



**Tuwano v Yawa; Mwereni Group Ranch (Interested Party) (Environment & Land Case E054 of 2024) [2025] KEELC 3294 (KLR) (7 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3294 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE E054 OF 2024**

**LL NAIKUNI, J**

**APRIL 7, 2025**

**BETWEEN**

**KASSIM ALI TUWANO ..... PLAINTIFF**

**AND**

**NDUNGO MGANGA YAWA ..... DEFENDANT**

**AND**

**MWERENI GROUP RANCH ..... INTERESTED PARTY**

**RULING**

**I. Introduction**

1. What is before the Honourable Court for its determination is the Notice of Motion application dated 26<sup>th</sup> August, 2024. It was filed by Kassim Ali Tuwano, the Plaintiff/Applicant against the Defendant/Respondent herein. It was brought pursuant to the provisions of Order 40 Rules 1 and 2, Order 45 Rule 1 Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A, 1B & 3A of the Civil Procedure Act, Cap. 21 and all other enabling provisions of the law.
2. In response to the application, the Respondent filed a replying affidavit sworn on 1<sup>st</sup> February 2025 by the Respondent herein.

**II. Plaintiffs/Applicants case.**

3. The Plaintiff/Applicants sought for the following orders:-
  - a. Spent.
  - b. That the Honourable Court be pleased to issue a temporary order of injunction restraining the respondents, their servants, agents, employees



or any other person from trespassing on, wasting, alienating, putting up, carrying out and construction works and or constructing and structure[s] or otherwise interfering or dealing with the suit property and/or interfere with the Plaintiff/Applicant's right to enjoy quiet possession pending the hearing and determination of this application.

- c. That the honourable court be pleased to issue a permanent order of injunction restraining the respondents, their servants, agents, employees or any other person from trespassing on, wasting, alienating, putting up, carrying out and construction works and or constructing and structure[s] or otherwise interfering or dealing with the suit property and/or interfere with the Plaintiff/Applicants right to enjoy quiet possession pending the hearing and determination of this suit
  - d. That the police county commander Kwale to enforce compliance of the orders above
  - e. That the costs of this application be provided for
4. The application was premised upon the grounds, testimonial facts and the averments of the eight (8) Paragraphs Supporting Affidavit KASSIM ALI TUWANO and the three (3) annextures marked as "KAT – 1, 2 & 3" annexed thereto. He averred as follows that:-
- a. He was the Plaintiff/Applicant herein and well conversant with the facts of this case thus competent to swear the affidavit on his own behalf.
  - b. He was the owner of an unregistered and unsurveyed suit land situated at Mwena Village in Mwereni Location
  - c. The suit land had no separate title and neither did the Defendants/Respondents but the entire area is comprised in a group ranch with a single title in the name of the Interested Party.
  - d. The Defendant/Respondent occupied a portion of the land adjacent to the suit property having been granted the same by the Applicant's father Ali Tuwano during his lifetime.
  - e. The Defendant/Respondent had on previous occasions made unsuccessful attempts to encroach upon the Applicant's land resulting in deliberations before the local administration where a verdict had been given in favour of the Applicant
  - f. The Defendant/Respondent had nevertheless proceeded with the said invasion and constructed a permanent structure on the Applicant's land. The applicant terms the invasion as a breach of his peace and quiet enjoyment of the suit land.
  - g. The court was urged to restrain the Defendant/Respondent from continuing with the construction as the same is bound to cause the applicant irreparable loss and harm hence the instant application.

### **III. The responses by the Defendant/Respondents.**

5. The application was opposed through filing of by a replying affidavit sworn by the Defendant/Respondent, Ndungo Mganga Yawa and dated on 1<sup>st</sup> February 2025. He outlined the following that:-
- a. The suit property Kwale/Mwereni/14 is registered as communal land registered in the names of the interested party which is currently defunct.



