Kariuki & another (Suing as Legal Representatives of the Estate of William Kariuki Ndirangu) v Naivasha & another (Land Case E026 of 2025) [2025] KEELC 6303 (KLR) (Environment and Land) (25 September 2025) (Ruling)

Neutral citation: [2025] KEELC 6303 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA

ENVIRONMENT AND LAND

LAND CASE E026 OF 2025

MC OUNDO, J

SEPTEMBER 25, 2025

BETWEEN

HANNAH MWIHAKI KARIUKI ..... 1ST PLAINTIFF

LEWIS NDIRANGU KARIUKI ..... 2ND PLAINTIFF

SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF WILLIAM KARIUKI NDIRANGU

AND

LAND REGISTRAR, NAIVASHA ..... 1ST DEFENDANT

KENYA NATIONAL HIGHWAYS AUTHORITY (KENHA) ..... 2ND DEFENDANT

RULING

1. Vide a Notice of Motion Application dated 8th May 2025 brought under the provisions of Order 51 of the Civil Procedure Rules, Section 3A of the *Civil Procedure Act*, Section 13 of the *Environment and Land Court Act* and all other enabling provisions of the law, the Applicants seek for an order staying the cancellation, revocation and/or expunging of records relating to title No. Kijabe/Kijabe Block 1/30245 by the 1st Respondent. They further seek for a temporary order of injunction restraining the 2nd Respondent, its agents, servants, employees and/or surrogates whomsoever, howsoever from trespassing, entering onto, occupying, possessing or in any way dealing with land parcel number Kijabe /Kijabe Block 1/30245, pending the hearing and determination of the instant suit as well as for costs.

2. The said application was supported by the grounds therein and a supporting Affidavit of an even date, sworn by Hannah Mwihaki Kariuki, the 1st Applicant herein who deponed that she was the widow

to William Kariuki Ndirangu (deceased) who was the bonafide proprietor of all that parcel of land known as Kijabe/ Kijabe Block 1/30245 (the suit property) which now vests in the deceased's estate and which land was a subdivision of his land parcel number Kijabe/ Kijabe Block 1/ 1939. That whereas the deceased had undertaken subdivision of the suit parcel of land which had resulted in land parcel numbers 7233-7319, he realized that the surveyor had omitted to issue a number to a strip of land lying between the highway and the stream and had formed part of land parcel No. Kijabe/ Kijabe Block 1/1939.

3. That subsequently, on 12th March, 2020, the deceased had written to the 1st Respondent requesting to be assisted in accessing the land as some people had encroached on it. He also sought for the issuance of a title deed to that particular strip. That the 1stRespondent had taken up the matter and instructed the County Surveyor to visit the suit property whereupon being furnished with the surveyor's findings, the 1st Respondent had duly issued the deceased with the title deed to the suit property.

4. That subsequently, on the 9th December, 2021 the Assistant Chief had directed one Silvester Ndirangu, who had encroached on the suit property to vacate the same.

5. On the 18th January 2024 however, the 2nd Respondent served them with a notice of an intended demolitions alleging that they had encroached on their suit property which caught them by surprise as they had never been served with any notices or communication by the 1st or 2nd Respondent on the ownership of the suit property.

6. That when they made enquiries on the validity and reasons behind the 2nd Respondent's notice, they discovered that on the 12th September, 2022, the 2nd Respondent had written to the 1st Respondent alleging that the suit property had been created from a road reserve. That on the 22nd of December, 2023 the 1st Respondent vide Gazette Notice No. 17543 indicated that the suit property lay entirely on a road reserve and riparian reserve where there had been notification that after expiration of 30 days, she would proceed to expunge the records and revert the parcel to the relevant Government entity for their use.

7. She deponed that all those decisions had been made without their knowledge and/or involvement and neither had they been given reasons for the drastic decisions. That they had come to learn of the 1st Respondent's decision after the lapse of the 30 days' Notice issued in the Gazette Notice. That the order of cancellation and purported investigations made against the suit property had been done un-procedurally, without according them an opportunity for a fair hearing and without giving sufficient reasons and had thus been based on irrationality, procedural impropriety and marred with illegalities ab initio for which decision was an illegality.

8. That it was thus in the interest of justice that the conservatory orders herein sought be granted to protect the subject matter so that the suit could be heard and determined on merit.

