



**Ndolo (Suing on Behalf of Elizabeth Kamene Ndolo) v Nol Turesh Loitokitok
Water and Sanitation Company Limited & 9 others (Environment & Land
Case E005 of 2020) [2025] KEELC 3839 (KLR) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3839 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E005 OF 2020**

EO OBAGA, J

MAY 15, 2025

BETWEEN

**STEPHEN NDOLO APPLICANT
SUING ON BEHALF OF ELIZABETH KAMENE NDOLO**

AND

**NOL TURESH LOITOKITOK WATER AND SANITATION COMPANY
LIMITED RESPONDENT**

AND

**MUEMA KITULU 1ST DEFENDANT
EMILY MWELU GATUGUTA 2ND DEFENDANT
HON MR JUSTICE DANIEL MUSINGA 3RD DEFENDANT
DAVID MUSEMBI KATIE 4TH DEFENDANT
ALPHONCE MWENDWA (SUING ON BEHALF OF THE ESTATE OF JACKSON
KAKUNZU) 5TH DEFENDANT
SAMUEL KYALO MUNYAE 6TH DEFENDANT
PETER KANYASYA 7TH DEFENDANT
MATHEW KYEVA MUTETI 8TH DEFENDANT
MARIA MUTISO 9TH DEFENDANT**



RULING

1. Before this court for determination is the amended Notice of Motion dated 26th July, 2024 brought under the provisions of Order 40 Rules 1 and 2 of the Civil Procedure Rules, 2010. The Plaintiff/Applicant seeks issuance of the following orders: -
 1. [Spent]
 2. That pending the hearing and determination this application and the main suit, the court does order and direct the Defendant/Respondent to stop any new water connection in the Land Title Number IR 70883 of North West on Sultan Hamud.
 3. That pending the hearing and determination this application and the main suit, the court does order and issue a temporary injunction restraining the Defendant/Respondent from trespassing with the land Title Number IR 70883 on North West of Sultan Hamud.
 4. That pending the hearing and determination this application and the main suit, the court does order that the Defendant/Respondent be restrained from interfering with the land Title Number IR 70883 on North West of Sultan Hamud.
 5. That the Defendant/Respondent to pay for the cost of this application.
 6. Any other relief that this honourable court finds just to grant.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Stephen Ndolo sworn on even date.
3. The Applicant averred that he is the duly appointed representative of Elizabeth Kamene Ndolo on the basis of a registered power of attorney. He further averred that the Respondent had unlawfully entered the land of Elizabeth Kamene Ndolo and proceeded to connect, install and supply water to unknown people who have encroached on land Title Number 70883. He contended that the said water connection had been done illegally without the consent and authority of Elizabeth Kamene Ndolo who is the registered owner of the land.
4. The Applicant asserted that the Respondent did not conduct due diligence to ascertain the registered owner of the land before connecting and installing water. According to him, the Respondent's act constitutes outright trespass to private land without regard to the constitutional rights of the registered owner. The Applicant contended that the Respondent's unlawful activities have made it impossible for the Applicant fully utilize the land as multiple outsiders have encroached on the land without any legal rights.
5. The Applicant contended that the Respondent has earned and continues to earn profit through the illegal activities on the land as it charges a fee for any water supplied to the persons who have encroached on the Applicant's land. It was averred that due to the Respondent's illegal activities, the registered owner of the property has suffered expense, loss and damage which she holds the Respondent liable. He urged the court to issue the orders as sought in the application.
6. The application was opposed by the Respondent vide the replying affidavit sworn by Gabriel Wafula on 11th February, 2025. He averred that he is the Commercial Manager of the 1st Defendant. It was further averred that the orders sought are prejudicial to the judgment delivered on 19th March, 2018 stating



