**Kombo v Gwede & 2 others (Environment and Land Case E051 of 2024)**
**[2025] KEELC 6306 (KLR) (23 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6306 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KWALE**

**ENVIRONMENT AND LAND CASE E051 OF 2024**

**LL NAIKUNI, J**

**SEPTEMBER 23, 2025**

**BETWEEN**

**KOMBO MWAMOSE KOMBO ..... PLAINTIFF**

**AND**

**SAMSON KIMANYI GWEDE ..... 1ST DEFENDANT**

**MWANAIDI TSUMA ..... 2ND DEFENDANT**

**NJIRA TSUMA ..... 3RD DEFENDANT**

**RULING**

## I. Introduction

1. This Honourable Court was called upon to make a determination onto the Notice of Motion application dated 31st July, 2024. The application was by Kombo Mwamose Kombo, the Plaintiff/ Applicant herein. It was brought under the provision of Sections 1A, 1B, 3A of the *Civil Procedure Act*, Cap. 21, Order 40 Rules 1 and 2 and Order 51 Rule 1 of the *Civil Procedure Rules, 2010* all of the Laws of Kenya together with all other enabling provisions of the law.

2. Upon service of the Application to the Respondents, the 1st Defendant/ Respondent responded through a replying affidavit sworn on 12th February, 2025. The Honourable Court shall be dealing with it indepth at a later stage of this Ruling.

## II. The Plaintiff/Applicant's Case

3. The Applicant sought for the following orders: -

    a. Spent

    b. Spent.

c. That this Honorable Court be pleased to issue an order of injunction restraining the 1st , 2nd, and 3rd Respondents, their agents, servants and any other person acting on their behalf from dealing, subdividing, constructing any structure on Plot No. 115/Jengo/kiwegu/kwal pending hearing and determination of this suit.

d. Costs.

4. The application was premised on the grounds, facts and testimony on the face of the application and further supported by the 12 Paragraphed annexed affidavit of Kombo Mwamose KombO, the Plaintiff/Applicant herein averred that:

a. The Defendants/Respondents were his neighbours and they were all well known to him.

b. The deponent was the registered owner of Plot No Kwale/Kiwegu/Jego/115 (Hereinafter referred to as "The Suit Land"). Annexed in the affidavit a copy of the title deed and marked it as "KMK - 1" which was a parcel of land that the Deponent inherited from his father.

c. Sometimes back the 1st, 2nd and 3rd Defendants/Respondents invaded the suit land and began to clear and construct some structures thereof. When they were asked to stop they ignored, neglected, and/or refused to adhere to that request. Annexed in the affidavit recent photos of the status of the plot and marked it as "KMK - 2".

d. Sometimes the Deponent bought the suit land from one Rashid Mohamed Jambia. He paid a sum of Kenya Shillings Six Hundred Thousand (Kshs. 600,000/-) as a purchase price. He had it registered to him. Annexed in the Affidavit and marked as "KMK – 3a and 3b" were copies of the Agreement and Title deed.

e. The deponent occupied and utilized the said parcel of land through farming and had continuously been residing thereon and he had enjoyed the peaceful possession and occupation of the said property.

f. During the demarcation process, the said portion of land was recorded in his name as Plot No. 115/Kiwegu/Jego/115 and he received a title deed in his name. Annexed in the affidavit annex a copy of the title deed and marked as "KMK - 4".

g. Recently the 1st, 2nd, 3rd Defendants/Respondents' father invaded the suit property. Upon his demise, the 1st, 2nd and 4th Defendants/Respondents embarked on what their deceased father used to do.

h. The Deponent on several occasions had tried to amicably settle this matter but the Defendants/Respondents were reluctant hence this case.

i. In the interest of justice, the Applicants be allowed to proceed to prosecute this case to safeguard their interest; estate of the deceased.

