



**Mgala & another v Beja & 4 others (Environment and Land Case
E002 of 2025) [2025] KEELC 6912 (KLR) (13 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 6912 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT AND LAND CASE E002 OF 2025**

**LL NAIKUNI, J
OCTOBER 13, 2025**

BETWEEN

YUSUF BEJA MGALA 1ST PLAINTIFF

SHAURI MGALA BEJA 2ND PLAINTIFF

AND

NGALA BEJA 1ST RESPONDENT

BEJA NGALA BEJA 2ND RESPONDENT

MOLSON NGUTA LEWA 3RD RESPONDENT

NJEMO NGALA BEJA 4TH RESPONDENT

NATIONAL CEMENT COMPANY LIMITED 5TH RESPONDENT

RULING

I. Introduction

1. The Honourable Court was called upon to make a determination unto a Notice of Motion application dated 19th May, 2025 filed by Yusuf Beja Mgala and Shauri Mgala Beja the Plaintiffs/Applicants herein. It was brought under the provisions of Order 40 Rules 1,5 and 10 of the Civil Procedure Rules, 2010, Sections 1A and 3A of the [Civil Procedure Act](#), Cap. 21 and all other enabling provisions of the law.
2. Upon effecting service, the 1st, 2nd, 3rd and 4th Defendants/Respondents filed both a Replying Affidavit sworn and dated on 3rd June 2025 together with a Notice of Preliminary objection dated 4th June 2025. At the same time, the 5th Defendant also raised an objection dated 9th June 2025. Hence, on 18th June, 2025 in the presence of all the parties, it was agreed by consensus that the Honourable Court deals with all these pleadings simultaneously but distinctly in an omnibus Ruling herein.



II. The Plaintiffs/Applicants' Case

3. The Plaintiffs/Applicants sought for the following prayers:-
 - a. Spent.
 - b. That this Honourable Court be pleased to issue an order of injunction restraining the Defendants by themselves or agents from evicting the Plaintiffs from their land in which they live, and from interfering with the Plaintiffs peaceful occupation of the suit land pending hearing and determination of this application
 - c. That this honourable court be pleased to issue an order of injunction restraining the Defendants by themselves or agents from evicting the plaintiffs from their land in which they live, and from interfering with the Plaintiffs peaceful occupation of the suit land pending hearing and determination of this suit
 - d. That costs of this application be provided for.
4. The application premised on the grounds, testimonial facts and averments made out under the 20 Paragraphed supporting Affidavit of Yusuf Beja Mgala, the 1st Plaintiff/Applicant herein with the authority of the 2nd Plaintiff to swear the affidavit on his behalf. The affidavit was dated and sworn on 19th May 2025 with three (3) annexures marked as "YBM - 1 to 3" thereof. The Applicant averred that:-
 - a. The Plaintiffs and the Defendants were related being the children and grandchildren of Beja Mgala Beja.
 - b. Further that each of them had a house on the suit property.
 - c. The deponent stated that sometime within the year 2023 they heard rumours that the land had been sold. However, the Applicants were not informed and sought for information from the Defendants but which was not availed.
 - d. Towards the month of November, 2023 the deponent was asked to come up with what appeared like a sale agreement between the Defendants and himself. A copy of the said agreement was annexed hereto and marked as "YBM - 1".
 - e. He then approached the 1st and 2nd Defendants for an explanation of the same but he was told to plan and vacate the land
 - f. The Deponent then instructed their Lawyers to write to the Defendants inquiring about the actions on the property but the letter was not responded to.
 - g. Sometime in the month of May a person by the name Peter Paul erected a fence over the property and from December 2024 the Applicants had severally been threatened with an impending eviction.
 - h. They now faced imminent eviction as the 5th Defendant had started pouring building materials on the suit land with intention of commencing construction and hence the instant application.



