



**Ngama & 3 others v Tsuma (Environment and Land Appeal
E048 of 2024) [2025] KEELC 4418 (KLR) (10 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4418 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL E048 OF 2024
FM NJOROGE, J
JUNE 10, 2025**

BETWEEN

**MWAMKALE TSUMA NGAMA 1ST APPELLANT
NGAMA TSUMA NGAMA 2ND APPELLANT
MBAJI MUNAU 3RD APPELLANT
THE LAND REGISTRAR, KILIFI 4TH APPELLANT**

AND

TSUMA HEBA TSUMA RESPONDENT

RULING

1. The subject of this ruling is the Respondent's Notice of Motion application dated 21/2/2025 brought pursuant to Article 25 (c), 39, 40, 50 and 159 of *the Constitution* of Kenya, Section 1A, 1B, 3A and 6 of the *Civil Procedure Act*, Order 45 Rule and Order 51 of the Civil Procedure Rules, 2010. The orders sought have been tailored as follows:
 1. Spent;
 2. Spent;
 3. Spent;
 4. This honourable court be pleased to review the consent order made on the 23/9/2024 particularly granting liberty to the 1st Appellant and that the said Mwamkale Tsuma Ngama be detained at Kaloleni Prison pending hearing and determination of this appeal;
 5. The 4th Appellant, her agents, servants and/or employees be restrained from making any entries, alterations, changes and/or modification to the registration, map, size and /or ownership to all that piece of land known as Mgumopatsa/Mazeras/178;



6. Costs of this application and entire suit be provided for.
2. The Application is supported by the grounds enumerated therein and the affidavits sworn by the Respondent on 21/2/2025 and 28/4/2025. In the application, the Respondent alleged that on or about 20/2/2025, the Appellants together with some surveyors and officers from the land registry, moved into his land Mgumopatsa/Mazeras/178 (hereinafter referred to as “the suit property”) attempting to take measurements and place beacons therein. He asserted that the said acts were in total breach of the decree and orders of the trial court and that he was never informed of the said visit. The Respondent was apprehensive that the Appellants are interested in modifying, manipulating and or changing the entries over the suit property. To him, the alleged illegal activities were occasioned by the 1st Appellant since he was released from civil jail and there is need to detain him for vitiating the consent order registered in this court on 23/9/2024.
3. In opposition, the 1st Appellant filed a replying affidavit which he swore on 19/3/2025 stating that the application is in bad faith and with intent to mislead the court. He asserted that the title to the suit property has an error in that the approximate area is 0.084 Ha and not 3.35Ha as indicated therein. The 1st Appellant added that as per the instructions to the surveyors, the said survey was being conducted strictly on their properties identified as Mgumopatsa/Mazeras/1107, 1108 and 1109, in line with a ruling delivered on 17/12/2024 by the Kaloleni Principal Magistrate, and that the allegations raised by the Respondent are bereft of any material evidence.
4. The Application was canvassed by way of written submissions.

Respondent’s Submissions

5. Relying on the cases of Brooke Bond Liebig (T) Ltd v Mallya Civil Appeal No. 18 of 1975 [1975] EA 266 and Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited [2015] eKLR where the Court discussed the basis for review or setting aside of a consent judgment or order, counsel submitted that the Respondent has demonstrated serious grounds for setting aside or reviewing the orders of 23/9/2024, and that the Appellants have confirmed engaging in the alleged contemptuous acts. Counsel added that the ruling mentioned by the Appellants has no nexus to the present proceedings and does not order for a survey to be conducted.

1st Appellant’s Submissions

6. According to counsel for the 1st Appellant, the application does not meet the legal threshold for review under Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules restated in the case of Republic v Public Procurement Administrative Review Board & 2 Others [2018] eKLR. To him, the claim of encroachment by the Respondent is neither new nor supported by any evidence; neither does it reveal an error on the record.
7. Counsel further submitted that the test for granting an interlocutory injunction was established in the case of Giella v Cassman Brown & Co. Ltd [1973] EA 358 and affirmed in the case of Christopher Menge Kiyaka & Another v FMM [2020] eKLR as, an applicant must demonstrate a prima facie case with probability of success; demonstrate the probability of suffering irreparable injury that cannot be compensated by way of damages, and show balance of convenience favouring the granting of an injunction. To counsel, the Respondent has failed to demonstrate the above three requirements. He urged the court to dismiss the application for lack of merit.