**III. Response by the 1st Defendant**

5. The 1st Defendant, Samson Kimanyi Gwede responded to the Application through a 12 Paragraphed Replying Affidavit sworn on 12th February, 2025. The Deponent averred that: -

a. The Defendants/Respondents admitted the contents of Paragraph 1 and denied the contents of Paragraphs 2 and 3 of the Supporting Affidavit and further stated that the Plaintiff was not their neighbor as they were not sharing boundaries with him.

b. At paragraph 4 of the supporting affidavit sworn on 31st July, 2024, the Plaintiff/Applicant stated that he was the registered owner of Plot No. Kwale/Kiwegu/Jego/115 but no evidence had been shown to show that the Plaintiff/Applicant inherited the Plot from his father. The title Deed annexed in the affidavit as "KMK – 1" was for Rashid Mohammed Jambia. There was no relationship between the Plaintiff/Applicant and Rashid Mohammed Jambla had been shown to the Court.

c. The 1st Defendant/Respondent denied the contents of Paragraph 5 of the supporting affidavit and stated that the Defendants/Respondents and their families had been living on the suit plot and were in actual occupation even before it was allocated to them by the Kwale Land Adjudication. Annexed in the affidavit a copy of the adjudication record and processing in respect of the suit plot marked as "SKG – 01" and "SKG – 02" respectively.

d. In response to the contents of Paragraph 6 of the supporting affidavit the Defendants/Respondents stated that the Plaintiff/Applicant was well aware that the suit plot belonged to the Gwede family and that he went ahead and bought it.

e. Therefore, the process used by the Plaintiff/Applicant and the Rashid Mohamed Jambia in obtainingthe title Deed of the suit plot to their names was not procedural. No proper documents of transfer had been shown to support the Plaintiff/Applicant's claim and/or application.

f. In response to Paragraph 7 of the Plaintiff/Applicant's supporting affidavit, the Plaintiff/Applicant according to the deponent was not telling the truth to the Court. He had not occupied or utilized, possessed or occupied the suit plot as all as all the developments on the suit property belonged to the Defendants/Respondents and their families.

g. In response to the averments made under Paragraph 8 of the Plaintiff/Applicant's supporting affidavit, the Deponent stated that the Plaintiff/Applicant had allegedly at Paragraph 6 herein above that he bought the suit plot from Rashid Mohammed Jambla and now stated that the suit plot was recorded in his name during the process of demarcation. Clearly, the Plaintiff/Applicant was lying on oath.

h. In response to Paragraphs 9 and 10 of the Supporting Affidavit, the Defendants/Respondents' father did not invade the suit plot but was living on the suit plot allocated to their father and that no evidence had been filed to prove the allegations.

i. The Plaintiff/Applicant had not reached the Defendants/Respondents on the issue of settlement as alleged.

j. The Deponent urged the Court in the interest of justice that the Plaintiff/Applicant's Application be dismissed with costs.

**IV. Submissions**

6. On 17th March, 2025 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 31st July, 2024 be disposed of by way of written submissions and all the parties complied.

7. However, by the time of penning down this Ruling, the Honourable court had not managed to access the submissions of any of the parties herein from both the Judiciary CTS portal nor the Court file. Pursuant to that, it proceeded to reserve a Ruling on 23rd September, 2025 on its own merit accordingly.

**V. Analysis and Determination**

8. I have carefully read and considered the pleadings herein by the parties herein, the relevant provisions of the *Constitution* of Kenya, 2010 and the statures.

9. In order to arrive at an informed, fair and reasonbale decision, the Honorable Court has framed the following three ( 3 ) issues for its determination. These are:-

    a. Whether the Notice of Motion application dated 31st July, 2024 meets threshold required of a temporary injunction under Order 40 Rules 1 of the *Civil Procedures Rules, 2010*.

    b. Whether the parties herein are entitled to the reliefs sought.

    c. Who will bear the Costs of Notice of Motion application 31st July, 2024.