9. In response and in opposition to the Applicants' Application, the 1st and 2nd Respondents filed their Respective Grounds of Opposition both dated 23rd May 2025 wherein the 1st Respondent's grounds of opposition were that:

10. The application was premature and constituted an abuse of the court process because the Applicants have failed to exhaust the statutory remedies as enshrined under the provisions of Article 47 and 159 (2) of *the Constitution* of Kenya 2010 and the *Fair Administrative Action Act*. That there were laid down procedures under Sections 5(e), 5(h), 14(3) of the *National Land Commission Act*, 2012 wherein the commission was mandated to investigate into the alleged land injustice arising from the identification of their parcel as road reserve wherein the Applicants did not file their complaint nor

seek the Commission's oversight intervention under Section 5(h) regarding Kenya National Highway Authority (KENHA) land use planning decision affecting their property.

11. That the entire dispute arose from the Applicant's failure to submit the documents to KENHA as initially required, demonstrating a consistent pattern of unwillingness to engage with proper administrative channels and statutory procedures established by law, which directly precipitated the subsequent gazette notice and expungement proceedings.

12. That the 1st Respondent acted well within their statutory authority in implementing the gazette notice for land expungement and reversion, following proper administrative procedures after the Applicant's non-compliance with document submission requirements where the gazette notice was issued in accordance with established legal procedures and statutory requirements, providing adequate notice to all interested parties including the Applicant.

13. That the Applicant was afforded reasonable opportunity to comply with administrative requirements but deliberately chose not to engage with the proper statutory channels, instead opting to bypass mandatory procedures through premature action.

14. That even if the Court were to consider the substantive merits (which is denied), the matter involves complex technical issues regarding road planning, land use allocation, and public infrastructure development that are within the primary expertise of the National Land Commission rather than the Court.

15. That the Applicant's failure to exhaust administrative remedies has prejudiced not only the proper legal process, but also the possibility of cost-effective resolution that would serve both public and private interests and therefore the application is fundamentally flawed, premature and constitutes an abuse of the court process thus it should be dismissed with costs.

16. The 2nd Respondent's opposition on the other hand was based on the grounds that:

    i. The Applicants had not satisfied the conditions for grant of the stay order that they sought.

    ii. The Applicants had not demonstrated that the substantive suit was arguable or that they had a prima facie case with a likelihood of success.

    iii. The Applicants had not shown or demonstrated that the substantive suit would be rendered nugatory were the conservatory order of stay not granted or that they would suffer irreparable loss which could not be compensated by way of damages or restitution.

    iv. That the scales of balance of convenience tilted in favour of denying the application on the grounds of public interest and convenience.

    v. That further, the Applicants had not demonstrated that the suit property was at the risk of being wasted, damaged, or alienated, or disposed thus potentially hindering the enforcement of a future decree.

    vi. That the Application was vexatious, frivolous and an abuse of the Court process and should be dismissed forthwith with costs.

17. Directions were taken for the disposal of the Application by way of written submissions wherein the Applicants vide their undated submissions summarized the factual background of the matter before framing their issues for determination as follows:

    i. Whether the Applicants have demonstrated that they will suffer substantial loss if the orders sought by them are not granted?

ii. Whether the Application was made without unreasonable delay?

iii. Whether the orders sought by the Applicants should be granted on a balance of convenience.

iv. Whether they had established a prima facie case to warrant the award of the injunction sought by them.

v. Whether costs to be paid by the Defendant/Respondent

18. On the first issue for determination, the Applicants' relied on the decision in the case of Giella vs. Cassman Brown to submit that their application was founded on the necessary ingredients for the grant of an interlocutory injunction. That they had proved that they would suffer substantial loss were the orders sought not granted as the Respondents would proceed to cancel, revoke and/or expunge records relating to title number Kijabe/Kijabe Block 1/3045 as per Gazette Notice No. 17543 wherein the Respondents would then trespass, enter into/ occupy, possess their suit parcel of land which was demonstration of a clear imminent risk of irreparable harm if the orders sought were not granted.

19. They placed reliance in the decided case of case Hamisi Juma Mbaya v Asman Amakecho Mbaya [2019] KEELC 1611 (KLR) to submit that their application had been made without unreasonable delay and urged the Court to consider the fact that they had only learnt of the 1st Respondent's decision after the 30 days given in the Gazette Notice having lapsed.

20. On the second issue for determination as to whether they should be granted the orders sought on a balance of convenience, they placed reliance on the Black's Law Dictionary on the definition of balance of convenience and on the decisions in the cases of Amir Suleiman v Amboseli Resort Limited (2004) eKLR and Naurori v Freeman & 2 others (Environment & Land Case E010 of 2023) [2024] KEELC 6701 (KLR) (14 October 2024) (Ruling) to urge the court to opt for a lower risk and grant them the orders of temporary injunction so sought.