III. The 1st to 4th Defendants/Respondents case

5. In opposing the application, the 1st to 4th Defendants filed a 15 Paragraphed Replying affidavit sworn by Njemo Ngala Beja the 4th Defendant with authority from the rest of the Defendants to act on their behalf. He averred as follows that:-
 - a. The Applicants were misleading the court taking that each and every family member was aware that an investor being the 5th Respondent had shown interest in the land.
 - b. All the family members were informed of the same as per the agreement by the family members.
 - c. In most instances the 1st Applicant was being represented by the 2nd Applicant since he was away on his duties as a truck driver.
 - d. The proceeds of the sale were shared equally among the parties. From the letter shared by the Applicants dated 8th January 2024, the 1st Applicant was keen on knowing the purchase price despite having the sale agreement, that he also pretended to want to know the position of the house and transparency in the balance.
 - e. The 1st Applicant was seeking for balance of the purchase price by blackmailing the investor through this suit. That the family had agreed on 9th February 2023 to sale the suit property and had elected a person to represent them before the Area Chief.
 - f. Indeed, all the parties were paid and the proceeds used to purchase other portion of land where the Applicants were part of for purposes of moving their families.
 - g. The court was urged to disallow the application by the applicants and to further disregard the averments therein as they not true.
6. Furthermore, the 1st to 4th Respondents filed a Notice of Preliminary Objection dated 9th June, 2025 which raised the following grounds that:-
 - a. the Honourable Court has no jurisdiction to determine the issue raised in the suit by dint of the provision of Section (2) and (3) of the [Fair Administrative Action Act](#) 2015 and Article 159 (2) (c) of the [Constitution](#) of Kenya 2010.
 - b. The Plaintiffs had not exhausted mandatory internal dispute resolution mechanism available under the provision of Sections 29 and 30 (3) of the [Land Adjudication Act](#) Cap. 284 and the [Land Consolidation Act](#) Law of Kenya.
 - c. This case was a nullity and waste of the Honourable Court's time because this court has no jurisdiction to hear and determine un-adjudicated land or land still under adjudication.
 - d. This suit was bad in law and it should be dismissed with costs.
7. On the other hand, the 5th Respondent raised a Preliminary objection dated 9th June 2025 on the following grounds that:-
 - a. by dint of the provision of Section 30 of the [Land Adjudication Act](#) of Kenya Cap. 284, all civil proceeding matters concerning interest in land in an adjudication section shall be discontinued until the adjudication register in that adjudication section has become final in all aspects.
 - b. Chengoni area where the suit property is situated had been declared an adjudication section and the Plaintiff never sought the statutory consent from the Land Adjudication officer before filing the suit as required by law.



- c. The suit herein should be stayed

IV. Submissions

8. As already stated above, on 18th June 2025 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 19th May 2025 and the preliminary objection dated 4th June 2025 be disposed of by way of written submissions. Unfortunately, at the time of preparing this ruling none of the parties had complied. Pursuant to that, the Honourable Court reserved 13th October 2025 as the date for delivering of the Ruling on its merit accordingly.

V. Analysis and Determination

9. I have carefully read and considered the pleadings herein, being the Notice of Motion application dated 19th May 2025 by the Plaintiffs/Applicants, the replies by the Defendants/Respondents being the preliminary objections and the relevant provisions of the Constitution of Kenya, 2010 and the statutes.
10. In order to arrive at an informed, reasonable, fair and Equitable decision, the Honorable Court has four (4) framed issues for determination as follows: -
- Whether the Preliminary Objections raised by the 1st, 2nd, 3rd, 4th & 5th Defendants meet the threshold by Law and Precedents.
 - Whether the Preliminary objections dated 4th June 2025 and 9th June 2025 should be upheld by the court.
 - Whether the Notice of Motion application dated 19th May 2025 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.
 - Who will bear the Costs of Notice of Motion application and the preliminary objection.

Issue No. a). Whether the Preliminary Objections raised by the 1st, 2nd, 3rd, 4th & 5th Defendants meet the threshold by Law and Precedents.

11. In the interest of time and saving of judicial time, it is my view that dealing with both preliminary objections at the same time is proper and efficient in dispensing justice. This is for the simple reason that they all challenge the jurisdiction of this court to deal with the application and suit before it by dint of Section 30 of the Land Adjudication Act of Kenya Cap 284.
12. Under this sub – heading, the Honourable Court will endeavour to deal with the issue of the efficacy and legality of the Objection raised by the Defendants herein. According to the Black Law Dictionary a Preliminary Objection is defined as being:-
- “In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
13. The threshold of a preliminary objection was set out by the Court of Appeal in the now “Classicus locus’ case of “Mukisa Biscuit Manufacturing Co. Limited – Versus - West End Distributors Limited (1969) EA 696” as follows:
- “.....a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit.”



