

- 5) **THAT pending the hearing and determination of the main suit, an injunction do issue against the office of the 4th Defendant and all persons endowed with the powers of the office 4th Defendant restraining them from altering, re-parceling and registering any instruments purporting to increase the area of Title Number Makueni/Ngulu/520 and Title Number Makueni/Ngulu/522 belonging to the 1st and 2nd Defendants.**
- 6) **[SPENT]**
- 7) **THAT pending the hearing and determination of the main suit, an injunction do issue against the 1st to 3rd Defendants, their servants, agents, third parties and all persons claiming from them and who have encroached on the suit property, forbidding them from entering, possessing, encroaching, claiming, owning and occupying the 40.51 hectares contained in the survey report dated 05/04/2024 relating to the suit property.**
- 8) **THAT pending the hearing of the main suit, an order do issue for an independent inspection and survey of the suit property and a report be filed in this honourable court for consideration.**
- 9) **[SPENT]**
- 10) **THAT this honourable court do issue an order of inhibition forbidding any registration of any further dealing and/or instruments geared at altering the area and size of Title Number Makueni/Ngulu/3276 belonging to the Plaintiff.**
- 11) **THAT the 4th and 5th Defendants be compelled to indemnify the Plaintiff in terms of Sections 81 and 82 of the Land Registration Act No. 3 of 2022 for their wrongful and illegal actions emanating from**

the findings of the exercise of an area access and confirmation summons dated 11/06/2024.

12) 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 Festus Mwaniki Lonzi sworn on even date. He averred that he is the registered proprietor of land Title No. Makueni/Ngulu/3276 which measures approximately 422.22 hectares. He added that the land was registered in his favour on 14/12/2022. The Applicant contended that land Title No. Makueni/Ngulu/3276 resulted from the amalgamation of land Title No. Makueni/Ngulu/494, Title No. Makueni/Ngulu/3237, Title No. Makueni/Ngulu/3155 and Title No. Makueni/Ngulu/1850.
3. The Applicant further contended that on 16/10/2023, his representatives alongside the 1st and 3rd Defendants, the area Assistant Chief Ngulu Sub-location and surveyors from the office of the 5th Defendant undertook a survey exercise with the aim of ascertaining the acreage of the suit property land Title No. Makueni/Ngulu/3276. That the exercise was also intended to ascertain the acreages of land Title No. Title No. Makueni/Ngulu/520 and Title No. Makueni/Ngulu/522 belonging to the 1st and 2nd Defendants respectively.
4. The Applicant averred that after the site visit, the officers of the 5th Defendant generated a report dated 5/4/2024 which was addressed to the 4th Defendant. That the findings of the report were as follows:-
 - a) Title No. Makueni/Ngulu/520 measured 36.47 hectares as opposed to 11.15Hectares as contained in the title.
 - b) Title No. Makueni/Ngulu/522 measured 11.54 hectares as opposed to 6.60Hectares as contained in the title.

- c) Title No. Makueni/Ngulu/3276 measured 381.71 hectares as opposed to 422.22 Hectares as contained in the title.
5. He added that the 5th Defendant's report made a finding that the suit property had a deficit in size of total of 40.51 hectares. The Applicant maintained that the 1st and 2nd Defendants have encroached into the suit property to an extent of 40.51 hectares. That the said encroachment has occasioned a threat into the ownership of the Applicant's Title No. Makueni/Ngulu/3276 as people who are purporting to have purchased land from the 1st and 2nd Defendants have settled on the suit property illegally.
 6. The Applicant averred that after the 5th Defendant issued its report, the 1st and 2nd Defendants decided to approach the 4th Defendant in an effort to thwart the implementation of the findings. He further averred that vide a letter dated 11/6/2024, the 4th Defendant scheduled a site visit under the subject 'Area Confirmation Access Summons' which was scheduled to take place on 20/6/2024.
 7. The Applicant averred that upon learning of the 4th Defendant's letter, he wrote to the 4th Defendant detailing that he was an interested party as parcel No. Makueni/Ngulu/494 had been listed among the parcels that were the subject of the area confirmation. The Applicant further averred that since he had not been formally invited for the exercise, he indicated in his letter dated 17/6/2024 that he would not be available on 20/6/2024 adding that he requested for another date.
 8. The Applicant added that Nancy Mumo, who had been invited for the exercise, wrote to the 4th Defendant on 15/6/2024 informing them that since land Parcel No. Makueni/Ngulu/494 had already been sold to the Applicant, then the 4th Defendant should invite the Applicant for the scheduled exercise. The Applicant contended that the 4th Defendant totally disregarded their letters and

went ahead with the scheduled area confirmation in the Applicant's absence which is contrary to the provisions of Section 87 of the Land Registration Act, 2012.

