Masyuki (Suing on Behalf of 179 others) v Base Titanium Kenya Limited (Environment & Land Case E063 of 2024) [2025] KEELC 3244 (KLR) (3 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3244 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

ENVIRONMENT & LAND CASE E063 OF 2024

LL NAIKUNI, J

APRIL 3, 2025

BETWEEN

GIDEON MASYUKI ..... PLAINTIFF

SUING ON BEHALF OF 179 OTHERS

AND

BASE TITANIUM KENYA LIMITED ..... DEFENDANT

RULING

I. Introduction

1. The Honourable Court was tasked with the determination of two applications. The first one, dated 30th September, 2024 was filed by the Plaintiffs, while the second one dated 6th October, 2024 by, Base Titanium Kenya Limited, the Defendant herein.

2. Upon service each of parties filed their responses accordingly. The Honourable Court shall be dealing with each one of them in depth at a later stage. At the same time, the Honourable Court shall be handling these two applications separately but simultaneously and in the long run deliver one omnibus Ruling hereof.

II. The Notice o Motion applications dated 30th September, 2024 by the Plaintiffs/Applicants

3. The Plaintiffs/Applicants herein sought for the following orders:-

    a. Spent.

    b. Spent.

    c. That pending the hearing and determination of this suit interpartes a temporary injunction be and is hereby issued against the Defendants restraining it either by themselves, their agents or any other persons claiming through it from trespassing, mining and or dealing whatsoever with

all that unregistered land situate in Nguluku-Maumba measuring 4000 acres or thereabout hereinafter "the suit property"

d. The costs of this application be in the cause

4. The application is based on grounds, testimonial fact and the averments made out under the 13 Paragraphed supporting affidavit of Gideon Mutisya Masyuki. He averred as follows that:-

a. He was the 1st Plaintiff herein and duly authorised to plead and swear this Affidavit herein on behalf of the others.

b. The Plaintiffs have been in occupation of the vast suit property in Nguluku-Maumba Kwale measuring 4, 000 acres.

c. It has been their residence having established permanent structures thereon and fully utilised the land through cultivation.

d. From their possession, occupation and use of the suit land they had accrued rights in respect of the suit property.

e. The Defendant had engaged in mineral extraction on the suit property.

f. Thus the Plaintiffs were entitled to compensation as they had not been compensated before the Defendant's invasion.

g. Instead, the Defendant illegally and without compensating them evicted them from the suit land.

h. It was in the interest of justice to allow the application so as to preserve the suit property.

III. The Grounds of Opposition by the Defendants/Respondents.

5. In response to the application by the Plaintiffs, the Defendants/Respondents filed Grounds of Opposition opposing the application. The same raised the following grounds:-

a. There was no reasonable cause of action against the Defendant as it pertained to the land the subject matter of the suit herein

b. Further and alternatively, this Honourable Court had no requisite jurisdiction to hear and/or determine the application [nor the Plaint] as the jurisdiction in relation to the matters complained of, and the ultimate relief sought in the Plaint lied squarely with the Cabinet Secretary responsible for Mining pursuant to the provisions of Sections 153,154 and 155 of the *Mining Act* 2016

c. Further and alternatively:-

i. The name Plaintiffs/Applicants had not demonstrated authority to file this application on behalf of other persons

ii. The alleged claims made never satisfied the test for a representative suit arise in the circumstances complained of by the named Plaintiff.

IV. The Preliminary objection by the Defendants/Respondents

6. The Defendants/Respondents further filed a Notice of Preliminary objection dated 31st January 2025. The preliminary objection challenged the suit herein on the following grounds:-

i. This Honourable Court does not have jurisdiction to hear and/or determine this suit in view of the provision of Sections 153,154 and 155 of the *Mining Act* 2016.

ii. The Plaint contravened the mandatory provisions of Order 4 Rule 3 of the Civil Procedure Rules, Cap. 2010.

iii. This Honourable Court had no subject matter over which it could exercise jurisdiction and consequently any order would be granted in vain in view of the Court of appeal decision in "Civil appeal No. 92 of 2008 - Anthony Gachara Ayub – Versus - Francis Mahinda Thinwa 2014[KECA] 623[KLR]".

iv. The 1st Plaintiff never had authority to act on behalf of 178 other Plaintiffs.