14. The Court went further to note that: -

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop”.

15. Likewise, the Court in the case “Oraro – Versus - Mbaja [2005] eKLR 141”, on the nature of preliminary objections observed that:-

“A preliminary objection is now well identified as and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary objection anything that purports to be a preliminary objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

16. The preliminary objection in this matter is founded on the notion that the Plaintiffs herein have failed to exhaust the dispute resolution mechanism under the provision of Section 30 of the Land Adjudication Act, Cap. 284 and as such the suit is unmerited having been instituted in a court devoid of jurisdiction to hear and determine it. The said section provides that: -

- “(1) Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act. [Rev. 2012] Land Adjudication CAP. 284 L5 - 17 [Issue 1].
- (2) Where any such proceedings were begun before the publication of the notice under section 5 of this Act, they shall be discontinued, unless the adjudication officer, having regard to the stage which the proceedings have reached, otherwise directs.
- (3) Any person who is aggrieved by the refusal of the adjudication officer to give consent or make a direction under subsection (1) or (2) of this section may, within twenty-eight days after the refusal, appeal in writing to the Minister whose decision shall be final.”

17. Therefore, by and large the objection raised by the Defendants herein meets the threshold of law as them being an issue of jurisdiction of this Court to hear and entertain the matter and the Doctrine of Exhaustion are one on matters of law. As such the preliminary objection is merited.



Issue No. b). Whether the Preliminary objections dated 4th June 2025 and 9th June 2025 should be upheld by the court.

18. Under this heading, the Court will proceed to determine whether the objections raised are relevant and hence applicable to the instant case. The gist of the preliminary objection is that the consent of the Land Adjudication officer was not obtained prior to the filing of these proceedings. Primarily, the Honourable Court dare pose the question here – does the suit land fall within the Land Adjudication section as alleged? Clearly, this is factual as opposed to legal issue where a Preliminary Objection has been all of a sudden prompted up supposedly for its determination. Anyway, the Court will give the parties some benefit of doubt here before re – evaluating the efficacy of the objections raised.
19. Legally speaking, the Act was assented on 26th June, 1968 and its commencement date was 28th June, 1968. The Act is the law that governs provides a framework for the ascertainment and recording of land rights and interests in Trust land. It outlines the procedures for identifying and registering land ownership, particularly within adjudication areas, to ensure clarity and security of land tenure. The main purpose of the Act is to formally recognize and document land ownership within designated areas; to resolve disputes related to land ownership and boundaries; to create a clear and legally recognized record of land rights for individuals and groups within the adjudicated section. All these processes concerning land under the adjudication regime provides for lodging of complaints where more than one person lays a claim to a specific parcel of land.
20. The preamble of the Act holds that it was to deal with all matters of the land adjudication and the persons who are ordinarily residents of the delineated adjudication section. From the very onset, the Honourable Court strongly and proudly so holds that this is one of those few legislation on land matters in Kenya that has such a well elaborated and established internal dispute resolution mechanisms. From the provisions of Sections 1 to 30 of the Act, it provides for the declaration of the adjudication are by the Minister for Lands (Sections 3 & 5); the appointment of the Land Adjudication Committee comprising of elders appointed from within the area (Section 6); composition of the adjudication register comprising of person who are ordinarily residents of the area based on birth, tribe, clan or customary lineage ,the demarcation and allocation; the appointment of the Arbitration Board (Section 7); the claims and attendance (Section 13); the process of demarcation, allocation of interests and rights to land and preparation of the records and register (Sections 14 to 25); raising of objections to adjudication register (Section 26); Finalisation of the adjudication register (Section 27) and action by the Chief Land Registrar – issuance of title deeds to the registered members (Section 28) and then Appels (Section 29). Based on the above, therefore, the registered person in the adjudication register and the area list, have the rights and interests go through the process of adjudication. These includes ascertainment and registration of the said rights and interests. The process culminates in the issuance of the title deed.
21. It bears such elaborate mechanisms for resolving land dispute through well established “Quasi – Judicial” legal structures. These include, the Adjudication Committees, Arbitration Board. The disputes are in form of objections raised by an aggrieved party. The provision of Section 19 (2) and (3) of the Act states as follows:-

“(2) If there are two or more conflicting claims to an interest in land and the recording officer is unable to resolve the conflict, he shall submit the dispute to the committee to decide. (3) The recording officer shall rectify the forms in accordance with any decision which the adjudication officer, the committee or the board may make in accordance with this Act.”