9. The Applicant contended that in issuing summons to the proprietor of Title No. Makueni/Ngulu/494, the 4th Defendant had failed in its duty of care as custodian of the land register because the said land was no longer in existence having been sold to the Applicant earlier. The Applicant contended that the 4th Defendant's exercise was illegal and compromised towards aiding the 1st and 3rd Defendants to lay claim on land that does not belong to them.
10. The Applicant contended that he had registered his complaint against the 4th and 5th Defendants with the Directorate of Criminal Investigations Makueni County as well as to the 4th Defendant. The Applicant averred that the 5th Respondent has now fraudulently authored a survey report dated 3/7/2024 that is falsified and made with the sole intention of illegally hiving off an area of the suit property.
11. The Applicant contended that the 4th And 5th Defendants are at an advanced stage of registering maps and instruments which may formally hive off the suit property since the 5th Defendant had prepared a map contained in Sheet 2 altering the boundaries of Title No. Makueni/Ngulu/520 and Title No. Makueni/Ngulu/522 adding more acreage to the land. He further contended that as a result of the 4th and 5th Defendants irregular actions, the suit property is at risk of being illegally altered. He urged the court to issue the orders sought.
12. The Applicant filed another Notice of Motion dated 25th October, 2024. He sought the following orders: -

- 1) **THAT pending the hearing and determination of the main suit, this Honourable court to order for an order of *status quo ante* pertaining to the acreage of title numbers MAKUENI/NGULU/3276 belonging**

to the Plaintiff and MAKUENI/NGULU/520 and Title Number MAKUENI/NGULU/522 belonging to the 1st and 2nd Defendants respectively as was before the boundary inspection conducted by the 4th and 5th Defendants on 20/6/2024.

- 2) THAT pending the hearing and determination of the main suit, an injunction do issue against the 1st to 3rd Defendants, their agents, servants and all persons purporting to act on their behalf restraining them from any further action of allocating, subdividing, disposing, alienating, transferring and/or further dealings within the suit property geared at defeating the acreage of the Plaintiff's claim to the suit property.**
- 3) THAT pending the hearing and determination of the main suit, an independent inspection and/or site visit be conducted on the suit property to ascertain the boundaries and acreage of title number MAKUENI/NGULU/3276 belonging to the Plaintiff and its current state.**
- 4) THAT this honourable court do conduct a site visit to the suit property for purposes of understanding the facts and pleadings filed by the Plaintiff herein.**
- 5) THAT the costs of this application be in favour of the Plaintiff/Applicant.**

13. In a supporting affidavit sworn by Festus Mwaniki Lonzi on the same date, he averred that the orders sought in the application dated 30/7/2024 are integral and intended to preserve the status quo ante in order to allow an independent area confirmation inspection to be done before implementation of the 5th Defendant's report dated 3/7/2024. He added that in the absence of an independent area confirmation exercise and a report thereafter being filed in

court, then the Applicant's burden of proof on exercise that was conducted on 20/6/2024 being fraudulent will be crippled.