- that the 2nd to 10th Defendants are the legal owners of the property and that the Plaintiff/Applicant had been compelled to sign transfer documents to them.
7. The Respondent contended that the Applicant has no legal interest in the land since ownership was vested in the 2nd to 10th Defendants vide the judgment delivered in Makueni ELC Case No. 233 – 241 of 2017; Muema Kitulu versus Elizabeth Kamene Ndolo.
 8. The Respondent averred that vide the ruling dated 24th June, 2021, the court acknowledged the judgment of 19th March, 2018 and directed that the 2nd – 10th Defendants be registered as proprietors of the portion of land they occupy in LR No. 1757/19 formerly LR No. 1756/6 (IR 70883). It was the contention of the Respondent that the allegations made by the Applicant on trespass to the suit property are unfounded.
 9. The Respondent asserted that the 1st Defendant entered into a valid contract with the 2nd to 10th Defendants to connect clean water and that the 1st Defendant is legally mandated to carry out water connection without interference. That the right to clean and safe water in adequate quantities as envisioned by Article 43 (d) of *the Constitution* is a fundamental right that should not be deprived to any citizen within the Republic.
 10. The Respondent asserted that since the parties had complied with pre-trial directions on 27th November, 2023 and the matter certified as ready for hearing on 28th February, 2024 and 11th June, 2024, the present application is a delay tactic to stall the hearing and disposal of the main suit. It was averred that the present application is frivolous, vexatious and intended to waste the court's time by preventing the 2nd to 10th Defendants from enjoying the fruits of the judgment delivered in ELC Case No. 233 – 241 of 2017.
 11. The amended application was canvassed by way of written submissions.
 12. In the Applicant's submissions dated 5th September, 2024, Counsel submitted that the Applicant had produced a copy of the Title deed to the suit property marked as Exhibit "SN1" Title Number IR 70883. Counsel argued that the Applicant enjoys all the proprietary rights as provided under Article 40 of *the Constitution*. Reliance was placed on the provisions of Sections 24 (a) and 26 of the *Land Registration Act*, 2012 on the sanctity of the Plaintiff's title. Counsel contended that the Applicant had demonstrated a prima facie case with a probability of success.
 13. Counsel went on to submit that the continued acts of installing water pipes, trespass and undue interference by the Respondent infringe on the Applicant's constitutional and proprietary rights. Counsel contended that the Applicant continues to suffer loss and damage since the 1st Respondent has chosen to ignore several demands on the issue.
 14. Counsel urged the court to allow the orders as sought.
 15. In the Respondent's submissions dated 11th February, 2025, Counsel identified the following issues for determination: -
 - i. Whether the Applicant has met the threshold for grant of orders of temporary injunction? And
 - ii. Who should bear the costs of this application.
 16. Submitting that the Applicant had failed to demonstrate a prima facie case with a high likelihood of success, Counsel argued that the Applicant has no legal interest in the land which was vested in the 2nd – 10th Defendants by virtue of the judgment delivered on 19th March, 2018 in Makueni ELC Case No. 233 – 241 of 2017.



17. Counsel contended that the 2nd – 10th Defendants were confirmed to be the legal owners of the suit property and that the Applicant was compelled to sign transfer documents in their favour. Counsel thus defended the Respondent maintaining that it had the legal mandate to carry out connections without interference. Counsel contended that the application ought to be dismissed since the subject of the dispute is legal ownership and that it has already been determined in favour of the 2nd – 10th Defendants.
18. It was argued that the Applicant had failed to justify a case that he would suffer irreparable harm which cannot be compensated through damages. Counsel further argued that the Applicant had failed to show whether the judgment of 19th March, 2018 was stayed and thus the same remains binding. That the land ownership dispute herein having been determined in favour of the 2nd – 10th Defendants, the balance of convenience tilts in favour of the 2nd – 10th Defendants who are entitled to the fruits of the judgment.
19. Counsel urged the court to dismiss the instant application with costs.
20. The sole issue for determination is whether the Plaintiff/Applicant has met the legal threshold for issuance of the injunctive orders sought.
21. 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.)”
22. 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.”
23. A perusal of the pleadings and the evidence in the instant application reveals that the suit property is known as LR No. 1757/6 within Title No. IR 70883 as described in Exhibit “SN1”. Vide the judgment of this court produced as Exhibit “GK1, it shows that the 2nd – 10th Defendants were awarded their respective portions in the suit property which is registered in the name of Elizabeth Kamene Ndolo and a further order of permanent injunction issued restraining Elizabeth Ndolo from interfering with the respective use and enjoyment of the said portions of land.
24. The Applicant did not adduce any material evidence to show that the judgment of this court dated 19th March, 2018 had been stayed, reviewed and or set aside. The 2nd – 10th Defendants therefore have a proprietary interest in the suit property which was legally declared as such to be in existence as per the said judgment. The allegations of trespass into private property by 1st Defendant are highly improbable



given the fact the 2nd – 10th Defendants have proprietary interests in the suit property which they are entitled to fully enjoy. In fact, the 1st Defendant clarified that it had executed valid contracts for water installation at the suit property with the Defendants.

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

26. 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.”

27. Seeing that the Plaintiff has not surmounted 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.

28. 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”.

29. The upshot of the foregoing is that the amended Notice of motion dated 26th July, 2024 is devoid of merit and is dismissed with costs to the 1st Defendant/Respondent.

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HON. E. O. OBAGA

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 15TH DAY OF MAY, 2025.

In the presence of:

Ms. Mukami for Applicant.



Ms. Ngetich for 1st Defendant/Respondent.

Court assistant – Steve Musyoki