22. A party dissatisfied with the decision of the Adjudication Committee may prefer the dispute to the Arbitration Board for determination under the provision of Section 21 (3) of the Act which provides that: -

“Any person named in or affected by a decision of the committee who considers the decision to be incorrect may, within fourteen days after the decision, complain to the executive officer of the committee, saying in what respect he considers the decision to be incorrect.”

23. The Appeal lodged before the Minister under the provision of Section 29 of the Act. It provides that the decision by the Minister is final. The provision of Section 29 of the Act provides that: -

“Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by— delivering to the Minister an appeal in writing specifying the grounds of appeal; and sending a copy of the appeal to the Director of Land Adjudication and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final”.

24. Therefore, it is expected that the disputes should end there. However, arising from the operation of the Act, a party may only move High Court under two grounds. Firstly, whereupon there has been a violation or threat or breach of the fair administration action in the process of the hearing the Appeal by the Minister. For instance, an aggrieved party may seek for prerogative writs in form of Judicial Review in form of “Certiorari”, “Mandamus” or “Prohibition” under the common law as provided for under Sections 8 and 9 of the Law Reforms Act, Cap. 26 and Order 53 of the Civil Procedure Rules, 2010 and in the recent development of jurisprudence as provided for in the omnibus provision of the Articles 22, 23 and 47 of the Constitution of Kenya, 2010 and “The Fair Administrative Act No. 4 of 2015”.

25. Secondly, the other way to seek legal remedy by an aggrieved party emanating from the land adjudication process as stipulated from the Act, is through the provision of Section 30 of the Act as already provided above. To support the Court on this legal position, I seek refuge from the case of: “Mohamed Ahamed Khalid (Chairman) and 10 others –versus-Director of Land Adjudication & 2 others (2013) eKLR where Angote J held: -

“The law that was applicable for the ascertainment of land rights and interests over trust land is the Land Adjudication Act Cap 284. The said Act has an elaborate mechanism of appeal in the event an individual is aggrieved by the decisions of the land adjudication and settlement officer, the land adjudication committee, the land arbitration board and the Minister’s appeal committee. Indeed, before the Director signs the certificates of finality, the Land Adjudication Act provides that the adjudication register must be published which shall be followed with the hearing, determination and implementation of objections in respect to the Adjudication register. The Petitioners have not shown by way of evidence that the adjudication register in respect of the suit property was ever published and that they raised objections in respect to the matter in which the adjudication process was carried out. Considering that the Land Adjudication Act, Cap. 284 has an elaborate procedure on how complaints arising from the planning, demarcation and surveying of Trust Land are supposed to be dealt with, it is my view that this court cannot substitute the established bodies which are supposed to deal with these complaints. The Petitioners can only move



this court for declaratory orders and judicial review orders, or by way of an ordinary suit, once they have exhausted the mechanisms that the law has put in place.”

26. Similarly, the Court of Appeal in the case of:- “Speaker of National Assembly -Versus- Karume (1992) KLR 21” held that: -

“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly be adhered to since there are good reasons for such special procedures.”