21. They submitted that they had established a prima facie case to warrant the award of the injunction sought by them while placing reliance on the decided cases of Mrao Limited vs. First American Bank of Kenya Limited and 2 others (2003) eKLR and Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] KECA 606 (KLR).

22. It was their submission that the suit property was registered to the Plaintiff's deceased husband. That they had come to learn of the 1st Respondent's decision after the 30 days given in the gazette notice had lapsed for which the order of cancellation and purported investigations had been made against the suit property without due process and un-procedurally thus amounting to a decision that was an illegality. That having established a prima facie case, the Court ought to grant the orders sought herein with costs which followed the event.

23. The 2nd Respondent, vide their submissions dated 23rd June 2025 in opposition to the Applicants' Application also summarized the factual background of the matter and then framed one issue for determination to wit; whether the Applicants have met the established grounds for the grant of the stay orders as had been sought in the instant Application.

24. It was its submission that the nature of the prayers sought by the Applicant were aimed to stay the decision of an administrative body and which prayers were not available under the provisions of the Civil Procedure Rules. It placed reliance on the Supreme Court's decision in the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR on the distinction between injunction, an order of stay and conservatory orders as well as the decided case R v KRA & Kenol Kobil & Rayan Logistics Ltd [2018] eKLR to submit that the only stay orders available under the Civil Procedure

Rules were stay of proceedings and stay of execution. That essentially, what the Applicants herein were seeking were conservatory orders to stall the effects of an administrative decision which had already been taken hence what was before the court was a question as to whether the conditions for grant of conservatory orders had been met. They relied on the decided case in the Board Management of Uhuru Secondary School v City Country Director of Education & 2 Others [2015] eKLR that lay down the principles for the grant of conservatory orders.

25. The 2nd Respondent then placed reliance on then decision in the case of Mrao Limited v First American Bank of Kenya (2003) KLR 125 and the Court of Appeal's case of Nguruman Limited v Jan Bonde Nielsen and 2 others [2014] eKLR to submit that the Applicants had not demonstrated a prima facie case with a likelihood of success. That the 1st Respondent had already cancelled and/or revoked the suit property where the suit land had already reverted to the 2nd Defendant for public use. That subsequently, the Applicants were seeking to stay what had already been enforced which stay was no longer efficacious as there was nothing remaining to be stayed. Reliance was placed in the decided case of Republic v Public Procurement Administrative Review Board & 2 Others Exparte Adan Osman Godana t/a Eldoret Standard Butchery [2017] eKLR.

26. That further, the particulars that had been set out in the instant suit were grounds for Judicial Review. That indeed the provisions of Section 19 of the *Civil Procedure Act* provided for every suit to be instituted in such a manner as may be prescribed by the rules whereby the administrative decision being challenged by the Applicants had a proper channel provided for under the provisions of Order 53 of the Civil Procedure Rules. Their suit was thus unlikely to succeed.

27. That before granting Conservatory Orders, the Court was also required to evaluate the pleadings and determine whether the denial of Conservatory Orders would prejudice the Applicant. Reliance was placed in the decided case of Centre for Rights Education & Awareness (CREAW) & another v Speaker of National Assembly & 2 others [2017] eKLR to submit that the Applicants had not demonstrated the specific constitutional provisions or the specific fundamental rights that were at stake or needed the court to exercise its discretion to grant conservatory order at the instant stage. It was thus its submission that the Applicants had not made out a prima facie case to warrant the grant of the orders sought herein.

28. As to whether the suit would be rendered nugatory if the conservatory order was not granted, the 2nd Respondent submitted that the order sought to be stayed should be such that if the intervention of stay orders was not granted, the outcome of the case, if successful, would be worthless. Reliance was placed in the Court of Appeal's decision in the case of Patel & another v Patel (Suing as the Legal administrator of the Estate of Narshibhail Patel Fulabhai-Shareholder) & another (Civil Application E094 of 2022) [2023] KECA 631(KLR) (26th May 2023) (Ruling) as well as the decided case in Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR.

