



**Manyara v Mwiti & another (Environment and Land Appeal  
E01 of 2024) [2025] KEELC 108 (KLR) (22 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 108 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO  
ENVIRONMENT AND LAND APPEAL E01 OF 2024  
JO MBOYA, J  
JANUARY 22, 2025**

**BETWEEN**

**JOSEPH KIMATHI MANYARA ..... APPELLANT**

**AND**

**GODFREY MWITI ..... 1<sup>ST</sup> RESPONDENT**

**TACHE BORU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction and Background:**

1. The Appellant/Applicant [hereafter referred as the Applicant] has approached the court vide the application dated the 18<sup>th</sup> January, 2024; brought pursuant to the provision of Order 40 Rule 1; Order 51 Rule 1 of the Civil Procedure Rules 2010 and Sections 1A, 1B, 3, 3A and 63(e) of the [Civil Procedure Act](#), Chapter 21, Laws of Kenya; and in respect of which the applicant has sought the following reliefs [verbatim]:
  - i. ....Spent.
  - ii. That the Honourable Court be pleased to issue a temporary order of injunction restraining the Respondents by themselves, their Agents, Employees and all persons claiming under them from entering into, remaining on Plot No. Kambi Ya Juu/241 and or any way interfering with the appellant/applicant use, occupation and position of the same pending the hearing and determination of this application inter-parties.
  - iii. That the Honourable Court be pleased to issue a temporary order of injunction restraining the respondents by themselves, their agents, employees and all persons claiming under them from entering into, remaining on Plot No. Kambi Ya Juu/241 and or any way interfering with



the Appellant's/Applicant's use, occupation and position of the same pending the hearing and determination the appeal herein.

- iv. That the Honourable Court be pleased to issue such other and or further orders as may meet the ends of justice.
2. The instant application is premised on various grounds which have been enumerated in the body thereof. In addition, the application is supported by the Affidavit of one, namely, Joseph Kimathi Manyara [the Applicant] sworn on the 18<sup>th</sup> of January, 2024 and to which the Applicant has annexed two [2] sets of documents, including a copy of the Judgment being appealed against.
3. Upon being served with the subject application, the Respondents filed a Replying affidavit sworn by the 1<sup>st</sup> Respondent on the 2<sup>nd</sup> of February, 2024; and wherein the Deponent has contended that the subject application is not only misconceived, but same constitute[s] an abuse of the due process of the court.
4. Suffice it to state that the application came for hearing/directions before Hon. Justice P.M Njoroge, Judge [ now retired] on the 8<sup>th</sup> of April, 2024 whereupon the advocates for the parties agreed to canvass the application by way of written submissions. To this end, the Judge proceeded to and prescribed the timelines for the filing and exchange of the written submissions.
5. Thereafter, the advocate[s] for the parties proceeded to and indeed filed their respective written submissions. In particular, the Applicant filed written submissions dated the 15<sup>th</sup> of February, 2024; whereas the Respondents filed written submissions dated 23<sup>rd</sup> April, 2024. The two [2] sets of written submissions are on record.

## **Parties Submissions:**

### **a. Applicant's Submissions**

6. The Applicant filed written submissions dated the 15<sup>th</sup> of February, 2024; and wherein the Applicant has adopted the grounds contained in the body of the application. In addition, the Applicant has also reiterated the averments, adverted to and contained at the foot of the Supporting Affidavit.
7. Furthermore, the Applicant has ventured forward and highlighted two [2] salient issues for consideration and determination by the court.
8. Firstly, the Applicant has contended that the Respondents herein have commenced the process of executing the Judgment of the court and as a result thereof, the Respondents have entered upon the suit land and hived out a portion of the suit Land. In this regard, it has been submitted that the actions by the Respondents herein are bound to deny and deprive the Applicant of his entitlement[s] to the suit land.
9. Secondly, the Applicant has also contended that the actions by the Respondents are likely to subject the applicant to suffer irreparable loss. In any event, it has been contended that the Respondents' actions have been undertaken without justification and or any colour of rights over and in respect of the suit plot.
10. Arising from the foregoing, the Applicant has submitted that same has therefore established and demonstrated the requisite basis to warrant the grant of the orders sought. In this regard, the Applicant has implored the court to proceed and allow the application.