27. Further, in the case of:- “International Centre of Policy and Conflict & 5 Others – Versus - The Attorney General & 4 Others [2013] eKLR” as was cited in the case of “Diana Kethi Kilonzo & Another – Versus - IEBC & 10 Others [2013] eKLR” it was stated: -

“An important tenet of the concept of the rule of law is that this court before exercising its jurisdiction under Article 165 of the Constitution in general must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or state of organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act. ...Where there exists sufficient and adequate mechanism to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted”

28. On further regard to the provision of Section 30 (1) of the Act, I have noted the interpretation of the Court Appeal in respect of when the consent should be sought in the case of:- “Bhaijee & another – Versus - Nondi & another (Civil Appeal 139 of 2019) [2022] KECA 119 (KLR) (18 February 2022) (Judgment).” It is to the effect that the consent is condition precedent and must predate the filing of the intended suit. That superior courts have in various decisions, including the Court of Appeal in “Watuku Mutsiemi Watuku & Another Vs Republic & 5 Others” and this court in “Onesmus Daniel Masumbuko & Others – Versus - Augustino Baya Thoto [2019] eKLR, held that the Minister’s decision is final and not amenable for appeal to this court, unless when moved through invoking the court’s judicial review jurisdiction.

29. The other limb of the objection raised is based on the principle of exhaustion. It is contended that the jurisdiction of this court has been wrongly and prematurely invoked in relation to issues for which specific and exclusive procedures have been prescribed. The court is aware of the numerous court decisions where it has been held that where there are existing mechanisms provided under statute for resolution of disputes then this must be exhausted. See the Supreme Court of Kenya holding in the case of “Bernard Murage -Versus - Fine Serve Africa Limited & 3 others [2015] eKLR.

30. The doctrine was aptly captured by the Court of Appeal in “Republic – Versus - National Environment Management Authority Ex parte Sound Equipment Limited”, where the Court of Appeal 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 ...”

31. When tasked with determining issues on jurisdiction similar to the ones in the present suit, Okong’o J. commenting on the role of the Court vis-a-vis that of the adjudicating bodies under the Act, in the case of:- “Tobias Achola Osindi & 13 others – Versus - Cyprian Otieno Ogalo & 6 Others [2013] eKLR, held as follows:-

“The whole process leading up to the registration of land as aforesaid is undertaken by the Adjudication Officer together with other officers appointed under the Act for that purpose. It follows from the foregoing that once an area has been declared an adjudication area under the Act, the ascertainment and determination of rights and interests in land within the area is reserved by the law for the officers and quasi-judicial bodies set up under the Act...The Act has given full power and authority to the Land Adjudication Officer to ascertain and determine interests in land in an adjudication area prior to the registration of such interest. As I have mentioned above, the process is elaborate. The court has no jurisdiction to ascertain and determine interests in land in an adjudication area. In my view, the role of the court is supposed to be supervisory only of the adjudication process. The court can come in to ensure that the process is being carried out in accordance with the law. The court can also interpret and determine any point or issue of law that may arise in the course of the adjudication process. The court cannot, however, usurp the functions and powers of the Land Adjudication Officer or other bodies set up under the Act to assist in the process of ascertainment of the said rights and interests in the land...”

32. Now turning to the instant case. The Honourable Court feels it an opportune moment to revisit the above issue of objectivity and relevance of the objection raised by the Defendants. In so doing, it has critically accessed the filed pleadings by all the parties herein. Apart from the 1st, 2nd, 3rd & 4th Defendants loosely and generally stating in their Replying affidavit as follows:- “Chengoni area where the suit property is situated had been declared an adjudication section and the Plaintiff never sought the statutory consent from the Land Adjudication officer before filing the suit as required by law”.
33. There is nowhere else that the suit land has been associated or falling within the confines of the Land Adjudication Section hence to be governed under the Land Adjudication Act, cap. 286. The Defendants have failed to provide Court with any empirical documentary evidence to that effect. For instance, the Land Adjudication Section declaration letter by the Minister of Land, the Area List nor the Land Adjudication Committee records for that matter among other important information. It has not been demonstrated that the land adjudication process has commenced and hence ongoing to warrant the application of the Act including seeking consent from the Land Adjudication Officer as envisaged under Section 30 of the Act. Far from it. It is trite law that by the provision of Order 2 Rule 6 of the Civil Procedure Rules, 2010 holds that parties are bound by their own pleadings.
34. On the contrary, the Plaintiffs from the filed Complaint dated 19th May, 2025, they have sought for the following orders. These are:-
- a. A declaration that any agreement between the Defendant with regard to sale of land of the late Beja Mgala Beja is null and void;
 - b. An order of injunction restraining the Defendants by themselves or agents from evicting the Plaintiffs from their land in which they live, and from interfering with the Plaintiffs peaceful occupation of the suit land;



- c. Any other orders the Court deems fit to grant.
- d. Costs of the suit.