14. The Applicant contended that in the absence of an order of status quo ante, for the boundaries of the subject properties remaining as they were before the area confirmation of 20/6/2024, then the suit herein will be rendered an academic exercise. He further contended that the 4th Defendant has already implemented the 5th Defendant's report dated 3/7/2024 by virtue of altering the size of land Parcel No. Makueni/Ngulu/520 belonging to the 1st Defendant to 35.68 hectares yet the issues raised in the main suit touch on fraud and illegality.
15. The Applicant contended that following the increment of the 1st Defendant's land, he is now in the process of subdivision for gainful disposition and that the said process will further complicate the matter at hand. He averred that no prejudice will be suffered by the Defendants if an order for an independent boundary inspection is issued.
16. The 1st Defendant filed a replying affidavit in respect of both applications which was sworn by himself on 18th February, 2025. Opposing the issuance of Prayer Nos. 2,3,4,5,9,10 and 11 of the application dated 30th July, 2024, he averred that the title numbers for Makueni/Ngulu/520 and Makueni/Ngulu/522 have already been amended and a grant of the orders sought will be in vain. Similarly, he contended prayer Nos. 6 and 7 had already been overtaken by events because Title Nos. Makueni/Ngulu/520 and Makueni/Ngulu/522 have been amended and that they have already taken occupation of the entire acreage thereof.
17. The 1st Defendant contended that the rectified titles in respect of Parcel Nos. Makueni/Ngulu/520 and Makueni/Ngulu/522 were issued on 17th July, 2024 way before the Plaintiff approached this court. The 1st Defendant averred that the Plaintiff's applications are non-justiciable as the issues requiring intervention have become moot. He further averred that the process which

culminated in the issuance of his title was lawful and that the interim orders sought will have irreversible consequences.

18. The 1st Defendant averred that he lives in Parcel Nos. Makueni/Ngulu/520 and Makueni/Ngulu/522 and that an order of injunction will amount to eviction. He further averred that the land is also occupied by other families that purchased from his late father. The 1st Defendant contended that sanctity of the process culminating to the rectification and issuance of new titles is pending before this court and hence an injunction cannot be issued against a lawful proprietor. He urged the court to dismiss the application.

19. Festus Mwaniki Lonzi filed a further affidavit sworn by himself on 26th May, 2025. Reiterating the contents of his two supporting affidavits, the Applicant contended that the area confirmation exercise of 20/6/2024 had not been overtaken by events since the official government report dated 5/4/2024 done by the 5th Defendant had not been quashed. That the findings of the said report have not been implemented. That the Plaintiff continues to suffer prejudice as a result of the Defendants' fraudulent actions.

20. The 4th and 5th Defendants did not file their respective replies to the Plaintiff's applications despite being served.

21. The two applications were canvassed by way of written submissions.

22. In the Plaintiff's submissions dated 26th May, 2025, Counsel identified the following issues for determination: -

- a) *Whether the 4th Defendant fraudulently and/or illegally altered the acreage of Title Number Makueni/Ngulu/3276;*
- b) *Whether the 1st to 3rd Defendants are in illegal possession of 40.51 Ha hived off the Plaintiff's property known as Makueni/Ngulu/3276;*
- c) *Whether the Honourable Court ought to grant the status quo ante orders pertaining to the acreage of the title numbers Makueni/Ngulu/3276,*

Makueni/Ngulu/520 and Makueni/Ngulu/522 pending an independent site inspection and survey;

d) Whether the Applicant stands to suffer any prejudice if the prayers are not granted.

23. Submitting on the first issue, Counsel contended being the custodian of all land records, the 4th Defendant purported to issue summons in respect of Title No. Makueni/Ngulu/494 when the said land had already been amalgamated with other parcels of land namely 3237, 3135 and 1850 to form Title No. Makueni/Ngulu/3276 belonging to the Applicant. Counsel further submitted that the 4th Respondent had blatantly ignored the findings of the 5th Defendant's report 5/4/2024 resulting in a fraudulent exercise on 20/6/2024.

24. On the second issue, it was submitted that the 5th Defendant's report dated 5/4/2024 established that there was encroachment of the suit property by the 1st and 2nd Defendants who are the owners of Title No. Makueni/Ngulu/520 and Title No. Makueni/Ngulu/522 by an area of 40.51 Ha. It was further contended that no action had been taken to rectify the discrepancies noted in the said report.

25. Submitting on the third issue, Counsel opined that the court ought to satisfy itself that the present circumstances are already prejudicial to the Applicant and that there is no other sufficient remedy that can be granted to rectify the damage. Counsel submitted that the court is vested with powers under Section 80 of the Land Registration Act, 2012 to rectify the acreages pertaining to titles based on the glaring discrepancies unveiled by the report dated 5th April, 2024.

26. Lastly, it was submitted that the Applicant had discharged his burden of proof as required under Sections 107 and 109 of the Evidence Act. Counsel urged the court to allow the two applications herein.