V. The Grounds of Opposition by the Plaintiffs/Applicants

7. The Preliminary Objection by the Defendants/Respondents was challenged by the Grounds of Opposition dated 7th February 2025 by the Plaintiffs/Applicants herein. The grounds raised were as listed here below:-

a. That the Preliminary Objection dated 31st January 2025 was fatally defective, bad in law and an abuse of the court process and should be struck out.

b. That the provisions of Sections 153,154 and 155 of the *Mining Act* 2016 never divested the Honourable Court jurisdiction to hear the suit.

c. That the suit has complied with the provision of Order 4 Rule 3 of the Civil Procedure Rules, 2010 as the suit property is unregistered community land recognised under *the constitution* and the law.

d. That the preliminary objection flied in the face of the principles enunciated in the case of "Mukhisa Biscuit" thus fit for dismissal with costs

e. That the suit before court was a representative suit and in compliance with Order 1 Rule 8 of the Civil Procedure Rules, 2010.

f. That the preliminary objection dated raised issues of technicality that were curable under Article 159 of *the constitution* 2010.

g. That it was in the interest of justice that the preliminary objection dated the 31st January 2025 be dismissed with costs.

VI. The Notice of Motion application dated 6th December, 2024 by the Defendants/Respondents

8. The Defendants/Respondents application was brought under the provisions of Order 2 Rule 15[1][a] and 15[1][d], Order 4 Rule 1[3] and 1[6], Order 4 Rule 3 and Order 51 of the Civil Procedure Rules, 2010. The Defendants/Applicants sought for the following orders:-

a. The Plaint dated 30th September 2024 be struck out.

b. The costs of this application be provided for.

9. The application was premised on grounds that: -

a. The Plaint dated 30th September 2024 never disclosed a reasonable cause of action in law.

b. Further and alternatively this Honourable Court had no jurisdiction to hear and/or determine the claim made in the Plaint.

c. That no authority to act had been annexed to the verifying affidavit as required by Order 4 Rule 1 of the Civil Procedure Rules, 2010.

d. That the Plaint was an abuse of the court process.

10. It is instructive to note that the application was not supported by an affidavit. It was indicated that the same would be supported by express provisions of the Civil Procedure Rules and the *Mining Act* as set out on the face of the application.

VII. Replying Affidavit by the Plaintiffs

11. In opposing the Defendant's application, the Plaintiff filed a Replying Affidavit dated 7th February 2025 and sworn by the 1st Plaintiff Gideon Masyuki. He averred as follows that:-

a. The Plaint sufficiently identified the suit property as an unregistered community land situate in Maumba Nguluku recognised under article 63 of *the constitution*.

b. The suit did not violate the provisions of Order 4 Rule 3 of the Civil Procedure Rules, 2010 as the suit property was disclosed as unregistered community land.

c. The contradictions in the acreage of the suit property were occasioned by a typing error and was curable under Article 50 of *the constitution*.

d. The community land was recognised by the law statute and customary and thus enforceable.

e. The proper interpretation of Sections 154 and 155 of the *Mining Act* was that the court had the jurisdiction to determine a dispute under the act as the same was not couched in mandatory terms.

f. The suit was also a representative suit with an authority to act and is thus properly before court

g. The Court was urged to dismiss the objection and application for being an abuse of the court process

VIII. Submissions

12. On 29th January 2025 while all the parties were present in Court, they were directed to have both Notice of Motion applications dated 30th September 2024 and 6th December 2024 referred to collectively as "the applications" disposed of by way of written submissions.

13. Parties complied. A ruling date was reserved on 18th March, 2024 by Court accordingly but due to unavoidable circumstances it was delivered on 3rd April, 2025.

A. The Written Submissions by the Defendants in support of the application dated 6th December 2024, its grounds of opposition dated 31st January 2025 and preliminary objection dated 31st January 2025

14. The Defendants/Respondents filed their written submissions. Through their Advocates on record, they raised the following issues for determination; -

a. Whether the Honourable Court has jurisdiction to hear and determine the suit in view of sections 153,154 155 of the *Mining Act* 2016.

b. Whether the Plaint dated 30th September 2024 contravenes the mandatory provisions of Order 4 Rule 3 of the Civil Procedure Rules, 2010.

c. Whether the Honourable court had subject matter over which it can exercise jurisdiction

d. Whether the 1st Plaintiff has authority to act on behalf of the other 178 Plaintiffs

15. On the 1st issue for determination. It was submitted that the provision of Sections 153 to 157 of the *Mining Act* set out a clear process for settling compensation claims related to mining activities. That the Plaintiffs are precluded by dint of Section 153 of the *Mining Act* from instituting this suit before court before having the same presented before the Cabinet Secretary in charge of Mining.

16. That the court was only approached on appeal and not at the first instance. The Defendants invoked the principle of exhaustion and stated that a party must first invoke the dispute resolution mechanisms set by the law before resorting to the courts. It was further submitted that the use of the word "may" in the *Mining Act* should not be construed as permissive or conferring optionality in light of the exhaustion doctrine. That the jurisdiction of this court was thus questioned given the provisions of the *Mining Act* and as such this court could not proceed with this matter.

17. On the second issue for determination. It was submitted that the provision of Section 19 of the *Civil Procedure Act*, Cap. 21 provides that every suit is to be commenced in the manner prescribed by the Civil Procedure Rules. That the provision of Order 4 Rule 3 of the Civil Procedure Rules, 2010 provides that a suit instituted over immovable property should give a clear description of the property.

18. That from the filed Plaint, the Plaintiffs herein had failed to give a clear description of the suit property thus making the claim vague. In that case, therefore, a reasonable cause of action was yet to be established. Further, that the Plaintiffs was an unregistered community and could not bring a claim before court. Also that the documents relied upon by the Plaintiffs as ownership documents reveal the title deeds registered in the names of individuals and not the community as alleged.

19. The Defendant maintained that the Plaint ought to be struck out for failure to meet the requirements set under the provision of Order 4 Rule 3 of the Civil Procedure Rules, 2010 and for not disclosing any reasonable cause of action.

20. On whether the court has a subject matter over which it could exercise jurisdiction. It was submitted that the court would be making orders in vain given that the Plaint does not disclose a reasonable cause of action by the failure to disclose the suit property.

21. Whether the 1st Plaintiff had the authority to act on behalf of the rest of the Plaintiffs it was submitted that the 1st Plaintiffs Verifying Affidavit never attach any written authority from the rest of the Plaintiffs. Further that the suit does not meet the set requirements of a representative suit as the same was never advertised and that the list relied upon by the Plaintiffs consisted of names and national identity numbers and did not constitute a representative group as contemplated in law.

22. The Defendant also submitted on the application for injunction orders as sought by the Plaintiffs. It was submitted that the same does not meet the threshold set in the case of:- "Giella - Versus - Cassman Brown & Co Limited [1973] E A 358" as the Plaintiffs had failed to establish "a prima facie case" with a probability of success, the loss and damages they anticipated to meet in the event the injunction was not granted and lastly that the balance of convenience never tilted in their favour.

23. In conclusion, the Defendant prayed that the preliminary objection be allowed and the Plaint herein be dismissed with costs. That the Notice of Motion application dated 30th September 2024 be struck off as prayed.

A. The Written Submissions by the Plaintiffs in respect to the application dated 6th December 2024

24. The Law firm of Messrs. Omurwa Advocates filed their submissions on behalf of the Plaintiffs herein dated 9th February 2025. On whether the suit offended the provision of Order 4 Rule 3 of the Civil Procedure Rules, 2010 it was submitted that there was a clear annexed written authority to the Plaint which was a clear indication that the suit complied with the foregoing provisions of the law. Reliance was placed on the holding in the case of: "Kahindi Katana Mwongo & Another Versus Cannon Assurance Co Ltd [2013] eKLR".

25. On whether the suit offended the provisions of Sections 154 and 155 of the *Mining Act*. It was submitted that the provisions in the said sections were not drafted in mandatory terms as the term may could not be termed mandatory as opposed to shall. That for that reason this court was also a court of first instance as was held by this court in its ruling in the case of:- "Kavii - Versus - Base Titanium Limited [2023] eKLR". The court was urged to maintain its stance as was held in the quoted authority.

26. It was submitted that the suit herein was a representative suit as an authority to act had been annexed in the affidavit in support of the application where the 1st Plaintiff is authorised to act on behalf of the rest of the Plaintiffs.

27. The Defendant further submits that the issues raised in the Defendant's application are matters of procedural technicality and the same can be cured by the provisions of Article 159 of *the constitution* of Kenya 2010. The court is urged to dismiss the Defendant's application with costs.

Written Submissions in respect to the Preliminary Objection and application dated 30th September 2024 by the Plaintiff

28. The Plaintiff had reiterated most of the issues discussed in their submissions earlier filed over the application dated 6th December 2024. It was submitted that the Plaintiffs had met the threshold for grant of injunction orders as they have proved that they was in occupation of the suit property and it is the defendant who had invaded the same and was undertaking mining activities thereon. The court is urged to dismiss the preliminary objection and allow the application for injunction as prayed.

Analysis and Determination

29. I have carefully read and considered the pleadings herein by the Applicants from the twin applications herein, the preliminary objection and grounds of opposition raised, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.

30. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has the following framed four (4) issues for its determination: -

    a. Whether the preliminary objection has met the legal threshold based on Law and precedents.

    b. Whether this Honourable Court has jurisdiction to entertain the instant suit and application

    c. Whether the Plaintiffs have met the threshold to warrant granting of the injunctive orders sought

    d. Who bears the costs of this suit?

Issue No. a). Whether the Preliminary Objection has met the legal threshold based on Law and precedents.

31. Based on precedents, the issue of the Preliminary Objections has to be dealt with as matter of priority basis. In choosing to first address the preliminary objection, the Court is alive to the fact that it could in the first instance resolve the issues raised in the application as it is trite that an objection if properly raised can dismiss a suit without further proceedings. Thus, the first issue for determination is whether the preliminary objection seeking the dismissal of the application is sustainable.

32. In view of this, I will start by setting out what is a proper preliminary objection . According to the Black Law Dictionary a Preliminary Objection is defined as:

> " In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary....."

33. I am guided by various decisions of the courts. In the case of "Nitin Properties Limited – Versus - Singh Kalsi & Another [1995] eKLR" the court stated thus:-

> 'A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.'

34. The Tanzanian Court of Appeal sitting in Dar es Salaam, in the case of "Karata Ernest & others vs Attorney General (Civil Revision No 10 of 2020) [2010] TZCA 30 (29 December 2010)", (Luanda, JA, Ramadhani, CJ, Rutakangwa, JJA), put the issue of preliminary objections in a more exhaustive manner as follows: -

> " At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists o f a point of law which has been pleaded, or which arises by dear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when deliberating on the merits or otherwise of the concerned legal proceedings".

35. The case of "Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696" was notorious on the issue of what constitutes a preliminary objection where their Lordships observed thus:

> " ----a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation

or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration".

36. In the same case Sir. Charles Newbold, P. stated:

> "a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop".

37. A "demurrer" according to Black's Law Dictionary has its roots in French law 'demorer' and Latin 'demorari' and was defined as follows:-

> " A pleading stating that although the facts alleged in a complaint may be true, they are insufficient for the Plaintiff to state a claim for relief and for the Defendant."

38. The preliminary objection in this matter is founded on the notion that the Plaintiffs herein have failed to exhaust the dispute resolution mechanism under Section 154 and 155 of the *Mining Act* and as such the suit is unmerited having been instituted in a court devoid of jurisdiction to hear and determine it. In the write up of "Words and Phrases Legally Defined Vol. 3", John Beecroft Saunders defines jurisdiction as follows:

> By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

39. The authority of a court to determine a matter is derived from *the constitution*, an act of parliament or both. The Supreme Court of Kenya's decision of "Mary Wambui Munene – Versus - Peter Gichuki Kingara and 2 others, [2014] eKLR" averred that the question of a court's jurisdiction is a pure point of law when it stated thus : -

> " The question of jurisdiction is a pure question of law. This Court has on several occasions adopted the dictum of Nyarangi JA in the Owners of Motor Vessel "Lillian S" – Versus - Caltex Oil (Kenya) Ltd [1989] KLR 1 that it has to be determined from the start, and that where the Court finds it has no jurisdiction, it should down."

40. The issue of jurisdiction is thus an issue of law and as such the preliminary objection is merited. Is the court vested with the requisite jurisdiction to handle the instant dispute? This court [Lady Justice Dena J] when tasked with a Preliminary Objection similar to the one filed before this court in the case of "Kavii – Versus - Base Titanium Limited & 2 others (Environment & Land Petition E002 of 2022) [2023] KEELC 18436 (KLR) (29 June 2023) (Ruling)" made a finding that it had the requisite jurisdiction to deal with disputes arising from the *mining act* since the provision Section 154 gave a litigant several options on the channels to be explored to resolve disputes.