Additionally, in order to preserve their ancestral land, they have instituted this application and seeking the afore stated interim injunctive reliefs. They are apprehensive that unless injunction orders sought are granted, the Defendants are keen on disposing off the suit property and thus the applicants are at the risk of being rendered homeless by eviction.

- 35. For whatever its worth, the process of dispute resolution as stipulated in the [Land Adjudication Act](#) does not provide for instances where the suit property is to be preserved pending determination on ownership. If anything, it is clear that the Minister is not clothed with powers to grant injunctive orders. I believe that there are special circumstances in this case that make viable the exemption to the doctrine of exhaustion.
- 36. What follows and which seems to be the predominant issue at this point is whether there arise any special circumstances that surpass the strictness deployed in the doctrine of exhaustion. The Court in “William Odhiambo Ramogi & 3 Others – Versus - Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested parties) (2020) eKLR outlined the exceptions to the rule as follows:
 - “ 60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the [Constitution](#) or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.
 - 61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court’s jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR.
 - 62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.”
- 37. From the above, what can be deduced is that it is necessary for the court to look carefully at the suitability of the dispute mechanism in the context of a case to case basis in making its determination. Indeed, every case carries with it different circumstances as compared to another. Where the adequacy and availability of the mechanism is deemed wanting this creates an exceptional case that allows the



Court to intervene. This was well captured in the case of “Krystalline Salt Limited – Versus - Kenya Revenue Authority (2019) eKLR” where it was held that:-

“What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/ or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile.

...this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy.”

38. Despite the above cases being hinged on judicial review, I comfortably borrow a leaf from the same on the basis that the Plaintiffs suit is premised majorly on their right to ownership of property and preservation of the same at this particular point. It is my humble finding accordingly that the application of the doctrine of exhaustion in the circumstances of this case justifies its exemption. Evidence has been tendered to confirm that indeed the suit property is ancestral land an aspect not contested by either parties, it is also clear that the Defendants are keen on disposing off the property to the 5th Defendant and which decision the 1st Applicant states he was not adequately consulted on. The Plaintiffs are entitled to protection of their rights to the property once they present a prima facie case pending a full hearing. It is in the interest of justice that I declare such to be special circumstances which ought to lead to an exemption of the doctrine of exhaustion. From the foregoing, therefore, I will not belabour much into the reasons why both preliminary objections must not succeed and hold that they outrightly lack merit. The case has been ably outlined above.

Issue No. c). Whether the Notice of Motion dated 19th May 2025 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.

39. On the second prayer for a temporary injunction as per the Applicants application dated 19th May 2025. The law appertaining to interlocutory injunctions is set out under Order 40 Rule (1)(a) and (b) of the Civil Procedure Rules, 2010 which provides as hereunder-

“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.”



40. The power exercised by Courts in applications seeking interlocutory injunctive orders is discretionary in nature. The discretion is guided by the conditions for that are set out in the infamous case of “Giella – Versus - Cassman Brown & Co. Limited”. In the words of Spry, V.P., the principles are-
- “First, a Plaintiff must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Plaintiff 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.”
41. Similarly, in the case of “American Cyanamid Co. – Versus - Ethicom Limited [1975] A AER 504”, the Court considered the test for granting of an interlocutory injunction where three elements were noted to be of great importance namely:
- i. There must be a serious/fair issue to be tried,
 - ii. Damages are not an adequate remedy,
 - iii. The balance of convenience lies in favour of granting or refusing the application.
42. Similarly, in the case of: “Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others” the Court of Appeal explained that all the three conditions are to be applied as separate, distinct and logical hurdles which the plaintiff is expected to surmount sequentially. The Court held as follows: -
- “In an interlocutory injunction application, the plaintiff has to satisfy the triple requirements to;
- a) establish his case only at a prima facie level,
 - b) demonstrate irreparable injury if a temporary injunction is not granted, and
 - c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.
43. 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 plaintiff is expected to surmount sequentially. See the case of:- “Kenya Commercial Finance Co. Limited – Versus - Afraha Education Society [2001] Vol. 1 EA 86”. If the Plaintiff 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 defendant will suffer, in the event the injunction is not granted, will be irreparable.
44. In other words, if damages recoverable in law is an adequate remedy and the defendant is capable of paying, no interlocutory order of injunction should normally be granted, however strong the plaintiff’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 Plaintiff to injunction directly without crossing the other hurdles in between.
45. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the plaintiff if interlocutory injunction is refused would be balanced and compared with that of the defendant, if it is granted.