### **b.Respondents' Submissions:**

11. The Respondents filed the written submissions dated the 23<sup>rd</sup> of April, 2024; and wherein the Respondents have adopted and reiterated the contents of the Replying Affidavit sworn in opposition to the Application under reference. In addition, the Respondents have highlighted and canvassed two [2] salient issues for consideration by the court.
12. First and foremost, the Respondents' have submitted that the applicant case before the lower court touched on and concerned Plot No. 242 Kambi Ya Juu within Isiolo Town. In particular, it has been submitted that the applicant contended that same is the owner of the said plot, namely, Plot No. 242 Kambi Ya Juu. Nevertheless, it has been submitted that despite his contention before the Lower Court, the applicant has now abandoned his claims before the Lower Court and is now seeking to procure orders of temporary injunction over and in respect of Plot No. 241 Kambi Ya Juu, which is separate and distinct from the suit plot that was being claimed in the Lower Court.
13. According to the Respondents, the orders sought by the Applicant at the foot of the current application, are contrary to and at variance with the pleadings that were filed by the applicant in the Lower Court. In this regard, it has been contended that the applicant is seeking to change the character of the suit and thus the application beforehand constitute[s] an abuse of the due process of the court.
14. Secondly, the Respondents' have submitted that the applicant herein has neither met nor satisfied the requisite ingredients to warrant the grant of an order of stay of execution of the Judgment and decree of the court. Moreover, it has been contended that the Applicant has not satisfied the conditions adverted to at the foot Order 42 Rule 6 (2) of the Civil Procedure Rules 2010.
15. To buttress the submissions that the Applicant has not met the conditions to warrant the grant of the orders of stay of execution pending the hearing and determination of the appeal, the Respondents' have cited and referenced various decisions including In RWW VS EKW [2019] eKLR; JAMES WANGALWA & Another Vs Agnes Naliaka Chesito [2012] eKLR and Arun C. Sharma Vs Ashana Raikundalia t/a Rairundalia 7 Co. Advocates & 2 Others [2014] eKLR respectively.
16. Arising from the foregoing submissions, the Respondents' have invited the court to find and hold that the application beforehand is devoid of merits and thus same ought to be dismissed with costs.

### **c. Issues for Determination:**

17. Having reviewed the Application, the Response thereto; and upon consideration of written submissions filed on behalf of the respective parties, the following issues crystallize [emerge] and thus worthy of determination;
  - i. Whether the Applicant herein has demonstrated the existence of a prima facie case with probability of success or otherwise.
  - ii. Whether the applicant herein has demonstrated a likelihood of Irreparable loss arising/ accruing; if the orders sought are not granted.



#### **d. Analysis and determination:**

##### **Issue number 1**

#### **Whether the applicant herein has demonstrated the existence of a prima facie case with probability of success or otherwise.**

18. The Applicant before the court seeks an order for temporary injunction pending the hearing and determination of the appeal beforehand. To the extent that the application beforehand seeks for an order for temporary injunction, it suffices to underscore that it is incumbent upon the Applicant to establish and demonstrate the existence of a prima facie case with probability of success.
19. Pertinently, the Applicant herein can only progress the claim for an order of temporary injunction, if same [Applicant] can prove that same has a case and or appeal that [sic] espouses probability of success and not otherwise.
20. As pertains to what constitute a prima facie case/appeal, it is appropriate to take cognizance of the definition and meaning adverted to and espoused in the case of Mrao Limited Vs First American Bank of Kenya Limited [2003] eKLR where the Court of Appeal stated as follows;

“In civil cases, a prima facie case is a case in 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 to call for an explanation or rebuttal from the latter.