41. The ruling in “the Kavii Case [Supra]” has however been appealed against and is pending determination at the court of appeal. However, the provision of Section 154 [c] provides for resolution of disputes by a court of competent jurisdiction, the statutory provisions of the *Mining Act* outline a particular procedure as to how disputes should be resolved. The same provides as follows:-

Section 154 of the *Mining Act* is on general provisions on dispute resolution arising from mining activities and provides as follows:-

Any dispute arising as a result of a mineral right issued under the *Mining Act*, may be determined in any of the following manners-

a. By the Cabinet Secretary as prescribed in this Act;

b. Through a mediation or arbitration process as may be agreed upon by the disputing parties or as may be stated in an agreement or

c. Through a court of competent jurisdiction

Section 155 provides as follows:

-Subject to the provisions of this Act, the Cabinet Secretary may inquire into and determine the following matters;

a. A dispute of the boundaries of an area held under a prospecting or mining right

b. Any wrongful act committed or omitted in the course of prospecting and mining operations, by any persons against any other person

c. A claim by any person to be entitled to erect, cut, construct or use any pump, line of pumps, flume, race, drain dam.....

d. A claim to have any priority of water taken.....

e. Assessment and payment of compensation where provided for under this Act.

42. Mativo J in the case of “Republic – Versus - Council of Legal Education & another Ex - Parte Sabiha Kassamia & another [2018] eKLR” tried to distinguish the use of the words shall and may in statute interpretation. The same was aptly put as follows:-

> “ The operative word in the above provisions is "shall." The Black's Law Dictionary, defines the word "shall" as follows: -
>
> "As used in statutes, contracts, or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary significance, the term "shall" is a word of command, and one which has always or which must be given a compulsory meaning: denoting obligation. It has a peremptory meaning, and is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears."

43. The definition goes on to say "but it may be construed as merely permissive or directory (as equivalent to "may"), to carry out the legislative intention and in cases where no right or benefits to any one depends on its being taken in the imperative sense, and where no public or private right is impaired by

its interpretation in the other sense." So "shall" does not always mean "shall." "Shall sometimes means "may."

44. From the provisions of the *Mining Act*, and interpretation of the terms "shall" and "may" in the dictum above, this court opines that the same do not expressly oust the jurisdiction of the ELC in respect of the procedure for the determination of disputes that involve the management of the environment as the case herein.

45. Further guidance is provided for in the provision of Article 162 (2) (b) of *the Constitution* as read together with Section 13 (1) of the *Environment and Land Court Act*, No. 19 of 2011 which vests this court with the appellate and original jurisdiction over the matters that are handled under the *Mining Act*. It is this court's finding that it has the jurisdiction to handle this suit and the preliminary objection is thus dismissed.

46. The merit of this suit has been challenged by the Defendant who states that the subject matter has not been clearly described hence does not raise any reasonable cause of action and secondly that the 1st Plaintiff has filed the suit without the authority of the rest of the plaintiffs. That for this reason the suit fails to meet the threshold set for a representative suit.

47. The Defendant has submitted that the Plaintiffs have not adequately identified the property as required by the law in any suit concerning immovable property. Certainly, the provision of Order 4 Rule 3 of the Civil Procedure Rules, 2010 is clear that where the subject matter of the suit is immovable property, the Plaint should contain a description of the property sufficient to identify it. The Plaintiffs have identified the suit property as unregistered land situate in Nguluku-Maumba measuring 4000 acres or thereabout. They further state that they are in occupation of the land and that the Defendant has invaded the same and is carrying out its mining activities thereon. The Defendant does not dispute carrying out any activities at Nguluku-Maumba. It however questions the acreage provided for by the Plaintiffs and their lawful ownership of the land. I further note the issue of whether the suit property is community land or not has been raised.

48. However, I note that this was not the main issue at this particular point as the court cannot deal with the issue of the forms of land ownership at this point as the same is a substantive issue. The Defendant is keen on interpreting the provisions of Order 4 Rule 3 of the Civil Procedure Rules in isolation rather than from the wider context of what pleadings should really be bearing in mind the overriding objectives of the court.

49. The Plaintiffs main issue is the use of the land without prior compensation and it will be an injustice for the court to focus more on the descriptive nature of the land itself while forgetting the main gist of the suit which is the Defendant's mining activities. For that reason, the court finds that for purposes of resolving the main issue giving rise to the dispute before court, the suit property has sufficiently been described.

50. Lastly, I will not belabour much on the issue of the 1st Plaintiffs authority to institute this suit as I have seen an annexture of the same with the names and signatures of the rest of the Plaintiffs. As far as I am concerned, this is enough evidence of the authority to act on behalf as required by Law.

Issue No. b). Whether the application meets the threshold to grant the temporary injunctive order sought

51. Under this sub – heading the Honourable Court shall be examining whether the Plaintiff is entitled to the injunctive orders sought. The law regarding grant of interlocutory injunctions is found in under the provision of Order 40 Rule 1 of the Civil Procedure Rules which provide as follows:

> " 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;
>
> (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 order."

52. 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) EA 358", where it was stated: -

> " 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."

53. 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".

54. 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"

55. 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."

56. 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."

57. In the present case, from the stated facts the Plaintiffs/Applicants have produced before court a copy of the Certificate of title deeds to the suit property in evidence of its ownership – occupation and use. The Plaintiffs have further given proof of the activities on the suit property by the Defendant and which they state commenced without compensation to the Plaintiffs. Also that these activities have driven them away from the land in what they term as a forceful eviction where the mining activities have been explored by the Defendants with need to consider their compensation as provided for by law have demonstrated 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)".

58. The court has further considered the evidence on record against the second principle for the grant of an injunction, that is, whether the Applicants might suffer irreparable injury which cannot be adequately compensated by an award of monetary damages should the mining activities proceed as it is. With this regard 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 face, 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."

59. On the issue whether the Applicants 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. Here, I do wish to reiterate the dictum of the

court 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 a grant a temporary injunction to restrain such acts..."

60. The Plaintiffs are apprehensive that in the event that the Defendant's actions are not stopped, they are probably going to lose their properties without any form of compensation from the Defendant. I believe that the second threshold for grant of the orders sought has been made. It is imperative of the court to protect the Plaintiffs from loss and to further preserve the suit property pending the hearing and determination of the suit.

61. From the foregoing, the balance of convenience automatically tilts towards the applicants. The case of "Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) EKLR" 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".

62. I am guided further by the holding in the case 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."

63. Consequently, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them pending the hearing and determination of the suit on merit.

Issue No. e). Who will bear the costs of the Preliminary Objection and the applications.

64. It is well established that the issue of Costs is at the discretion of the Court. Costs are the award that is granted to a party at the conclusion of any legal action or proceedings in any litigation. The provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. By events it means the results or out come of the said legal action.

65. In this case, the result of the case are that the Plaintiffs/Applicants have managed to prove their case herein. For that very fundamental reason, therefore, the costs of this suit will be made to the Plaintiffs/Applicants herein to be borne by the Defendants/Respondents herein.

IV. Conclusion & findings

66. Consequently, having caused the indepth analysis of the framed issues, the High Court based on the Principles of Preponderance of Probabilities and the balance of convenience, proceeds to make the following orders:-

    a. That the Preliminary Objection dated 31st January 2025 be and is hereby dismissed.

    b. That the Notice of Motion application dated 30th September 2024 by the Plaintiffs/Applicants be and is hereby found to have merit and thus is allowed.

    c. That pending the hearing and determination of this suit, a temporary injunction is hereby issued against the Defendants restraining it either by themselves, their agents or any other persons claiming through it from trespassing, mining and or dealing whatsoever with ALL THAT unregistered land situate in Nguluku-Maumba measuring 4000 acres or thereabout hereinafter "the suit property"

    d. That the Notice of Motion application dated 6th December 2024 by the Defendants be and is hereby found to lack merit and thus be dismissed.

    e. That there be a mention of the matter on 25th June, 2025 for purposes of conducting a Pre – Conference pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010 and thereafter by consensus a hearing date on 29th October, 2025 by physical means.

    f. That the costs of both the Preliminary Objection and the application to be awarded to the Plaintiffs.

    It is ordered accordingly.

RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS 3RD DAY OF APRIL 2025

.....

HON. MR. JUSTICE L.L NAIKUNI,

ENVIRONMENT & LAND COURT

AT

KWALE.

Ruling delivered in the presence of: -

Mr. Daniel Disii, the Court Assistant.

Mr. Kisewe Advocate for the Plaintiffs/Applicants.

. M/s. Mwango Advocate for the Defendants/Respondents.