46. On the second factor, that the plaintiff 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 plaintiff to demonstrate, *prima facie*, 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 plaintiff. 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 the amount can be measured with reasonable accuracy or the injury or harm is of such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”
47. Under Order 40 Rule 1 of the Civil Procedure Rules, 2010 it is mandatory for the party seeking a temporary injunction to demonstrate and/or prove that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party to the suit or being wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose of the property. In such scenarios, Courts will more often than not, grant orders for temporary injunction to restrain such acts. In the case of “Samson Aliton Okello – Versus - Barclays Bank of Kenya Limited [2009] eKLR”, Lesiit, J. observed that:-
- “an injunction is an equitable remedy and a party seeking such a remedy must conduct himself in relation to the suit and the matter at hand in a manner that will meet the approval of a court of equity.”
48. In the present case, there is no doubt that the suit property is in danger of being alienated since the Defendants maintain that the same was purchased by the 5th defendant and that the applicants herein had knowledge and consent of such purchase. The 1st Applicant refutes the said claim and states that he was neither informed or consulted over the sale and is apprehensive that he might be rendered homeless by the sale. The question therefore is whether a *prima facie* case has been established. A *prima facie* case was defined by the Court of Appeal in the case of “Mrao Limited – Versus - First American Bank of Kenya & 2 others [2003] KLR 125” which was cited with approval in the case of:- “Moses C. Muhia Njoroge & 2 others – Versus - Jane W Lesaloi and 5 others [2014] eKLR”, as follows:-
- “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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.
49. In the case of:- “Paul Gitonga Wanjau – Versus - Gathuthi Tea Factory Company Limited & 2 others [2016] eKLR”, the Court cited with approval the following passage by the case of “Steven Mason & McCarthy Tetraut (Supra)” in an article entitled “Interlocutory Injunctions: Practical Considerations”
- “With some exceptions, the first branch of the injunction test is a low threshold. As stated by the Supreme Court in *R. J. R. Macdonald vs. Canada (Attorney General)*. Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at the trial. Justice Henegham of the Federal Court explained the review as being “on the basis of common sense and a limited review of the case on the merits.” [11] It is usually a brief examination of the facts and law.”



50. Further, in the case of:- “Kenleb Cons Limited – Versus - New Gatitu Service Station Limited & another [1990] eKLR”, the Court held as follows on what a party seeking an injunction must demonstrate:-

“To succeed in an application for injunction, a plaintiff must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction”.

51. The Plaintiffs and the defendants have both annexed copies of what seem to be agreements to dispose of the suit property. Further is an agreement for sale before the chief between the plaintiffs and the Defendants with the 5th Defendant who is referred to as an investor. I however note that the deponent in the affidavit opposing the application at paragraph 6 stated that the 1st Applicant was represented by the 2nd Applicant since most of the time he was out of town since he is a truck driver. This statement confirms one thing, the 1st applicant was not present during the deliberations and transactions.
52. In view of the foregoing, satisfied that on the strength of the averments by both parties, the Plaintiffs have established a prima facie case with a probability of success.
53. On whether the Plaintiffs /Applicants will suffer irreparable injury/loss that cannot be compensated by an award of damages if the application for temporary injunction is not allowed? As stated above, the Applicant has proved that the suit property has been sold and the same was without his consent. The 1st to 4th Defendants have also alluded to a possibility of moving to another area and abandoning the suit property for the 5th Defendant as a result of the sale. It is this court’s finding that if injunction pending hearing and determination of this suit is denied, the plaintiff shall risk losing the suit property.
54. On the balance of convenience, in the case of:- “Amir Suleiman – Versus - Amboseli Resort Limited [2004] eKLR, Ojwang, Ag. J (as he then was), elaborated on what a “balance of convenience” means by stating that-

“The Court in responding to prayers for interlocutory injunctive reliefs, should always opt for the lower rather than the higher risk of injustice.”

