



Kivumbu (Suing as the Legal Representative of the Estate of Kivumbu Ndwiwa - Deceased) v Mwau & 2 others (Environment and Land Case E008 of 2023) [2025] KEELC 6784 (KLR) (9 October 2025) (Ruling)

Neutral citation: [2025] KEELC 6784 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND CASE E008 OF 2023
EO OBAGA, J
OCTOBER 9, 2025**

BETWEEN

HALLAN MUTUA KIVUMBU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KIVUMBU NDWIWA - DECEASED) PLAINTIFF

AND

FRANCIS KIMILU MWAU 1ST DEFENDANT

CHIEF LAND REGISTRAR MAKUENI COUNTY 2ND DEFENDANT

CHIEF LAND SURVEYOR MAKUENI COUNTY 3RD DEFENDANT

RULING

1. Before this court for determination is the Notice of Motion dated 31st October, 2023 brought under the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act* in addition to Order 40 Rules 1, 2 and 5 of the Civil Procedure Rules, 2010. The Plaintiff/Applicant seeks issuance of the following orders: -
 1. [Spent]
 2. [Spent]
 3. That this Honourable court does issue temporary orders of injunction restraining the Defendants by themselves, their agents, servants or anybody acting on their behalf from trespassing, subdividing, putting beacons, selling, cultivating, erecting fences, clearing bushes and pastures, cutting down trees, burning charcoal, grazing, demolishing structures, evicting anybody and or dealing with the 4.6 hectares that have been removed from the title deed of parcel NZAUI/KALAMBA/638 in any manner that offends the possession rights of any



beneficiary of the estate of Kivumbu Ndwiwa (deceased) or the Plaintiff's right to quiet possession pending the hearing and determination of the main suit.

4. That the OCS Emali Police Station be ordered to ensure compliance of the orders granted in this application.
5. That costs of this application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Hallan Mutua Kivumbu sworn on even date.
3. The Applicant averred that he is the legal representative of the estate of Kivumbu Ndwiwa who died on 15th November, 2000. He further averred that the deceased was issued with a title deed for land Parcel No. Nzai/Kalamba/638 (the suit property) in the year 1995 and the total acreage thereof is 11.4 hectares. He added that the beneficiaries of the estate of the deceased have been in possession of the suit property since the year 1978 without any interference.
4. The Applicant averred that the 1st Defendant is the registered owner of land Parcel No. Nzai/Kalamba/594 which measures 5.6 hectares and borders the suit property. He stated that the 1st Defendant filed Makueni ELC Case No. E005 of 2022 seeking the removal of 3.96 hectares of the suit property and adding them onto his parcel of land, but the suit was struck out with costs.
5. The Applicant averred that a new title deed for land Parcel No. Nzai/Kalamba/594 emerged in a miscellaneous civil application that was filed by the 1st Defendant against him in Makindu Law Courts. The new title deed showed that the 1st Defendant's land had increased in acreage from 5.6 hectares to 11.2 hectares at the expense of the suit property. That the said alteration was done pursuant to the judgment of court delivered in Machakos RMCC No. 43 of 1991. However, through a letter done by the Court Administrator of Machakos, the referenced case number showed the names of different parties and not the 1st Defendant.
6. The Applicant contended that the Defendants had jointly colluded to unlawfully remove 4.6 hectares from the suit property. He further contended that if indeed the judgment delivered on 1/10/1991 was in existence, then it could not be enforced in 2023 for being statute-barred.
7. The Applicant averred that on or about 17/10/2023, the Defendants trespassed into the suit property and erected a thorn fence in the middle of the homestead in an attempt to evict them. He urged the court to issue the injunctive orders sought in order to preserve the suit property from illegal activities which may cause irreversible damage.
8. The 1st Defendant filed a replying affidavit sworn by himself on 18th February, 2025. He averred that he is the registered owner of land Parcel No. Nzai/Kalamba/594 measuring 10.2 hectares and hence an injunction cannot issue in respect of his own land. The 1st Defendant contended that there is a pending appeal in this court ELCLA NO. E012/2024 in respect of the suit property in which an order of status quo ante and an order restraining the 1st Defendant from evicting the Plaintiff was granted. He stated that the instant application is a waste of the court's time.
9. The 1st Defendant contended that Machakos RMCC No. 43 of 1991 Francis Kimilu Mwau v Kivumbu Ndwiwa was determined by the adoption of a Surveyors Report which directed that 4.6 hectares be hived off from the suit property. He added that the parties herein lived in harmony until 2017 when the Plaintiff filed Makueni ELC Case No. 13 of 2017 which was subsequently dismissed on account of being res judicata since the issues raised therein were found to have been directly and substantially in issue in Machakos RMCC No. 43 of 1991.