Analysis And Determination

8. The issues for determination are:
 - i. Whether the court should review the consent order made on the 23/9/2024 and have the 1st Appellant detained in prison pending the hearing and determination of this appeal.
 - ii. Whether the 4th Appellant, her agents, servants and/or employees be restrained from making any entries, alterations, changes and/or modification to the registration, map, size and /or ownership of the suit property.
 - iii. Costs?
9. The present appeal challenges a ruling delivered on 20/8/2024 by the Hon. R.M Amwayi in Kaloleni Land Case No. E012 of 2021 where the 1st Appellant was found in contempt of court orders issued by that court on 12/4/2022. Upon filing this appeal, the 1st Appellant moved the court vide an Amended Notice of Motion application dated 19/9/2024 which was settled by a consent dated 24/9/2024. The effect of the consent order was that the ruling delivered by the trial court on 20/8/2024 be stayed and the 1st Appellant be released from civil jail pending the hearing and determination of the appeal.
10. The Respondent now wants the Court to review the above consent and have the 1st Appellant re-committed to civil jail.
11. In the case of SMN v ZMS & 3 others [2017] eKLR, the Court of Appeal while dealing with the issue of setting aside consent judgments or orders held as follows:

“Generally, a court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties.”
12. Upon consideration of the pleadings and submissions by both parties, this court is of the view that the consent entered on 24/9/2024 was mutually agreed upon by the parties and adopted as an order of the Court. The principles guiding the setting aside or review of consent order are well settled. A consent order may only be set aside where it is shown that the consent was obtained by fraud, collusion, mistake, or misrepresentation, or where the terms are contrary to public policy or incapable of enforcement.
13. The Respondent has not demonstrated that any of the aforementioned grounds exists to warrant a review of the consent order dated 24/9/2024. Accordingly, the Respondent’s application to review the consent order and have the 1st Appellant re-committed to civil jail lacks merit and is hereby dismissed.
14. On whether or not the 4th Appellant, her agents, servants and/or employees should be restrained from making any entries, alterations, changes and/or modification to the registration, map, size and /or ownership of the suit property, it is noted that from framing of the prayer, it is not clear whether the restraint is pending the determination of the appeal or otherwise. Be that as it may, and assuming that the same is to be issued pending the hearing and determination of the appeal, the Respondent was under the obligation to demonstrate that he is entitled to that prayer which is an injunctive relief.
15. The principles to be considered in an application for injunction were enunciated in the case of Nkuruman Limited v Jan Bonde Nielsen & 2 others [*CA No.77 of 2012*](#) [2014] eKLR that: -

“...In an interlocutory injunction application the applicant has to satisfy the triple requirements to a, establish his case only at a prima facie level, b, demonstrates irreparable



injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

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

16. The Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd* (Civil Appeal 39 of 2002) [2003] KECA 175 (KLR) gave a definition on what constitutes a prima facie case: that it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.
17. In the present case, the Respondent has not demonstrated that the 4th Respondent is in the process of making any alterations to the land register concerning the suit property. I am thus not convinced that a prima facie case has been established. As established in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [supra], the three conditions to be met by an applicant in such an application, are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially. Therefore, having failed to demonstrate a prima facie case, I see no basis to exercise my mind on the remainder two conditions, that is irreparable loss and balance of convenience. Consequently, I decline to grant prayer no. 5.
18. However, seeing that the issue between the parties appears to be a boundary dispute, it is pertinent and in the interest of preserving the subject matter of the appeal and ensuring no party gains undue advantage, the Court hereby directs that the status quo prevailing as at the date of this ruling shall be maintained pending the hearing and final determination of the appeal.
19. The appellant shall file and serve the record of appeal within 45 days from the date of this order and file an affidavit of service thereof.
20. The Deputy Registrar of this court shall call for the lower court file from Kaloleni Law Courts and attach it to this file and the appeal shall be listed for directions as to hearing on 28/10/2025.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 10TH DAY OF JUNE 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