**Issue No. a). Whether the Notice of Motion Application Dated 31st July, 2024 Meets Threshold Required of a Temporary Injunction Under Order 40 Rules 1 of the Civil Procedures Rules, 2010.**

10. Under this sub – title, the main issue for consideration by Court here is whether the Plaintiff is entitled to be granted the relief of an interlocutory injunction. The application herein is premised under the provision of Order 40 Rule 1 of the *Civil Procedure Rules 2010* amongst the provisions of the law. Which provides as follows: -

    Order 40, Rule 1

    Where in any suit it is proved by affidavit or otherwise—

    a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

    b) that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

11. Fundamentally, the principles applicable in an application for an injunction were laid out in the celebrated case of "*Giella – versus - Cassman Brown & Co Limited* (1973) EA 358", where it was stated: -

> " 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 be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

12. The three conditions set out in "*Giella* (*supra*)", need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out

by the Court of Appeal in the case of "*Nguruman Limited – versus - Jan Bonde Nielsen & 2 others* [2014] eKLR": -,

> "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 stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Limited - versus - Afraha Education Society* [2001] Vol. 1 EA 86. 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 is 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. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between".

13. In dealing with the first condition of prima facie case, the Honorable Court guided by the definition melted down in the famous case "*Mrao Limited – versus - First American Bank of Kenya Limited & 2 others* (2003) KLR 125" of: -,

> "So, what is a *prima facie case*, I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself would 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"

**Issue No. b). Whether the Parties Herein are Entitled to the Reliefs Sought**

14. Under this sub – heading, the Honourable Court will endeavor to apply the above stipulated legal principles to the instant case. As the Court previously observed in this ruling, the Defendants/ Respondents were his neighbours and they were all well known to him. The deponent was the registered owner of the suit property. Sometimes back the 1st, 2nd and 3rd Defendants/Respondents invaded his plot and began to clear and construct some structures thereof and when were asked them to stop they had ignored, neglected, and or refused to adhere to that request.

15. Sometimes the Deponent bought the suit property from one Rashid Mohamed Jambia. he made payment of the purchase price at a sum of kenya Shillings Six Hundred Thousand (Kshs. 600,000/-) and got it registered into his name. Thereafter, he occupied and utilized the said parcel of land through farming and had continuously been residing thereon. He had enjoyed the peaceful possession and occupation of the said property.

16. In the case of "*Mbuthia – versus - Jimba credit Corporation Ltd* 988 KLR 1", the court held that;

> "In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the party's cases."

17. Similarly, in the case of "*Edwin Kamau Muniu – versus - Barclays Bank of Kenya Ltd*" the court held that;

> " In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria."

18. In the present case, the Plaintiff/Applicant has produced a Certificate of Title and an agreement entered between him and one Rashid Mohamed Jambia. Production of a title deed is prima facie evidence to warrant to issuance of injunctive orders. To this end therefore, regarding this first condition though, I hold that the Plaintiff/Applicant has clearly demonstrated a prima facie case with a probability of successat the trial as enunciated in the case of "*Giella -versus - Cassman Brown & Co. Ltd* (*supra*)".

19. On the second limb for considering grant of injunction, that is, whether the Plaintiff/Applicant might suffer irreparable injury which cannot be adequately compensated by an award of monetary damages. The court has further considered the annextures on record. With regards to the second limb of the Court of Appeal in "*Nguruman Limited* (*supra*)", held that:-

> " 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."

20. On the issue whether the Applicant will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. It is not hidden that the Plaintiff/Applicant's property is under risk of being alienated from him. The judicial decision of "*Pius Kipchirchir Kogo – versus - Frank Kimeli Tenai* (2018) eKLR" provides an explanation for what is meant by irreparable injury and it states;

> " Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury."

21. Quite clearly, the Applicant would not be able to be compensated through damages being the land according to them was fraudulently subdivided hence the same has to be determined through a full trial having preserved the suit property. The Applicant has therefore satisfied the second condition as laid down in "*Giella's case*".

22. Thirdly, the Applicant has to demonstrate that the balance of convenience tilts in his favour. In the case of "*Pius Kipchirchir Kogo – versus - Frank Kimeli Tenai* (*supra*)" which defined the concept of balance of convenience as:

> " The meaning of balance of convenience will favour of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.
>
> In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".