- b. That after dissolution of the ranch, elders from the Duruma tribe remain the custodians of the suit property.
- c. That the applicant who is not a Duruma has never owned the land and neither have other persons who are not from the said Duruma tribe as they never served or got elected in the group ranch.
- d. However, the Duruma tribe allocated by donation some areas of the suit property to other tribes including the Digo from which the applicant comes from, however the disputed portion is not part of the land that was donated to the other tribes.
- e. That on the contrary it was the applicant and his tribe the Digo that had invaded the suit property and occupied areas not allocated to them.
- f. The Applicant states that the instant suit is an abuse of the court process as there have been similar issues raised in Msambweni MCELC No 4 of 2019.

#### **IV. Submissions.**

- 6. On February 17<sup>th</sup>, 2025, in the presence of all the Counsels for the Plaintiff/Applicant and Defendant/Respondent herein, the Honourable Court directed parties to canvass the matter by way of written submissions. Unfortunately, at the time of writing this ruling, only the Applicant had complied with the said order. Nonetheless, upon the lapse of the stipulated timeline, Court has decided to render its ruling accordingly.

#### **V. The Written Submissions by the Plaintiff/Applicant.**

- 7. The Law firm of Messrs. Aminga & Co Advocates filed submissions dated 7<sup>th</sup> March, 2025 on behalf of the Plaintiff/Applicant. Mr. Aminga Advocate submitted that the necessary ingredients for grant of orders of injunction were set out in the classicus case of: “Giella - Versus - Cassman Brown case. These included establishing a prima facie case, proof that irreparable harm is suffered and the balance of probability.
- 8. On whether there had been establishment of a prima facie case, the applicant submitted that the Applicant’s family had been on the suit property while the Defendant/Respondent claims that their occupation has been through encroachment. Based on this material, the Plaintiff/Applicant had already proved a prima facie case. To buttress on this point, the Learned Counsel placed reliance on the case of: “Robert Mugo Wa Karanja - Versus - Ecobank Kenya Ltd & Another [2019] eKLR”.
- 9. On irreparable harm, the Learned Counsel submitted that the Defendant/Respondent’s action of encroaching into the Plaintiff/Applicant’s portion and putting up permanent structures was a threat to dispossessing the latter and unless restrained by an order of this court the Applicant was bound to suffer irreparable harm. Court was referred to the holding in the case of “Kenya Commercial Finance Ltd - Versus - Afraha Education Society & Others Civil Appeal No 142 of 1999”.
- 10. On the balance of convenience. The Learned Counsel submitted that the court should maintain status quo pending the hearing and determination of the suit.

#### **VI. Analysis and determination.**

- 11. This Court has considered all the issues raised in the Notice of Motion application dated 26<sup>th</sup> August 2024, the Supporting affidavit and the Replying Affidavit by the Defendant/Respondent herein dated



1<sup>st</sup> February 2025, the Written Submissions the cited authorities by the Plaintiff/Applicant, the relevant provision of *the Constitution* of Kenya, 2010 and statutes.

12. In order to arrive at an informed, just, fair and reasonable decision, the Court has framed the following three (3) issues for its determination. These are: -

- a. Whether the Notice of Motion application dated 26<sup>th</sup> August, 2024 met the threshold for granting temporary injunctive orders.
  - b. Whether the parties were entitled to the reliefs Sought
  - c. Who will bear the Cost of the application?
- Issue No. a). Whether the Notice of Motion application dated 26<sup>th</sup> August, 2024 met the threshold for granting temporary injunctive orders.

13. Under this Sub – heading the Honourable Court will be examining whether the application by the Plaintiffs/Applicant herein meets the required standards for granting the temporary injunctive orders as required by Law. The application herein is premised under the provision of Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst the provisions of the law. Which provides as follows: -

Order 40, Rule 1

Where in any suit it is proved by affidavit or otherwise—

- a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b) that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, 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.

14. Fundamentally, the principles applicable in an application for an injunction were laid out in the celebrated case of “Giella – Versus - Cassman Brown & Co Limited (1973) (Supra), where it was stated:

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“First an applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

15. The three conditions set out in “Giella (supra)”, need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of “Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others [2014] eKLR”: -,

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages



are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Limited - Versus - Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between".

16. In dealing with the first condition of prima facie case, the Honorable Court guided by the definition melted down in the famous case "Mrao Limited – Versus - First American Bank of Kenya Limited & 2 others (2003) KLR 125" of: -,

"So, what is a prima facie case, I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself would conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter"

17. In the case of "Mbuthia – Versus - Jimba credit Corporation Ltd 988 KLR 1", the court held that;

"In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the party's cases."

18. Similarly, in the case of "Edwin Kamau Muniu – Versus - Barclays Bank of Kenya Limited" the court held that;

"In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria."

19. In the present case, the Plaintiff/Applicant claims to be the beneficial owner to the suit property. The Plaintiff/Applicant holds that the suit land has no separate title and neither does the Defendant/Respondent. That the entire area is comprised of the group ranch with a single title in the name of the Mwereni group Ranch, the Interested Party herein. He alleges that the Defendant/Respondent has encroached on the applicant's portion. Definitely, these fact are vehemently disputed by the Defendant/Respondent. He holds that the suit property Kwale/Mwereni/14 is registered as communal land registered in the names of the interested party which is currently defunct. That after dissolution of the ranch, elders from the Duruma tribe remained as the custodians of the suit property. That the Plaintiff/Applicant was not a Duruma and had never owned the land and neither have other persons who are not from the said Duruma tribe as they never served or got elected in the group ranch. All these are triable issues to be dealt with during a full trial.

20. For these reasons, therefore, the Court finds that regarding the first condition, the Plaintiff/Applicant is yet to demonstrate a prima facie case with a probability of success at the trial as enunciated in the case of "Giella - Versus - Cassman Brown & Co. Limited (Supra)".



21. The court has further considered the evidence on record against the second principle for the grant of an injunction, that is, whether the Plaintiff/Applicant might suffer irreparable injury which cannot be adequately compensated by an award of monetary damages. With regards to the second limb of the Court of Appeal in the case of:- “Nguruman Limited (Supra)”, held that:-

“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.”

22. On the issue whether the Plaintiff/Applicant will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Applicants must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. Once more, the Honourable Court is not convinced that the Plaintiff/Applicant has demonstrated this limb as yet.

23. The judicial decision of:- “Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (2018) eKLR” provides an explanation for what is meant by irreparable injury and it states;

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

24. Therefore, the Plaintiff/Applicant has not satisfied the second condition as laid down in “Giella’s case”.

25. Thirdly, the Applicants have to demonstrate that the balance of convenience tilts in their favour. In the case of “Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (Supra)” which defined the concept of balance of convenience as:

“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”.



26. In the case of “Paul Gitonga Wanjau – Versus - 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.”

27. The balance of convenience tilts in the favour of the Applicants. The decision of “Amir Suleiman – Versus - Amboseli Resort Limited [2004] eKLR” where 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.”

28. Bearing this in mind, I am convinced that 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. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the claim of the Applicants and it will be in the interest of both the Applicants and the Respondents that the suit property is preserved until the hearing and determination of the suit.

29. In the case of:- “Robert Mugo wa Karanja – Versus - Ecobank (Kenya) Limited & Another [2019] eKLR” where the court 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...”

30. In view of the foregoing, I strongly find that the Plaintiff/Applicant has not met the criteria for grant of orders of temporary injunction.

ISSUE No. b). Whether the parties were entitled to the reliefs Sought

a. Under this Sub – title, the Honourable Court will critically proceed to implement the above elaborate principles to the facts of the instant case. However, as already indicated above, based on the pleadings, several issues such as whether the suit property was community land under the group ranch; the history on ownership of the suit property; the rightful occupant of the disputed parcel. Who between the parties herein has invaded the others portion and so forth. These are issues that would require thorough interrogation and the best placed moment would



be during the full trial whereby empirical both oral and documentary evidence will be adduced and tested.

31. With the above in mind, this court opines that status quo orders will suffice in the instant suit pending the hearing and determination of the same. The Black's Law Dictionary, Butter Worth's 9<sup>th</sup> Edition, defines status quo as a Latin word which means 'the situation as it exists'. The purpose of an order of status quo has been reiterated in a number of decisions.

32. In the case of "Kenya Airline Pilots Association (KALPA) – Versus – Co - operative Bank of Kenya Limited & another [2020] eKLR", the purpose of a status quo order was explained as follows:-

“..... By maintaining the status quo, the court strives to safeguard the situation so that the substratum of the subject matter of the dispute before it is not so eroded or radically changed or that one of the parties before it is not so negatively prejudiced that the status quo ante cannot be restored thereby rendering nugatory its proposed decision.”