29. That the orders sought by the Applicants in the main suit were capable of being granted and enforced at the conclusion of the proceedings herein and that the Court retained full discretion to make appropriate orders after hearing the case on merit. That were the Court to find that the Defendants' decision was null and void, the same could be reversed, and the Plaintiffs restored to the land since there had been no demonstrable risk that the land or the title thereto would be lost or transferred if stay was not granted at the interim stage. Reliance was placed in the decided case of Kirera v Senate & 8 others (Petition 4 of 2024) [2024] KEHC 7490 (KLR) (13 June 2024) (Ruling) to submit that the nature of the reliefs sought in the main suit were such that they remained fully capable of being granted and enforced at the conclusion of the proceedings, regardless of whether conservatory orders were issued at the instant case. That in any event, there was no demonstrable risk that the suit would be rendered nugatory in the interim hence the Application for conservatory orders had failed to meet the nugatory test.

30. As to whether public interest would be served or prejudiced by a decision to exercise discretion to grant or deny conservatory order, its reliance was hinged in the decisions in the cases of Gatirau Munya Case (Supra), Kenya Medical Association v Kenya Revenue Authority & 2 others (Petition E163 of 2024) [2024] KEHC 11301 (KLR) (Constitutional and Human Rights) (27 September 2024) (Ruling) and Martin Nyaga Wambora v Speaker of the County Assembly of Embu & 3 Others [2014] eKLR to submit that the interruption of the 2nd Respondent's lawful actions should be taken into account to allow its functioning in the public interest.

31. It was thus not in the public interest, to restrain the 2nd Defendant from its function since it would deny the larger citizenry of the 2nd Respondent's much needed provision of road development and services. That the public interest thus tilted in favour of the Respondents in the circumstances of the case herein.

32. With regard to where the balance of convenience lie, reliance was placed in the decided case of Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] KEELC 2424 (KLR) as well as on the decided case of Nairobi Kiru Line Services Ltd v County Government of Nyeri & 2 others [2016] eKLR to submit that the Applicants had not been in the occupation of the suit land and therefore the most convenient step to take in the instant application was to direct parties to maintain the status quo until the case was heard and determined. That the 2nd Respondent had already taken possession of the suit parcel and was better placed to keep off squatters from encroaching on the suit parcel, the Applicants having deponed that some people had already encroached on the suit property.

33. It placed reliance in the Martin Nyaga Wambora's case (supra) to submit that having demonstrated that the orders of status quo would be the best option in the circumstance since there was no imminent real danger posed to the Applicants, it was abundantly clear that the balance of convenience tilted in their favour rather than in the Applicants' favour. The court was thus urged to find that the application before it was incompetent and devoid of merit and to dismiss the same with costs to the Respondent.

Determination.

34. I have thus considered the party's Application, the responses, submissions the authorities cited as well as the applicable law. It is doubtless to state that the Application herein seeks for interim relief from the court for an order staying the cancellation, revocation and/or expunging of records relating to title No. Kijabe/Kijabe Block 1/30245 by the 1st Respondent and secondly for restraining orders against the 2nd Respondent, its agents, servants, employees and/or surrogates whomsoever, from dealing whatsoever with suit land, pursuant to the decision of the 1st Respondent, in a Gazette Notice No. 17543 dated 22nd December 2023.

35. The Applicants' complaint is that that despite the William Kariuki Ndirangu (deceased) being the bonafide proprietor of all that parcel of land known as Kijabe/ Kijabe Block 1/30245 (the suit property), on the 12th September, 2022, the 2nd Respondent wrote to the 1st Respondent alleging that the suit property had been created from a road reserve and riparian reserve wherein vide a vide Gazette Notice No. 17543 dated the 22nd of December, 2023 the 1st Respondent gave a 30 days' Notice and subsequently expunged the records and reverted the parcel to the 2nd Respondent all these having taken place without their knowledge, involvement and/or according them an opportunity to be heard.

36. The 1st Respondent's opposition to the Application herein was that the prayers sought by the Applicants were to stay the decision of an administrative body which prayers were not available under the Civil Procedure Rules. That the Applicants have failed to exhaust the statutory remedies as enshrined under the provisions of Article 47 and 159 (2) of *the Constitution* of Kenya 2010 and

the *Fair Administrative Action Act*. That the Applicants did not file their complaint nor seek the National Land Commission's oversight intervention as envisaged under Section 5(h) of the *National Land Commission Act* regarding Kenya National Highway Authority (KENHA) land use planning decision affecting their property nor did they submit their documents to KENHA as required thereby demonstrating the unwillingness to engage with proper administrative channels and statutory procedures established by law, which then directly precipitated the subsequent Gazette Notice wherein the 1st Respondent acted well within their statutory authority in implementing the Gazette Notice for land expungement and reversion, following proper administrative procedures.