55. In the case of “Paul Gitonga Wanjau – Versus - Gathuthis Tea Factor Company Limited & 2 others [2016] eKLR”, the Court when addressing the issue of balance of convenience expressed itself thus:-

“Where any doubt exists as to the plaintiffs’ 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 Defendant on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the plaintiff, 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 the plaintiff 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 on convenience lies. ”

56. The balance of convenience automatically tilts towards the Plaintiffs/Applicants.



Issue No. d). Who will bear the costs of the application and the objections

57. It is now well established that the issue of Costs is at the discretion of the Court. Costs mean the award that a party is granted at the conclusion of a legal action or proceeding in any litigation thereof. The Black Law Dictionary defines cost to mean: -

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”

58. The provision of Section 27 (1) of the Civil Procedure Act, Cap. provides as follows: -

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

59. A careful reading of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise. By events, it means the outcome or result of the legal action.

60. In this case, while the Court finds no merit from the raised objections, the Plaintiffs/Applicants have fulfilled the conditions set out under Order 40 Rule 1 of the Civil Procedure Rules, 2010. In tandem with the provisions of Section 27 (1) of the Civil Procedure Act, Cap. 21, the events and/or results in this case are the Plaintiff/ Applicant has succeeded in his case. Therefore, for this very fundamental reason, the costs of the Notice of Application dated 19th May 2025 and the two notice of preliminary objections will be made to the Plaintiffs/Applicants by the Defendants/Respondents herein.

VI. Conclusion & Disposition

61. In long analysis, upon the Honorable Court has carefully considering and weighing the conflicting parties' interest as regards to balance of convenience, it is clear that the Plaintiffs/ Applicants have a case against the Defendants/ Respondents. Thus, for avoidance of doubt I do specifically proceed to order: -

- a. That the two Notices of Preliminary objection dated 4th June 2025 by the 1st to 4th Defendants and the other by the 5th Defendant dated 9th June 2025 be and are hereby dismissed.
- b. That the Notice of Motion application dated 19th May, 2025 by the Plaintiffs/Applicants herein be and is hereby found to be meritorious and hence the prayers sought are allowed accordingly.
- c. That the Honourable Court be and is hereby pleased to issue an order of injunction restraining the 1st, 2nd, 3rd, 4th & 5th Defendants/Respondents herein by themselves or agents from evicting the Plaintiffs/Applicants herein from their land in which they live, and from interfering with the Plaintiffs peaceful occupation of the suit land pending hearing and determination of this suit



- d. That for expediency sake, there shall be a mention on 4th December, 2025 for purposes of conducting Pre – Trial Conference pursuant to the provision of Order 11 of the civil procedure Rules, 2010. There shall be a hearing of the case on 24th March, 2026 by the consensus of the parties.
- e. That the cost of the Notice of Motion application dated 19th May 2025 and the two preliminary objections dated 4th June 2025 and 9th June 2025 are awarded to the Plaintiffs/Applicants to be borne by the Defendants/Respondents herein.

It is ordered accordingly.

**RULING DELIVERED THROUGH THE MICRO - SOFT TEAMS VIRTUAL MEANS, SIGNED
AND DATED AT KWALE THIS 13TH DAY OF OCTOBER, 2025**

.....

**HON. MR. JUSTICE L.L NAIKUNI,
ENVIRONMENT & LAND COURT AT KWALE.**

Ruling delivered in the presence of: -

- a. Mr. Daniel Disii, the Court Assistant.
- b. M/s. Otieno Advocate holding brief for Mr Magolo Advocate for the Plaintiffs/Applicants.
- c. M/s. Auma Advocate holding brief for Mr. Mwarandu Advocate for the 1st, 2nd, 3rd & 4th Defendants.
- d). M/s. Kavindu Advocate holding brief for Mr. Nyachiro Advocate for the 5th Defendant.

HON. JUSTICE L.L NAIKUNI