33. In a bid to distinguish status quo from injunctive orders, Odunga J [as he then was] in the case of:- "Fatuma Abdi Jillo – Versus - Kuro Lengesen & another [2021] eKLR. In Republic – Versus - National Environment Tribunal, Ex-parte Palm Homes Limited & Another [2013] e KLR", stated, "inter alia":-

“When a court of law orders or a statute ordains that the status quo be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining status quo is meant to preserve existing state of affairs...Status quo must therefore be interpreted with respect to existing factual scenario..."In TSS Spinning & Weaving; Company Ltd – Versus - Nic Bank Limited & another [2020] e KLR, the unpacked the purpose of a status quo order as follows: "In essence therefore, a status quo order is meant to preserve the subject matter as it is/existed, as at the day of making the order. Status quo is about a court of law maintaining the situation or the subject matter of the dispute or the state of affairs as they existed before the mischief crept in, pending the determination of the issue in contention. 'In Kenya Airline Pilots Association (KALPA) Vs Co-operative Bank of Kenya Limited & another [2020] e KLR, the purpose of a status quo order was explained as follows:"..... By maintaining the status quo, the court strives to safeguard the situation so that the substratum of the subject matter of the dispute before it is not so eroded or radically changed or that one of the parties before it is not so negatively prejudiced that the status quo ante cannot be restored thereby rendering nugatory its proposed decision."Murithi Jin Boabab Beach Resort as quoted by F. Tuiyot Saifudeen Abdullahi & 4 Others in Mombasa High Court Misc. Civil Cause No. 11 of 2012, described the nature of a status quo order as follows: "In my view, an order to Status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is a substantive equitable remedy granted upon establishment of a right, or at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof. It does not depend on proof of right or prima facie case. In its effect, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or the eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint.”



34. Based on the foregoing, therefore, it is this Court's assertion that the most suitable order to grant is while awaiting the final determination of the main suit, for the parties to maintain the status quo onto the suit land. This will mean the situation to remain as it was prior to the institution of this suit and no development to be undertaken whatsoever.

ISSUE No. c). Who will bear the costs of the application

35. It is well established that the issue of costs is at the discretion of the Court. Costs mean the award that a party is granted at the conclusion of the legal action or proceedings in any litigation. The proviso of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 provides that costs follow the event. By event it means the result or outcome of the legal action.

36. In the instant case, from the given facts and circumstances, it is just reasonable that each party bear their own costs for the filed application hereof.

## **VII. Conclusion & Disposition.**

37. Having established that the parties herein are both in occupation of the suit property, it is proper that the court seeks to establish who should be rightfully in occupation of the same and this can only be through substantive hearing of both parties by viva voce evidence. It is also noted that the court has earlier on issued status quo orders when the application was first brought before it *ex parte* which can remain in force as has been explained above.

38. To this end, this Honourable Court proceeds to make the following findings. These are:-

A. That The Notice Of Motion Application Dated 26<sup>th</sup> August, 2024 Partly Succeeds Purely For Purposes Of Preservation Of The Suit Property.

B. That There Be An Order For Status Quo To Be Maintained To The Extent That The Parties In Occupation Shall Remain In Possession Of The Suit Premises Until The Suit Is Heard And Determined.

C. That There Shall Be Neither Evictions, Continued Construction Nor Any Developments Thereon.

D. That There Shall Be A Mention Date On 23<sup>rd</sup> June, 2025 For Purposes Of Conducting A Pre – Trial Conference Pursuant To The Provision Of Order 11 Of The Civil Procedure Rules, 2010. There Shall Be Hearing Of The Suit On 28<sup>th</sup> July, 2025 Through Physical Means.

E. That Each Party Shall Bear Its Own Costs.

IT IS ORDERED ACCORDINGLY.

**RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS**

**VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS 7<sup>TH</sup> DAY OF APRIL 2025.**

**HON. MR. JUSTICE L.L NAIKUNI.**