27. In the 1st Defendant's submissions dated 7th April, 2025, Counsel identified the sole issue for determination as whether the application has merit. Counsel submitted that the Applicant had failed to demonstrate the existence of any legal right purportedly infringed by the 1st Defendant. Counsel held the view that the suit property measures less than what is recorded on the title whereas Title No. Makueni/Ngulu/520 and Title No. Makueni/Ngulu/522 have a greater acreage than what is officially documented.
28. Counsel contended that there was no evidence demonstrating that the 1st Defendant has encroached into the suit property. Counsel argued that the Applicant has failed to demonstrate that the alleged injury is irreparable or incapable of compensation through damages.
29. Counsel submitted that the Applicant's grounds in support of his application for injunctive relief are speculative and unsupported by credible evidence. Counsel further submitted that the balance of convenience tilts against the Applicant because he had failed to demonstrate the harm he alleges outweighs the detriment to the Defendants if the injunction were to be granted.
30. Counsel was of the view that the orders sought by the Applicant are final in nature and are inappropriate at this stage without a full examination of the evidence on record. Counsel contended that the Applicant had failed to demonstrate the tripartite threshold for injunctive relief as established in **Giella v Cassman Brown [1973] EA 358** and thus the application dated 30th July, 2024 should be dismissed with costs.
31. The issues for determination from the twin applications herein are: -
- a) Whether the Plaintiff/Applicant has met the legal threshold for issuance of the injunctive orders sought;*
 - b) Whether Applicant is entitled to an order for an independent survey of the suit property;*

32. 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.)”

33. 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.”

34. A perusal of the evidence in the two applications reveals that the suit property Title No. Makueni/Ngulu/3276 is registered in the name of Festus Mwaniki Lonzi vide the Title deed that was issued to him on 14th December, 2022. It is also not in dispute that the suit property is the result of an amalgamation of land Parcel Nos. Makueni/Ngulu/494, Makueni/Ngulu/1850, Makueni/Ngulu/3155 and Makueni/Ngulu/3237. Before Parcel No. Makueni/Ngulu/494 was transferred to the Applicant, the land was registered in the names of Dorothy

Paul Mumo and Nancy Mumo as shown in the copy of green card marked as Exhibit “FML3”.

35. It is also not in dispute that the 1st and 2nd Defendants are the registered owners of land Parcel Nos. Makueni/Ngulu/520 and Makueni/Ngulu/522 respectively vide the title deeds issued on 17th July, 2024 and 24th July, 2024. The acreage of land Makueni/Ngulu/520 was altered by the 4th Defendant from 11.15 hectares to 35.68 hectares vide the entry on the green card (Exhibit FML2) implementing the 5th Defendant’s report dated 3/7/2024.
36. The Applicant lamented that he was not officially invited to a site visit that was conducted on 20th June, 2024 by officers from the 4th and 5th Defendants’ offices when summons for area confirmation dated 11th June, 2024 were irregularly issued to the previous owner of land Parcel No. Makueni/Ngulu/494 Nancy Mwikali Mumo. The Applicant decried that he was not represented during the Land Registrar’s area confirmation exercise, being an interested party, which contravened the provisions of Section 19 of the Land Registration Act, 2012 and hence the findings of the exercise were irregular.
37. The Applicant contended that the report dated 3/7/2024 was at variance with an earlier report done by the Sub-County Surveyor Kibwezi/Makindu dated 5/4/2024. That the report dated 5/4/2024 (“FML 5”) had determined that there was a deficit of 40.51 hectares in the suit property whereas the neighbouring Parcel Nos. Makueni/Ngulu/520 and Makueni/Ngulu/522 had excess acreages of 25.32 hectares and 4.94 hectares respectively. The Applicant asserted that the 1st and 2nd Defendants had therefore illegally encroached into his land as per the said report.
38. From the evidence, it is apparent that there are two distinct reports which were done by officers of the 5th Defendant and it is the latter one which was implemented by the 4th Defendant. It is also apparent that the latter report had

the result of occasioning an increased acreage to the 1st and 2nd Defendants' land when there had been a land dispute as noted in the report dated 5/4/2024 that was done by the 5th Defendant and addressed to the 4th Defendant. It is also clear that the Applicant was not given an opportunity to be heard or make representation in the exercise that was done on 20/6/2024 by the 4th Respondent offending the provisions of Section 19 of the Land Registration Act, 2012.