10. The 1st Defendant contended that he filed Machakos Miscellaneous Application No 17 of 2018 which was a reconstruction of the file in Machakos RMCC No. 43 of 1991 seeking contempt orders after the Plaintiff moved the boundary by 4.6 hectares in 2017. He added that vide a ruling delivered on 8th December, 2021, the court upheld the judgment in Machakos RMCC No. 43 of 1991 and directed the parties herein to abide by the boundaries established therein.
11. The 1st Defendant averred that a survey was later conducted by the 3rd Defendant who established that the actual size of his land was 10.2 hectares as opposed to the 5.6 hectares appearing on his title deed and his title was rectified accordingly. He insisted that the Plaintiff's application is frivolous, vexatious and that it amounts to abuse of process.
12. The Plaintiff filed a further affidavit sworn by himself on 4th April, 2025. He averred that following the delivery of the ruling dated 30th October, 2024 on the preliminary objection, the 1st Defendant went to the suit property and fenced off some of the Plaintiff's houses in an attempt to forcefully take possession. He urged the court to issue the orders as prayed.
13. The application was canvassed by way of written submissions.
14. In the Plaintiff's submissions dated 4th April, 2025, Counsel contended that the jurisdiction of this court to issue injunctive orders is provided for under Order 40 Rule 1 of the Civil Procedure Rules. Counsel further contended that the title deed of the suit property which is in the name of Kivumbu Ndwiwa (Deceased) was issued in the year 1978 and re-affirmed in 1995 showing that the land had an acreage of 11.4 hectares. It was argued that the Plaintiff has been in possession of all that land until April 2023 when the Defendants unlawfully interfered with the register by removing 4.6 hectares from the suit property.
15. Counsel contended that the averment that the 1st Defendant's title was rectified via a judgment delivered in Machakos RMCC No. 43 of 1991 remains as a speculation because evidence of the same had not been adduced. It was submitted that the said judgment was incapable of being enforced in 2023 for offending the provisions of Section 4 (4) of the *Limitation of Actions Act*. Counsel was of the view that the Plaintiff had established a prima facie case as required.
16. On irreparable injury, Counsel submitted that the Plaintiff had annexed evidence showing that the 1st Defendant was fencing off part of the suit property including the houses where the Plaintiff resides. It was argued that such actions if not stopped will render the Plaintiff homeless. Counsel further argued that a forceful displacement from the suit property cannot be sufficiently compensated by an award of damages.
17. Submitting on balance of convenience, Counsel argued that the Plaintiff might find a useless judgment in his hands should the Plaintiff's case eventually succeed when the injunctive orders have been disallowed. Counsel was of the view that the beneficiaries of the estate of the late Kivumbu Ndwiwa reside in the disputed 4.6 hectares of the suit property and that it is in the interest of justice that their rights be protected pending hearing and determination of the main suit.
18. In the 1st Defendant's submissions dated 22nd May, 2025, Counsel submitted that the decision which culminated in the issuance of a new title to the 1st Defendant was final. Counsel contended that the rights of the 1st Defendant as the registered owner must be upheld in accordance with the provisions of Section 26 of the *Land Registration Act*. Counsel submitted that at this interlocutory stage, it is difficult to determine whether indeed 4.6 hectares of land was illegally excised out of the suit property and thus the Plaintiff had not established a prima facie case.



19. Submitting on irreparable harm, Counsel contended that the Plaintiff had not demonstrated any imminent threat of eviction from the suit property by the 1st Defendant. It was concluded that the Plaintiff had not met the threshold for the grant of the orders sought and thus a prayer was made for the dismissal of the 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 evidence in the instant application (“HMK 2” and “HMK3”) reveals that the suit property known as land Parcel No. Nzau/Kalamba/638 is registered in the name of Kivumbu Ndwiwa (Deceased) and measures 11.4 hectares. The Applicant also produced a copy of an official search certificate (“HMK 3”) showing that the suit property measuring 11.4 hectares was still registered in the name of Kivumbu Ndwiwa (Deceased) as at 10th May, 2022.
24. Again, the Applicant produced a copy of an official search certificate dated 10th May, 2022 for land Parcel No. Nzau/Kalamba/594 (“HMK 5”) showing that the land is registered in the name of the 1st Defendant and that the land measured 5.6 hectares.
25. In Exhibit “HMK 11”, the green card for the suit property shows that it measures 6.8 hectares pursuant to a rectification of the land register done by the 2nd Defendant in accordance with an order of the court issued in Machakos RMCC No. 43 of 1991. A copy of an official search dated 10th July, 2023 (“HMK 11”) reveals that the suit property currently measures 6.8 hectares.
26. Conversely, Exhibit “HMK 12” which is a copy of the green card and the official search certificate dated 7th July, 2023 shows that land Parcel No. Nzau/Kalamba/594 currently measures 10.2 hectares pursuant to the aforementioned rectification that was done by the 2nd Defendant affecting the acreage of both parcels of land.
27. None of the parties herein adduced a copy of the judgment and or decree of the court that was issued in Machakos RMCC No. 43 of 1991. This forms the basis of the Plaintiff’s claim of fraud and illegality



against the Defendants insisting that 4.6 hectares comprising of the suit property was unprocedurally excised and awarded to the 1st Defendant.

28. Therefore, the Plaintiff/Applicant has satisfied this Court that he has a prima facie case raising arguable issues against the Defendants.

29. 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.”

30. The Plaintiff averred that his family had been in possession of the suit property since the year 1978. He annexed a green card to confirm the said position as Exhibit “HMK 3”. In addition, he produced Exhibit “HMK 6” which are photographs depicting the developments that have been undertaken by his family within the suit property. Asides from that, he produced Exhibit “HMK 16” in his supporting affidavit and in his further affidavit, he produced Exhibit “HMK 12” showing the recent invasion of the suit property comprising installation of barbed wire, thorn fences and trees that have been felled, actions which he accuses the 1st Defendant of.

31. Conclusively, it is the finding of this court that the Plaintiff has established that he will suffer irreparable harm ensuing from the 1st Defendant’s actions should the invasion of the suit property go on unchecked.

32. 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”.

33. The upshot of the foregoing is that the Plaintiff has demonstrated merit in the instant application which is hereby allowed in terms of prayers 3, 4 and 5.

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HON. E. O. OBAGA

JUDGE



RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 9TH DAY OF OCTOBER, 2025.

In The Presence Of:

Mr. Mbatia for 1st Defendant.

Ms. Singi for Plaintiff.

Court assistant – Steve Musyoki