A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

21. Moreover, the meaning and import of what constitute a prima facie case was revisited by the court of appeal in the case of Nguruman Limited v Jan Bonde Nielsen, Herman Philipus Steyn Also Known As Hermannus Phillipus Steyn & Hedda Steyn [2014] KECA 606 (KLR), where the court stated thus;

“We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges.

The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”



22. Guided by the principle and in particular, the meaning of what constitute[s] prima facie case, it is now expedient to revert to the matter beforehand and to discern whether the Applicant herein has demonstrated the existence of prima facie case.
23. To start with, it is not lost on this court that the Applicant herein had contended that same [Applicant] is the owner of Plot No. 242 Kambi ya Juu, Isiolo Town. For good measure, the Applicant herein sought to procure various orders including permanent injunction to restrain the Respondents from entering upon and/or interfering with [sic] his [Applicant's] rights to and over the suit property.
24. Subsequently, the dispute canvassed by the Applicant was heard and determined by the trial court [Magistrates' Court] who returned the Judgment that the applicant herein did not prove the existence of Plot No. 242, namely, the Suit Plot, which was being claimed by the Applicant. Furthermore, the trial court found and held that the plot that was being claimed by the Applicant as Plot No. 242 Kambi ya Juu, was in fact the plot belonging to the Defendants [who are the Respondents] herein.
25. Other than the foregoing, the Trial Court also found and held that the dispute by the Applicant herein pertaining to the disputed ground had been adjudicated upon by the Dispute Resolution Committee, who also found that the Applicant herein had been unable to prove his claim, as pertains to the Suit Plot.
26. Pertinently, the trial court returned a finding that the disputed ground constitutes Plot No. 241 Kambi Ya Juu and not otherwise. To this end, there is no gainsaying that the disputed ground constitutes Plot No. 241 belonging to the Respondents and this shall remain the position until the Judgment of the Magistrates' Court is overturned, where apposite.
27. In view of the foregoing, it is therefore imperative to state and observe that for as long as the Judgment of the trial court has not been set aside, the disputed plot constitute[s] Plot 241 and not Plot 242, [the latter which is the one being claimed by the Applicant].
28. In my humble albeit considered view, the Applicant herein has not established and proved the existence of any rights and/or interested over and in respect of Plot No. 241, Kambi ya Juu; capable of being vindicated vide an order of temporary injunction at this juncture.
29. Moreover, it is worthy stating that the Applicant's case turned on and concerned ownership of [sic] Plot No. 242 Kambi ya Juu; and not Plot No. 241 Kambi ya Juu. In this regard, the application by the applicant, which now seeks an order of temporary injunction in respect of Plot No. 241 Kambi ya Juu, is therefore at variance with the pleadings that were filed by and on behalf of the Applicant in the subordinate court.
30. Quite clearly, the application by the Applicant constitute[s] a departure from the pleadings and position that was previously taken and canvassed by the Applicant. There is no gainsaying that the Applicant herein appears to be shifting the goal post as pertains to [sic] his claims. Instructively, the shifting of goal posts by the Applicant herein, demonstrate[s] lack of bona-fides, in his [Applicant's] claim.
31. Notwithstanding the foregoing, it is apposite to underscore that parties, the applicant not excepted, are bound by their pleadings. Consequently, the Applicant herein cannot now turn around and be allowed to renege from his previous position and seek to procure orders over and in respect of a separate Plot. Such an endeavour would be tantamount to breach of the Doctrine of Departure and the provisions of Order 2 Rule 6 of the Civil Procedure Rules, 2010.
32. To this end, I beg to cite and reference the decision of the Court of Appeal in the case of Dakianga Distributors Limited Vs Kenya Seeds Company Limited [2015] eKLR where the court stated thus:



33. For coherence, the court stated thus;

“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them.