39. As there are two reports by the 5th Respondent which are contradictory there is no basis upon which this court can grant injunctive orders as prayed. The Applicant became aware that none of the prayers in the application dated 30th July, 2024 could be granted as the titles held by the 1st and 2nd Respondents were altered based on the report of 3rd July, 2024. The alteration was done on 17th July, 2024. It is therefore clear that no injunction can issue to restrain what has already happened. Court orders are not given in vain. This is what informed the Applicant to file the application dated 25th October, 2024.

40. The Applicant's claim is predicated on the survey report of 3rd May, 2024. There is subsequent report of 3rd July, 2024 which contradicts the one of 3rd May, 2024. In the circumstances, the Applicant has not demonstrated that he has a prima facie case with probability of success to warrant issuance of injunctive orders as prayed on maintained of status quo ante in view of the alteration to the 1st and 2nd Respondents' titles.

41. The Applicant is seeking for registration of an inhibition forbidding any registration or any further dealing in instruments geared at altering the size of title number Makueni/Ngulu/3276. This prayer is not clear but if the Applicant had in mind the alterations to parcel No. Makueni/Ngulun/520 and 522, titles of the two parcels have already been effected on 17th July, 2024. It is therefore clear that an order of inhibition will serve no purpose.

42. At prayer No. 11 of his application dated 30th July, 2024, the Applicant sought that the 4th and 5th Defendants be compelled to indemnify him in terms of Sections 81 and 82 of the Land Registration Act, 2012 for their wrongful and illegal actions emanating from the findings of the exercise of an area access and confirmation summons dated 11/06/2024.

43. That prayer contemplates that there has been a final determination as to the Plaintiff's claim against the 4th and 5th Defendants. It is an untenable prayer at an interlocutory stage of proceedings since granting the order sought without hearing the 4th and 5th Defendants and evidence being adduced would go against the tenets of a fair hearing.

44. 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”.

45. Regarding the second issue for determination, it is clear that the boundaries of the suit property in relation to Parcel Nos. Makueni/Ngulu/520 and Makueni/Ngulu/522 are in controversy. An independent determination of the boundaries of these properties will help in settling the controversy while also accelerating the matter towards final determination.

46. Section 3A of the Civil Procedure Act mandates as follows: -

‘Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.’

47. In Albert Boyo Kirui v Benjamin Kiprotich A. Kigen & 5 others [2019] eKLR the court observed as follows: -

“However, I find that prayer number 4 in the same application is merited as, if granted, it will address the issue of encroachment of the 3rd defendant’s land by the plaintiff which is the subject of the instant application. The court will upon receipt of the surveyor’s report be able to determine that issue of alleged encroachment appropriately... I also grant prayer no. 4 of the said application. The county surveyor shall visit plots nos. Kwanza/ Namanjalala/Kapsitwet Block 4/45 and Kwanza/ Namanjalala/Kapsitwet Block 4/131 and confirm the acreage of each parcel on the ground, ascertain whether, between the plaintiff and the defendant, any party has encroached on the other’s land and file a report herein within 60 days of this order.”

48. There is no basis laid for the court to visit the suit property at this stage. The Applicant’s claim can only be settled by carrying out an independent survey of the Applicant’s property in relation to parcel number Makueni/Ngulu/520 and 522. I therefore partially allow the Applicant’s application dated 25th October, 2024 by directing that an independent survey be carried out on parcel numbers Makueni/Ngulu/3276, 520 and 522 and ascertain their respective acreages and whether there is any encroachment on either of the parcels to one another. The said report to be filed in court within 60 days. The costs of the survey shall be borne by the Applicant who has requested for the survey. Costs of this application shall be in the cause.

It is so ordered.

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HON. E. O. OBAGA

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS

THIS 16TH DAY OF OCTOBER, 2025.

IN THE PRESENCE OF:

Mr. Mbatia for 1st to 3rd Defendants/Respondents

Ms. Mureithi for Plaintiff/Applicant

Court assistant - Nelima

ORIGINAL