



**Mutinda & another v Musembi (Sued as the Legal Administrator of the Estate of Mangondu Kingoto Musyimi) (Environment & Land Case 363 of 2017) [2025] KEELC 4186 (KLR) (30 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4186 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE 363 OF 2017**

**EO OBAGA, J  
MAY 30, 2025**

**BETWEEN**

**TERESIA WANJIKU MUTINDA ..... 1<sup>ST</sup> PLAINTIFF**

**PHILIP MUTINDA NGUMBI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**RICHARD BEN KASAA MUSEMBI (SUED AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF MANGONDU KINGOTO MUSYIMI) ..... DEFENDANT**

**RULING**

1. Before this court for determination is the chamber summons dated 3<sup>rd</sup> August, 2022 brought under the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act* in addition to Order 40 Rules 1 and 2 of the Civil Procedure Rules, 2010. The Plaintiffs/Applicants seek issuance of the following orders:-
  1. The Court be pleased to grant a temporary injunction restraining the Respondents whether by themselves, their agents and/or servants from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the Plaintiff's property being Title Number KIBAUNI/KAVUMBU/6X4 pending the hearing and determination of this application.
  2. An order evicting the Defendant from land Parcel KIBAUNI/KAVUMBU/6X4.
  3. An order exhuming the body buried on land Parcel KIBAUNI/KAVUMBU/6X4.
  4. The Officer Commanding Kalawa Police Station do enforce compliance of the orders above.
  5. The costs of this application be borne by the Defendant/Respondent.
  6. The honourable court be pleased to make such further or other orders as it may deem fit and expedient in the circumstances of this case.



2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Teresia Wanjiku Mutinda sworn on even date on her behalf and that of the 2<sup>nd</sup> Plaintiff.
3. The Applicant averred that she is legal owner of the parcel of land known as KIBAUNI/KAVUMBU/6X4. She further averred that sometimes in the year 2015 up to date, the Respondent trespassed and constructed on her land without her permission. That the matter was referred to the Land Registrar vide this court's ruling and a report dated 22<sup>nd</sup> July, 2020 subsequently filed. She added that the court further pronounced itself in the ruling dated 9/3/2022 setting the boundary line at points CG.
4. The Applicant averred that the Respondent has ignored all her protestations to vacate her land despite numerous letters which were written by her advocates. It was her contention that unless the Respondent is restrained by this court, she will suffer irreparable damage as the Respondent continues to interfere with her enjoyment of the suit property.
5. Opposing the application, the Respondent swore a replying affidavit on 21<sup>st</sup> May, 2024. He averred that the Land Registrar's report dated 22<sup>nd</sup> July, 2020 indicates that the disputed area measures 1.18 hectares and that the boundary between Parcel Numbers KIBAUNI/KAVUMBU/6X3 and KIBAUNI/KAVUMBU/6X4 was reinstated according to the area map. That the said report was upheld by this court vide the ruling dated 9<sup>th</sup> March, 2022 in totality.
6. The Respondent averred that it is the Applicant who has been encroaching on land Parcel No. KIBAUNI/KAVUMBU/6X3 as the area of land she occupies on the ground is bigger than the size of land indicated on her title deed which is 4.12 hectares.
7. The Respondent asserted that the orders sought herein are oppressive in nature in the sense that the beneficiaries of the estate of the late Mangondu Kingoto who was the registered proprietor of land Parcel No. KIBAUNI/KAVUMBU/6X3 will lose their rightful inheritance. He added that they will also suffer irreparable loss should the court grant the orders sought.
8. The application was canvassed by way of written submissions.
9. In the Applicant's submissions dated 12<sup>th</sup> February, 2025 Counsel submitted that the Applicant had satisfied the requirements for granting a temporary injunction as outlined in the case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358. Counsel contended that the Applicant had adduced evidence showing that the Respondent has illegally taken possession of the suit property and is utilizing it which is a violation of the Applicants' right to property. Counsel urged the court to allow the orders as sought.
10. In the Respondent's submissions dated 7<sup>th</sup> February, 2025, Counsel reiterated the averments in the replying affidavit sworn by the Respondent. It was submitted that this court is functus officio in view of the ruling delivered on 9<sup>th</sup> March, 2022 which upheld the findings of the Land Registrar in determining the location of the boundary which separates the parties' respective parcels of land.
11. Counsel contended that the Applicants have not satisfied the requirements for grant of a temporary injunction. That the portion of land the Plaintiffs are claiming was found to form part of the Defendant's land. It was submitted that the application is frivolous and misconceived and that it ought to be dismissed.
12. The sole issue for determination is whether the Plaintiff/Applicant has met the legal threshold for issuance of the injunctive orders sought.



13. The prerequisite conditions for a grant of injunctive orders under Order 40 Rule 1(a) of the Civil Procedure Rules, 2010 were determined in the celebrated case of *Giella v Cassman Brown & Co Ltd* [1973] 1 EA 358 at 360 (CAK) as follows: -

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. 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 adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (*E.A. Industries v. Trufoods*, [1972] E.A. 420.)”

12. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR the Court of Appeal defined a prima facie case in the following terms: -

“4. A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will 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.”

12. A perusal of the pleadings and the evidence in the instant application reveals that the boundary line was determined vide the Makueni Land Registrar’s report dated 22<sup>nd</sup> July, 2020. The findings of the report which corrected the boundary to reflect the area map confirms that on the ground, the Plaintiff/Applicant occupied a larger property than the total acreage indicated on her title deed. The area of land she was occupying before the Land Registrar reinstated the boundary was 5.13 hectares whereas the suit property should measure 4.12 hectares.

13. The ruling of this court delivered on 9<sup>th</sup> March, 2022 adopted the Land Registrar’s report. The sad ruling has not been appealed against or reviewed. The Applicant therefore has no proprietary interest in the area of land marked as “GLKC” as per the report. The allegations of trespass into private property by Defendant are highly improbable.

14. Unfortunately, the Plaintiff/Applicant has not satisfied this Court that she has a prima facie case with a probability of success against the Defendant in order to justify issuance of an interlocutory injunction.

15. The Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR opined as follows: -

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



12. Seeing that the Applicant did not surmount the first hurdle of proving a prima facie case for the grant of the interlocutory relief sought, it is not worthwhile to consider the other two limbs as the Court of Appeal aptly observed in *Nguruman Limited* (supra). A conclusive determination of the entire claims by the parties herein can only be determined at a full hearing of the case.

12. In *Julius Kuria Nganga v Wambui Kigamba* [2017] eKLR, the Court held as follows: -

“Further, the court will also take into account that at this stage the court is not called upon to determine the very issues with finality but only to find out if the Applicant has established that he deserved the orders sought basing it on the laid down criteria. See the case of *Edwin Kamau Muniu vs Barclays Bank of Kenya Ltd Nairobi (Milimani)* High Court, Civil Case No.1118 of 2002, where the court held that:

“In an interlocutory application, the court is not required to determine the very issues which will be canvassed at the trial with finality. All the court is entitled to at that stage is whether the Applicant is entitled to an injunction sought on the usual criteria”.

12. The upshot of the foregoing is that the application dated 3<sup>rd</sup> August, 2022 is devoid of merit and is dismissed with costs to the Respondent.

It is so ordered.

**HON. E. O. OBAGA**

**JUDGE**

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 30<sup>TH</sup> DAY OF MAY, 2025.**

**IN THE PRESENCE OF:**

Ms. Kyalo for Respondent.

Mr. Hassan for Applicant.

Court assistant – Steve Musyoki.