It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial. 33. Sir Jack Jacob in an article entitled “The Present Importance of Pleadings” published in [1960] Current Legal Problems and which article was quoted with approval by the Supreme Court of Malawi in *Malawi Railways Limited v Nyasulu* [1998] MWSO 3 states of the importance of pleadings:

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial.” [Emphasis added]

34. Arising from the foregoing decision, it is common ground that the Applicant herein cannot be allowed to oscillate between a claim over and in respect of ownership of Plot No. 242 and Plot No. 241, in the manner the applicant has purported to do vide the instant Application.
35. Be that as it may, it is my finding and holding that the Applicant herein, who is now claiming/seeking for an order of injunction in respect of Plot No. 241 Kambi ya Juu; and not Plot No. 242 Kambi ya Juu, which formed the basis of his [Applicant’s] claim, has failed to establish a prima facie case/ Appeal over in respect of Plot Number 241.
36. In a nutshell, my answer to issue number one [1] is to the effect that the Applicant has not established and/or proven the existence of any actionable interest[s] in respect of Plot No. 241 Kambi ya Juu; and to this extent, the Applicant has failed to demonstrate a prima facie case to underpin the grant of an order of temporary injunction either in the manner sought or otherwise.

## Issue No. 2

### **Whether the applicant hearing has demonstrated a likelihood of irreparable loss arising, if the orders sought are not granted.**

37. It was incumbent upon the Applicant to prove and demonstrate the existence of prima facie case/ Appeal. However, while discussing issue number one [1], the court has found and held that the Applicant has failed to prove a prima facie case. In this regard, it would have been apposite to terminate the ruling and dismiss the Application.
38. Nevertheless, and for the sake of completeness, it is expedient to address the second issue pertaining to proof of irreparable loss, [if any]. In any event, it is worth recalling that an Applicant is not entitled to an order of temporary injunction until and unless same has proven that irreparable loss, harm or injury is likely to accrue, if the orders sought are not granted.



39. Put differently, irreparable loss constitutes the key pillar and/or cornerstone upon which an order of temporary injunction is anchored. Instructively, it was incumbent upon the Applicant to show that same is likely to suffer an irreparable loss; if the actions complained of are not averted and/or restrained.
40. However, I have found and held that the Applicant's case related to Plot No. 242 Kambi ya Juu and not 241. To this end, the question that begs an answer is how the Applicant shall suffer irreparable loss, if any, pertaining to the use and actions in respect of a plot other than the one that was claimed by the Applicant.
41. Without belaboring the point, it is my finding and holding that the Applicant herein, has not proven the likelihood of irreparable loss, harm or damage; accruing unto him or at all. In this respect, it is common ground that the Applicant's contention[s] as pertains to irreparable loss, are misconceived and legally untenable.
42. Before departing from the issue of irreparable loss, it is important to take cognizance of the meaning of same. In this regard, it suffice to cite and reference the holding in the case of *Vivo Energy Limited vs Maloba Petrol Station & Others* [2015] eKLR.
43. For coherence, the Court stated thus;

“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.”

44. To my mind, the Applicant herein, whose claim in the subordinate court touched on Plot No. 242 Kambi ya Juu and not Plot No. 241 Kambi ya Juu; has not satisfactorily proven how the usage of and the actions, if any, on the latter plot will [sic] occasion irreparable loss or at all.

**Final Disposition:**

45. Flowing from the analysis [highlighted in the body of the ruling], it must have become evident and apparent that the Applicant herein has neither met nor satisfied the requisite ingredients that underpin the grant of an order of temporary injunction. For good measure, it was incumbent upon the Applicant to demonstrate the existence of a prima facie and a likelihood of irreparable loss arising.
46. Consequently, and in the circumstances, the final orders that commend themselves to the Court as hereunder:
  - i. The Application dated 18<sup>th</sup> January, 2024 be and is hereby dismissed.
  - ii. Costs of the Application be and hereby awarded to the Respondents
47. It is so ordered.

**DATED, SIGNED AND DELIVERED AT ISIOLO THIS 22<sup>ND</sup> DAY OF JANUARY, 2025**

**OGUTTU MBOYA,**



**JUDGE.**

In the presence of;

Court Assistant: Rahama/Mustafa

Mr Caleb Mwiti for the Respondents

No appearance for the Appellant/Applicant

Joseph Kimathi Manyara – Appellant/Applicant present in person.