23. In the case of "*Paul Gitonga Wanjau – versus - Gathuthis Tea Factor Company Ltd & 2 others* (2016) eKLR", the court dealing with the issue of balance of convenience expressed itself thus:-

> " Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies."

24. The balance of convenience tilts in the favour of the Applicantwho will be prejudiced if the Respondents were to take possession of the suit property before the suit herein is heard and determined on merit. The decision of "*Amir Suleiman – versus - Amboseli Resort Limited* [2004] eKLR" where the learned judge offered further elaboration on what is meant by "balance of convenience" and stated; -

> " The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice."

25. The balance of convenience lies with the Plaintiff/Applicant in this case. Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting him, as I wait to hear the suit on its merits. This is especially so because I have not had the opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the claim of the Applicant and it will be in the interest of both the Applicant and the Respondents that the suit property is preserved until the hearing and determination of the suit.

26. In the case of:- "*Robert Mugo wa Karanja – versus - Ecobank (Kenya) Limited & Another* [2019) eKLR" where the court in deciding on an injunction application stated;

> "Circumstances for consideration before granting a temporary injunction under Order 40 Rule 1 of the *Civil Procedure Rules* requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts..."

27. I am convinced that if orders of temporary injunction are not granted in this suit, the property in dispute might be in danger of being dealt in the manner set out in the application and apprehended by the Plaintiff/Applicant. In view of the foregoing, I strongly find that the Plaintiff/Applicant herein has met the criteria for grant of orders of temporary injunction.

**Issue No. c). Who Will Bear the Costs of Notice of Motion Application 31st July, 2024.**

28. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The proviso of section 27 (1) of the *Civil Procedure Rules* Cap. 21 Laws of Kenya holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of "*Harun Mutwiri – versus - Nairobi City County Government* [2018] eKLR and "*Kenya Union of Commercial, Food and Allied Workers – versus - Bidco Africa Limited & Another* [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise.

29. I have well stated in previous precedence and most especially in "*Sagalla Lodge Limited – versus - Samwuel Mazera Mwamunga & another (Suing as the Executors of Eliud Timothy Mwamunga – Deceased)* [2022] eKLR", that:

> "58. The Black Law Dictionary defines "Cost" to means, "the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other".
>
> The provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. The issue of Costs is the discretion of Courts. From this provision of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in this case is that the Notice of Motion application dated 7th December, 2021 by the Plaintiff has succeeded and hence they are entitled to costs of the application and that of the Defendants dated 21st December, 2021."

30. In the case of "*Hussein Muhumed Sirat – versus - Attorney General & Another* [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In the present case, the Honourable Court elects to have the costs in the cause

**VI. Conclusion and Disposition**

31. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to the principles of preponderance of probabilities and the balance of convenience. Clearly, the Plaintiff/Applicant has a case against the Defendants/ Respondents.

32. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-

    a. That the Notice of Motion application dated 31st July, 2024 be and is hereby found to have merit and hence allowed with costs in the cause.

    b. That an order of by way of a temporary injunction do issue that restraining the 1st, 2nd and 3rd Defendants/Respondents their agents, servants and any other person acting on their behalf from dealing, in form of sub - division, construction of any structure on Plot No. Kwale/ Kiwegu Jengo/115 pending hearing and determination of this suit.

    c. That for expediency sake there shall be a Pre – Trial conference conducted on 13th November, 2025 pursuant to the provision of Order 11 of the *Civil Procedure Rules, 2010.* There shall be a hearing of the matter on 26th February, 2026.

    d. That the cost of the Notice of Motion application dated 31st July, 2024 shall be in the cause.

    It is so ordered accordingly.

**RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT KWALE THIS 23RD DAY OF SEPTEMBER 2025.**

**.....**

**HON. MR. JUSTICE L. L. NAIKUNI**

**ENVIROMNENT AND LAND COURT AT KWALE**

Ruling delivered in the presence of:

a. Mr. Daniel Disii, Court Assistant.

b. No appearance for the Plaintiff.

c. M/s. Chesaro Advocate for the Defendants.