFENDANT

WALTER ETYANG ..... 7TH DEFENDANT

COSMAS IRARU ..... 8TH DEFENDANT

RULING

1. The Plaintiffs/Applicants commenced this suit vide a plaint dated 2nd July, 2024 contemporaneously with a Notice of Motion application under certificate of urgency also dated 2nd July, 2024. When the interlocutory application was placed before me sitting as the duty judge, I directed that the said application was not urgent to be heard on priority basis. I also directed the application to be canvassed by affidavit evidence and written submissions

2. The said application is opposed by George Okimaru, the 1st Respondent herein filed vide a Replying Affidavit filed in court on 27/9/2027.

Applicants Summary of Facts

3. The Applicant in his supporting affidavit stated as follows;

    1. That he the administrator of the Estate of his father David Wanjala (deceased) who is the registered proprietor of land parcel No. Kamukuywa Settlement Scheme/Naitiri/138, now Bungoma/Kamukuywa/138 having acquired the same in the year 1976. He attached a copy of letters od administration,search and certificate of Title and marked NW-1, 2 & 3 respectively.

    2. That in the year 1982, a suit was filed at Bungoma High court being HCCC NO. 127 of 1982; Habel Iraru Okimaru VERSUS David Wanja Welime challenging the ownership rights of the Applicant over the suit land which suit was dismissed with costs to the defendant who is the Applicant herein. He attached a copy of the Court Ruling dated 18/10/1982 as NW-4.

    3. That pursuant to the aforementioned decision, the Applicant undertook to enforce the eviction order by affirming his rights over the suit land and successfully evicted the trespasser, one Habel Iraru Okimaru. He attached a copy of eviction order dated 27/10/1982 and marked NW-5.

    4. That on 11th November, 1994 the legal representative of the aforementioned trespasser instituted another suit in court being HCCC No. 128 of 1994; George Okimaru Iraru (as legal representative of the estate of Habel Iraru Okimaru, Deceased) v Margaret Welime Wanjala (as legal representative of the estate of David Wanjala, Deceased) challenging the Applicant's ownership of the land for a second time. This suit was dismissed for want of prosecution by a Ruling dated 21st July, 2009. A copy of the said Ruling dated 21/7/2009 is attached and marked NW-6

    5. That on 7th March, 2012 the then legal representative of Habel Okimaru successfully revived the suit when the High Court granted orders allowing the continuation of the previously dismissed suit. That despite this revival, they failed to prosecute the suit, resulting in its dismissal for want of prosecution on 28th May 2017, marking the third such dismissal. A copy of the said Ruling is attached and marked NW-7.

    6. That following the third dismissal, they belatedly filed a notice of motion dated 8th July 2019, seeking leave to file an appeal against the aforementioned ruling out of time. This application was dismissed on 23rd January 2020, the court citing a lack of merit in the intended appeal.

    7. That without any colour of right and justification, the Respondents herein while applying the laws of the jungle, have forcibly entered the suit land accompanied by a group of men bearing weapons, the Respondents and their agents occupied the land, erected structures, and destroyed the Applicant's crops and sugarcane plantation.

    8. That alarmed by these unlawful developments, the Applicant filed an application dated 26th January 2024, anchored on the former Civil suit No. 128 of 1994. However, in its Ruling delivered on 20th January 2024, the court opined that the dismissal of Civil suit No. 128 of 1994 for want of prosecution rendered the court functus officio and concluded the suit in the same manner as a final judgment. Consequently, the court deemed the Applicant's prayers moot and thus the purpose of suing the new and/or current trespassers. A copy of the said Ruling is attached and marked NW-8.

9. That the Applicant asserts that there is no judgment nor order taking away the ownership of the suit land from them and that the suit property is part of the Estate of his Deceased Father which he is in the process of administering in accordance to the laws of succession.

10. That the Applicant avers that the Respondents continue to unlawfully occupy the Applicant's suit land, unjustifiably restricting the Applicant's access and free movement on the land.

11. That the Applicant is apprehensive that the Respondent's forceful occupation of the suit land has prevented him from harvesting his sugarcane which is now at the risk of perishing. That despite employing all necessary measures to secure the sugarcane, the Applicant has met with hostility from the Respondents and their agents.

12. That on 12th January 2024, the Respondent invaded the suit land with goons and proceeded to set ablaze the Applicant's sugarcane plantation resulting into an estimated loss of Ksh. 10,000,000/. The matter was reported at Mukuyuni Police Station via OB Number 10/6/3/2024. Later, the police came to the scene, took photos and subsequently arrested the defendants and are currently facing the charges at Kimilili Magistrates Court via Criminal case No. E082 of 2024 and more arrests are expected after the defendants burnt more canes on 28/06/2024.

13. That the Respondents actions exemplify a well schemed approach intended to defeat justice.

14. That given the sad circumstances, the Applicant's sugarcane which have been earmarked for harvesting cannot be accessed because the Respondents by themselves and also aided by goons, continue to violate the Applicant's right to property.

15. That the gist of the urgency therefore is to accord the Applicant an opportunity to harvest the sugarcane in the suit land, at least to preserve the same from going to waste as the court deals with the other limbs of the application.

16. That the Defendant/Respondents will suffer no prejudice if the orders sought are granted as they did not plant the said cane.

Respondents' Summary of Facts.

4. The Respondent opposed the said application vide a Replying affidavit filed in court on 27/09/2024 and stated as follows;

    1. That I do not deny the fact that over the years we have been before the courts and the litigation history referred to by the Applicant is largely but not entirely correct.

    2. That if the purpose of the history is to show that we have lost the right to defend ourselves over the suit property then that effort should fail. We shall be contending, if need be, that the Applicant has been and is still attempting to use the said litigation to sanitize his fraudulent acquisition of the suit property and defeat justice, which this court should reject.

    3. That my late father was an illiterate old man who worked hard as a skin dealer and was then blessed with the acquisition of the 37 acre parcel comprised of the suit property which he declined to sell to the Applicant's father and died insisting that he never sold, either in part or whole.

    4. That his resolve not to sell his land was informed of the fact of the hard work it took him and as a pioneer settler in the Kamukuywa Settlement Scheme, far away from home in Teso Busia,

had proceeded to assist his brothers James Okiru and Omai Iraru to obtain their own parcels nearby.

5. That my father also lost his younger brother Wildad Otwane who had two wives with several children which entire family he adopted as his own and settled there. Indeed, he buried the said Otwane in the suit property in 1980.

6. That before his own death, my father left a strict oral will to be buried on his land, the suit property, next to his brother and we obeyed and buried him there on 9th July, 2024 after 18 years in the mortuary at Webuye.

7. That on the application before court, the first fact to note is that the suit referred to as Bungoma High Court Civil Cause No. 127 of 1982 does not exist, never existed and cannot therefore be the anchor for the orders sought in the application before Court.

8. That even if the said suit and any orders thereunder were to be assumed to have existed, the same cannot be enforced in 2024 because they are stale and time barred under the *limitation of Actions Act* after 12 years during which period they were not enforced.

9. That as a matter of fact, Bungoma ELC No. 128 of 1994 was commenced 12 years after, with the purpose of evicting the plaintiff from parts of the suit property.

10. That the truth is that ever since the plaintiff hatched his scheme to take my father's land, we have never given him peace nor has he ever given us peace. We do not let him have his way and in whichever little way we could, we have resisted and continue to resist in the hope that justice will one day be done.

11. That when in 1981 our advocate Nyairo received a reply from the chairman of the Tongaren Land Control Board stating that the consent obtained was for transfer of 19 acres from Kamakuywa /138, the exact size of the land the plaintiff had obtained from our neighbour Cosmas Simiyu.

12. That we resolved as a family to insist on at least keeping the 18 acres before we could fight to recover the 19 acres and have always cultivated parts of the land for food while he uses the rest to cultivate cane and other crops. He annexed of the said letter dated 3rd March, 1981 as GOI-1.

13. That meanwhile, it was established that the plaintiff's father had used his transaction with Cosmas Simiyu for the entire Bungoma/Kamakuywa/139 Measuring 19 acres and cunningly switched the consent to fraudulently acquire our Bungoma/Kamakuywa/138 Measuring 27 acres instead.

14. That while it is true that my family and I are resident on the suit property Bungoma/ Kamakuywa/138, it is not correct to allege that we entered therein by invasion on 12/1/2024. The plaint and the statement of Defence in Bungoma ELC 128 of 1994 confirms this. He annexed copies of the Amended plaint and Amended statement of defence and marked GOI-2 (a) & (b).

15. That my father's suit Bungoma ELC No. 128 of 1994 was dismissed for want of prosecution and in an application brought against me after the dismissal to evict us was dismissed on 20-06-2024, decision over which the plaintiff sought interpretation over in Bungoma ELC Misc. Appl. NO. E12 of 2024 thus challenging the court's holding.

16. That our position is that since the said interpretation is yet to be determined, this suit is improperly before this court, since it was filed after and it should therefore either be withdrawn or stayed pending the interpretation.

17. That besides, this suit has been instituted in violation of the res-judicata doctrine since the issues raised therein were or ought to have been conclusively determined in Bungoma ELC No.128 of 1994.

18. That the need for temporary orders of injunction to enable the Applicant harvest sugarcane from parts of the suit property is no longer necessary since the cane therein was harvested under a consent between the parties which the defendant honoured but which the plaintiff has breached by refusing to withdraw the criminal charges he instituted against the defendant and his family. A copy of the consent is annexed and marked GOI-2.

19. That even the alleged loss of Ksh. 10,000,000/ from the cane which is denied, does not arise considering that

20. The consent enabled the plaintiff to harvest the said cane.

21. That it is not true that I have invaded the home of the Applicant on the suit property and allegedly damaged property and injured persons thereon. In any case, the plaintiff does not and has never lived on the suit property which he only cultivates.

22. That in view of the foregoing, the prayers sought in the application should not be granted as the suit stands no chance of seeing the light of the day being one fit for striking out.

23. That still should the court find that the matter merits going into trial, then the reliefs sought can only be determined by the court through a substantive hearing where evidence would have to be adduced in proof of the alleged contents of plaintiff's pleadings.

Plaintiff/Applicant's Further Affidavit.

5. By way of a rejoinder and with leave of court, the Applicant filed further affidavit sworn on 2nd October 2024 and stated as follows;

24. That I reiterate and state that my father bought the suit land from the defendant's father on a willing buyer-seller basis and voluntarily in the year 1975 and before the said land was offered for sale or purchase by the late David W, Welime the buyer and my father and the late Habel Iraru Okimaru due diligence was exercised and it is after the said deceased persons who were long term great friends consented amongst themselves to the said sale and a written land sale agreement was prepared on the 11/12/1975 by the Firm of Capten & Company Advocates in Kitale in the presence of Mr. Capten Advocate.

25. That this particular parcel of land is possessed jointly with the Estate of my late father now comprised in the title of the suit land and in between the suit land comprised in the title Number Bungoma/Kamakuywa/138 and 139 which is also my father's or our family land, there is another parcel in between which is owned or belongs to one Richard Nambacha Wafula.

26. That after my father bought the suit land, he was taken to the relevant land control Board and after a consent was obtained he followed the due process pertaining to registration and transfer of land and got the suit land transferred into his names.

27. That further I state that this land had been allocated to the defendant's father by the settlement Fund Trustee as a loanee and before he cleared the asset finance loan advanced to him in respect of the suit land, he opted to sale off the suit parcel of land herein to the plaintiff's father.

28. That the land control Board process and issuance of the land control Board consent to transfer the suit land was not objected to, appealed against or quashed in any court of law or recognized Tribunal.

29. That at the time my deceased father was buying the suit land, the same had a loan with the Government through the Settlement Trustee Fund Scheme as aforesaid which had not been fully paid or cleared by the defendant's father and which the plaintiff's father agreed to clear and finally cleared or paid the said loan as agreed in the land sale agreement between the two on behalf of the defendant's father to discharge it from any pending applications and encumbrances.

30. That the process of registration and intended transfer of the suit parcel of land to my deceased father took some time and upon the land control Board consent letter being issued and upon being presented at the lands office together with other supporting documents, the land was transferred to my deceased father because there were no objections or pending applications on the register.

31. That I state that the whole of my deceased father's family stay or reside on plot Number Bungoma/Kamakuywa/139 which measures approximately 11.7 HA. or rather 28.5 acres. Plot No. Bungoma/Kamakuywa/138 which is the suit land is used purely for agricultural activities since the issuance of the eviction order in Bungoma SRM'S Court Civil Case No. 127 of 1982 when the defendant's father and the whole of his family were evicted therefrom.

32. That it is true that in the recent times, the defendants indeed invaded portions of land parcel No. Bungoma/Kamakuywa/139 and 138 and without any colour of right caused a lot of damage to property mainly the sugarcane crop plantation which damage its value is in excess of millions of money.

33. That as admitted by the defendants, there was a case in the SRM'S Court at Bungoma Civil Case No. 127 of 1982 between my father and the defendant's father which determined in favour of my father which occasioned the defendant's father and his family to be evicted in the same year after enforcement of the court order for eviction and since then, my family was and is still in occupation and use up to date and this has been manifested by the fact that we have been doing agricultural activities on it for over 40 years until recently when the defendants jointly and severally started interfering with it by destroying the sugarcane crop on it, erecting structures thereon and even interrupting by force the remains of the body of the late Habel Iraru Okimaru who passed away 18 years ago.

34. That I also support the statement of the defendants in admission at paragraph 18, 19 and 20 of their statement of defence and counterclaim that indeed their appeal in court was dismissed in my father's estate favour and the orders of dismissal are still in force, have never been appealed against and since the issues in the said appeal were similar to the issues related to their counterclaim before court, their said counterclaim is rendered res judicata.

35. That I wish to state that the late Habel Iraru Okimaru was a well advised person on matters relating to sale and transfer of land and was not illiterate as alleged in paragraph 4 of the defendants' statement of defence, counterclaim and the defendant's replying affidavit on record since he was a village elder of our area.

36. That I maintain that the action of the defendants mobilizing a gang and a group of goons armed with pangas, rungus, building materials, hoes, jembes, who invaded my land, slashing down my crops, erecting structures thereon and burying therein the remains and body of the late Habel Iraru Okimaru when the orders of eviction were still in force or without colour of right, without my consent, is not only illegal but borders on contempt of court orders that were issued in the eviction proceedings.

37. That I maintain and reiterate that my father was a hardworking man, a honest person and he lawfully acquired the suit title herein and any alleged speculations of him being fraudulent of the title documents of ownership of the suit land is not true.

Applicant's Submissions

6. The Applicant through the Firm of M/S Oringe Waswa Advocates appearing with M/S Elizabeth Chunge & Co. Advocates filed submissions dated 2nd July and further submissions on 6th November 2024. In their submissions, the Applicant identified three issues for determination as follows;

   a. Whether the plaintiff should be granted an order for temporary injunction over the land parcel known as Bungoma/Kamakuywa/138 (herein after the suit property);

   b. Whether the defendants should be evicted from the suit property;

   c. Who should bear the costs of this application.

7. On the first issue, the Applicant submitted that Section 63 of the *Civil Procedure Act* and Order 40 of the Civil Procedure Rules gives the court power to grant an order of injunction. He submitted that, before granting an order of injunction, an Applicant must establish the triple conditions, to wit; He has a prima facie case with high chances of success, He is likely to suffer irreparable harm or damage and where the court is in doubt, it will decide the case on a balance of probabilities.

8. Regarding prima facie case, the Applicant relied in the case of Mrao Limited v First American Bank of Kenya Limited (2003) KLR where the court defined prima facie as 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 party.

9. On whether they will suffer irreparable damage, the learned counsel relied in the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai (2018) eKLR where the court observed that the injury must be one that cannot be adequately compensated for in damages.

10. On the last condition, the Applicant submitted that where the court is in doubt over the first two elements, the applicant should demonstrate that the balance of convenience tilts in his favour. In conclusion, the Applicant submitted that they have satisfied the first two conditions

Respondent's Submissions

11. The Respondents through the Firm of M/S Omagwa Angima & Co. Advocates submitted on three issues. The first issue is that this matter is res judicata which they submitted that the twin subject matter of this suit i.e injunction and eviction are issues already determined before this very court in Bungoma ELC 128 of 1994, with the dismissal of the defendant's said suit for want of prosecution which not disputed by the plaintiff/Applicant. The Respondents further submitted that Applicant is in fact relying on the fact of the dismissal to justify the institution of this fresh suit. He contends that the said dismissal does not make any pronouncement in favour of the plaintiff to justify the grant of the

reliefs and that the said dismissal is a negative result which the plaintiff cannot rely on to obtain orders of injunction and eviction he seeks in this suit. He submitted that the Plaintiff/Applicant lost the opportunity to raise these issues for determination in the said determined suit either through a counter-claim or by putting his evidence before the court in the said suit. He stated that in its Ruling delivered on 20/06/2024, this court addressed the matter and held itself to be functus officio and incapable of rehearing the matter. The Respondent further submitted that their firs objection to this suit is that the plaintiff's application asking the court to interpret its Ruling delivered on 20/06/2024 and this new suit cannot coexist and be simultaneously prosecuted before this court because that will amount to abuse of the process of court and is subjudice. It is also submitted that this court is now prevented from handling the matter because it is res judicata. He submitted that the reliefs sought by the plaintiff/Applicant in the present suit ought to have been litigated fully in the former suit which terminated with the dismissal of the same.

12. The Defendant/Respondent argued that although the plaintiff's case was dismissed, it was necessary for the contentious issues of possession and eviction to be determined but the defendant not only failed to file a counter-claim and adduce evidence to confirm his assertion that he was fully in possession to the exclusion of the plaintiff (now defendant). He stated that the doctrine of res judicata requires that when the opportunity to litigate a claim arises, a party is obligated by law to put his whole case before the court for decision and not present his case in piece meal.

Legal Analysis and Determination.

13. I have considered the Notice of motion application, the affidavits, both in support and in opposition thereto and the rival submissions as well as the applicable law.

14. Before I proceed to evaluate and analyse the evidence adduced, it is imperative to note the following uncontroverted issues;

    i. That were previous suits filed by the parties herein. One such suit was instituted by the defendant herein being High Court Civil suit No. 128 of 1994.

    ii. The defendant's suit referred under paragraph (i) above was dismissed by this court for want of prosecution on 21st July, 2009 under order 17 Rule 2 CPR.

    iii. That on 7th March 2012, the defendant through the 1st Defendant/Respondent herein who is its legal representative successfully revived the said suit but was again dismissed for want of prosecution on 28/05/2017.

    iv. That the Defendant/Respondent filed an application dated 08/07/2019 seeking leave to file an appeal out of time but the application was dismissed on 23/01/2020.

    v. That by an application filed in the former suit No. 128 of 1994 dated 26/01/2024, the plaintiffs/Applicants herein sought a myriad of orders and in a Ruling delivered on 20/01/2024, this court rendered itself that the court was functus officio and deemed the plaintiff/Applicants prayers moot.

    vi. That the plaintiff/Applicant filed a Miscellaneous Application No. E012 of 2024 seeking the court's interpretation of its Ruling in ELC case No.128 of 1994

15. In its ruling delivered on 28/05/2017, this court dismissed the said suit being ELC No. 128 of 1994 for want of prosecution. The plaintiff/Applicant herein filed a Notice of Motion application through the said suit dated 26/01/2024 under the said dismissed suit seeking numerous interlocutory orders. On 20/06/2024, this Honourable court rendered itself by dismissing the said application on grounds

that there was no substratum suit in which the application would stand since the suit under which the said application was filed had been dismissed for want of prosecution and no counter-claim had been filed by the plaintiff who was the defendant in the former suit.

16. Where a suit is dismissed for want of prosecution under order 17 Rule 2 CPR, the court becomes functus officio and any party not satisfied with the order so issued may appeal against the same or apply for review, if there are sufficient grounds to do so. It is imperative to note that there is no provision under the law for setting aside an order of dismissal of a suit for want of prosecution under order 17 Rule 2 CPR. The Supreme court of Kenya discussed the doctrine of functus officio in Election Petitions Nos. 3, 4 & 5 Raila Odinga & Others v IEBC & Others (2013) KLR cited with approval an excerpt from an article by Daniel Malan Pretorius, in '' The origins of the functus officio Doctrine, with specific Reference to its Application in Administrative law,'' (2005) 122 SALJ 832

> The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter... The (Principle) is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision maker.''

17. Having failed to file a counter-claim to the former suit, the defendant who is also the plaintiff herein filed the present suit simultaneously with the current Notice of Motion application dated 16th July, 2024 seeking orders for inter-alia injunction. It is trite that before an order of injunction is granted, the Applicant must establish the following three conditions;

    i. A prima facie case with high chances of success at the main trial;

    ii. He will suffer irreparable injury for which damages would not be an adequate remedy and

    iii. Where the court is in doubt, it may decide the matter on a balance of convenience.

18. At paragraph 11 of his supporting affidavit, the plaintiff/Applicant herein deposed that he has a legal title to the suit property and that the defendants/Respondents have infringed his right to the use and quiet possession and enjoyment of the same as guaranteed by the *constitution*.

19. In the case of Mrao Limited v First American Bank of Kenya Ltd (2003) eKLR, the court defined a prima facie as 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 party. From the affidavit evidence and the annexures thereto, the applicant has annexed a Certificate of Title indicating that he is the registered proprietor of the suit. Under Section 26 of the *Land Registration Act* 2012, the courts are mandated by statute to consider a Title document as a prima facie evidence of ownership to land and a conclusive evidence of proprietorship to land subject to challenge on grounds of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. There is no evidence adduced that the certificate of title issued to the plaintiff/Applicant herein has been challenged in any court of law. In the circumstances, I find that the plaintiff/Applicant has established a prima facie case.

20. The second issue is whether the Applicant will suffer irreparable injury and that damages would not be an adequate remedy. What constitutes irreparable injury was defined in the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai(2018) eKLR where the court stated that the injury must be one that cannot be adequately compensated for in damages and that existence of a prima facie is not itself

sufficient and that the Applicant should further show that irreparable injury will occur to him unless the injunction is granted and that there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury. Among the rights to be enjoyed by the registered owner of any land is the right to peaceful and Quiet possession and occupation of the land he owns. The Plaintiff/Applicant herein has deposed on oath that the Defendants/Respondents have illegally taken possession of the suit land and is utilizing part of it for their own benefit. Those actions by the defendants/Respondents in my view are tantamount to violation of the plaintiff/Applicant's right as guaranteed under the *constitution* and must be stopped. It is the plaintiff/Applicant's case that the Defendants/Respondents occupation of his land is without his consent or legal basis. He stated that he has suffered loss and injury which the Defendants/Respondents will not be able to compensate monetarily which include the extensive injuries the defendants have inflicted on the watchman who guards the suit property, the psychological and emotional torture that he continue to suffer as a result of the Defendant's illegal acts over the suit property a well as the threats the Defendants continue to pose to him, beneficiaries of the suit property and other third parties residing thereon. The plaintiff/ Applicant also stated that the defendants/Respondents have totally blocked him from accessing the suit property thus making him unable to use and enjoy the suit property as guaranteed under the *constitution*

21. I agree with the Applicant that the harm against the plaintiff/Applicant is unquantifiable, colossal and my not be remedied by way of damages.

22. On the question of the balance of convenience, I have looked at the supporting affidavit where the plaintiff/Applicant stated that on 12/01/2024, the Respondents invaded and continue to unlawfully occupy the suit land unjustifiably thereby restricting his access and harvest of sugar cane on the suit land which was at a risk of perishing. Those averments are confirmed in a consent order filed at Kimilili Magistrates' court dated 4th July, 2024 where it reads in part as follows;

    1. That the Applicant to peacefully harvest and remove the cane on the suit property Bungoma/Kamakuywa/138 as the Respondent and his family undertakes that the harvest will not be interfered with.

    2. That the Applicants as a sign of goodwill to withdraw the criminal charges against the Respondent after harvest of the cane."

23. From the above consent order, it confirms that the plaintiff/Applicant has been in possession and occupation of the suit property until 12/01/2024 when the Defendants/Respondents invaded and took possession of part of the suit property. Considering that the plaintiff/Applicant has invested on the suit property by planting sugarcane, I find that the balance of convenience tilts in granting the orders sought.

24. The upshot of my finding is that the Notice of Motion application dated 2nd July 2024 is merited and the same is allowed as follows;

    1. That an order be and is hereby issued directing the Applicant to proceed and harvest his sugarcane currently on L.R No. Bungoma/Kamakuywa/138 which is due.

    2. That a mandatory injunction be and is hereby issued restraining the Defendants, their agents, employees and/or representatives, from trespassing, encroaching, entering into, selling, developing, dealing or in any other manner interfering with the plaintiff's quiet possession and ownership of land parcel known as L.R No. Bungoma/Kamakuywa/138 pending hearing and determination of this suit.

3. That an Eviction order be and is hereby issued directed to the Defendants/Respondents, their agents, employees and or representatives, ordering them to vacate the suit property land parcel known as LR No. Bungoma/Kamakuywa/138 forthwith pending hearing and determination of this suit.

4. That the Officer Commanding Mukuyuni Police Station (OCS) be and is hereby ordered to provide security, law and order while the eviction exercise is being carried out.

5. That the Costs of the application to be borne by the defendants/Respondents

25. It is so ordered.

READ, DELIVERED AND SIGNED AT BUNGOMA THIS 11TH DAY OF DECEMBER, 2024.

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HON. E.C CHERONO

ELC JUDGE

In the presence of;

1. Mrs Chunge appearing with Mr. Oringe for the Plaintiff/Applicant.

2. Mr. Angima for the Defendant/Respondent.

3. Bett C/A.