37. That the matter involves complex technical issues regarding road planning, land use allocation, and public infrastructure development that are within the primary expertise of the National Land Commission rather than the Court.

38. The 2nd Respondent's opposition on the other hand was to the effect that the Applicants had not satisfied the conditions for grant of the stay order in that they had not established a prima facie case with a likelihood of success. That they had neither demonstrated that the substantive suit would be rendered nugatory were the conservatory order of stay not granted nor that they would suffer irreparable loss which could not be compensated by way of damages or restitution. That the scales of balance of convenience tilted in favour of denying the application on the grounds of public interest and convenience. That in any case the 1st Respondent had already cancelled and/or revoked title to the suit property which had already reverted to the 2nd Defendant for public use. That subsequently, the Applicants were seeking to stay what had already been enforced which stay was no longer efficacious as there was nothing remaining to be stayed. That the Application was vexatious, frivolous and an abuse of the Court process and should be dismissed forthwith with costs.

39. The issue for determination therefore by this court is whether the Applicants have established a prima facie case to enable this court grant them the interlocutory injunctive orders sought. The principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought are well settled in the case of Giella vs. Cassman Brown [1973] EA 358 which sets out the conditions that the Applicants needed to satisfy for the grant of an interlocutory injunction which is firstly establishing and demonstrating that they have prima facie case with a probability of success, secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and lastly in case the court is in any doubt in regard to the first two conditions, the court may determine the matter by considering in whose favor the balance of convenience tilts.

40. It is trite that the Applicants ought to demonstrate that they had a prima facie case with a likelihood of success and that in the absence of the conservatory orders they were likely to suffer prejudice. At this stage, the Court is only required to determine whether the Applicants are deserving of the orders sought and not on the merit of the case.

41. From all the material facts placed before me, I find that the interim orders herein sought by the Applicants' where they seek an order to stay cancellation, revocation and/or expunging of records relating to title No. Kijabe/Kijabe Block 1/30245 by the 1st Respondent cannot be granted at this stage for the reason that firstly there is nothing to be stayed as the decision had already been enforced, the 1st Respondent having already cancelled and/or revoked title to the suit property which has already reverted to the 2nd Defendant for public use and the stay is no longer efficacious.

42. Secondly, the Applicants having challenged the legality of a public body's decision-making process, the provisions of Section 9 (2) of the *Law Reform Act* as read with Order 53, Rule 2 of the Civil Procedure Rules would have been applicable in the circumstance.

43. Section 90 of the *Fair Administrative Action Act* provides for the Doctrine of Exhaustion as follows; –

> ''(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.
>
> (2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
>
> (3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).
>
> (4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
>
> (5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.''

44. The doctrine of exhaustion was aptly captured by the Court of Appeal in Republic v National Environmental Management Authority [2011] eKLR where the Court had observed: -

> " ... Where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and judicial review granted, it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it ..."

45. I find that although superior courts have jurisdiction to determine profound questions of law, first opportunity has to be given to the relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute. I thus find and hold that the Applicants application was in utter disregard to the dispute resolution mechanism availed by law therein sidelining the doctrine of exhaustion.

46. The Applicants have also sought for an interim order of injunction restraining the 2nd Respondent its agents, servants, employees and/or surrogates whomsoever, howsoever from trespassing, entering onto, occupying, possessing or in any way dealing with the said parcel of land. This relief is also not available to the Applicants for reason that pursuant to the cancellation of their title, the land reverted back to the 2nd Respondents wherein restraining them as herein above sought may result to an eviction of the 2nd Respondent from the suit property, pending the final determination of this suit which at this stage is premature. Considering that the Applicants are no longer in possession of the suit property, the balance of convenience does not lie in their favor.

47. This said and done, I find that the Applicants herein have not established a Prima facie case and I need not consider the other two conditions for the grant of temporary injunction as established in the Giella –vs- cassman Brown Ltd case (supra) as the conditions are sequential such that when the first

condition fails then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a prima facie case had been established.

48. The Court of Appeal in the case of Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society (2001) IEA 86 cited by Gitumbi, J (as she then was) with approval in the case of Joseph Wambua Mulusya –vs- David Kitu & Another (2014) eKLR observed as follows: -

> " The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied".

49. I find the Application dated the 8th May 2025 devoid of merit and proceed to dismiss it with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 25TH DAY OF SEPTEMBER 2025.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE