



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ELC CASE NO. 1202 OF 2007

COSMAS MULWA MALOMBE.....
.....PLAINTIFF

VERSUS

WANGO
MUNYALO.....DEFENDANT/RESPONDENT
MWENDWA KITHEKA.....INTERESTED
PARTY/APPLICANT

RULING

1. By a Notice of Motion dated 20th May 2025 brought under Articles 50 and 159 of the Constitution, Order 51 Rule 1, Order 22 Rule 25 Order, 10 Rule 11, and Sections 1A, 1B, and 3A of the Civil Procedure Act, the Applicants seek the following orders: -
 - 1) ***Spent.***
 - 2) ***Spent.***
 - 3) ***THAT there be a stay of execution of orders granted in ELC Case No. 1202 of 2007 issued on 19th June 2024 and other consequential orders thereon pending the hearing and determination of this suit.***

4) Spent.

5) That Plaintiff, their servants, agents and/or any other person acting upon their instructions be restrained from interfering with the Defendant's/Applicants quiet possession and exclusive use of land parcel No. Matinyani/Kasaini/1305 pending the hearing and determination of this suit.

6) THAT the Defendant/Applicant and Interested Party be allowed to file their defense.

7) That costs be provided for.

2. The application is based on the grounds appearing on its face together with the supporting affidavit of Mwendwa Kitheka, sworn on even date

THE APPLICANT'S CASE

3. A summary of the grounds and the averments is that the Defendant/Applicants were never served with the pleadings or notified of the eviction orders. The deponent averred that they only became aware of the matter after they were served with the eviction order.
4. The Applicants are apprehensive that the Plaintiff will proceed with the eviction scheduled on 23rd May 2025 if the orders sought are not granted.

THE RESPONDENT'S CASE

5. The deponent averred that he knows the Interested Party as he is his neighbour. He further averred that after judgment was entered, the Interested Party started claiming interest in the suit property in an attempt to defeat justice.

6. He further averred that the Interested Party was served on 7th March 2024 with the application dated 2nd October 2023. According to him the doctrine of Les Pendens is applicable in this matter as the judgment herein was issued in rem.

ANALYSIS AND DETERMINATION

7. Having considered the application and the response thereto, the only issue for determination is whether the Applicants are entitled to the orders sought.

8. The Applicants are seeking a stay of execution of the orders issued on 19th June 2024 pending the hearing and determination of this suit. The record shows that pursuant to the application dated 2nd October 2023, the court granted the following orders :-

a) ***THAT an order of eviction is hereby issued directed at the Defendant and or Interested Party, her relatives, servants and or agents to be evicted and removed from parcel of land title No. Mitinyani/Kasaini/1305 and any structures erected therein be demolished at their own costs.***

b) ***THAT the OCS Matinyani Police Station do provide security and or supervise the eviction exercise. The court filed was marked as closed.***

9. This matter was heard and determined vide the judgment delivered on 12th June 2023 and such, there is no suit pending for hearing and determination.

10. The Applicants have sought an injunction restraining the Respondent from interfering with the suit property pending the hearing and determination of the suit.

11. The principles applicable in an application for an injunction were laid down in the celebrated case of **Giella Vs Cassman Brown & Co Ltd 1973 EA 358**, where the court held that in order to qualify for an injunction:-

- ✓ ***First the 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 harm which would not be adequately compensated by an award of damages.***
- ✓ ***Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.***

12. The first issue for determination is whether the Applicants have established a *prima facie* case with a probability of success.

13. A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd Vs First American Bank of Kenya Ltd & 2 Others (2003) 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 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.”

14. This matter was heard and determined vide the judgment delivered on 12th June 2023. Based on the material placed before

me, I find that the Applicants have not established a prima facie case with a probability of success.

15. The conditions set out in the **Giella Vs Cassman Brown Case (Supra)** are to be considered sequentially.

In so finding I am persuaded by the holding in the case of **Nguruman Limited Vs Jan Bonde Nielsen & 2 Others [2014] eKLR** where the Court of Appeal stated 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.

16. Having found that the Applicants have not established a prima facie case with a probability of success, this courts finds that it will be immaterial to delve into the other limbs that are to be considered on grant of a

temporary injunction. In so finding, I am persuaded by the holding in the case of **Commercial Finance Co. Ltd vs Afraha Education Society & Others C A Civil Appeal No. 142 of 1999** where the court held that:-

“.....the judge should address himself sequentially on the conditions for granting an injunction instead of proceeding straight away to address himself on the third condition because where the Applicant has no registered interest in the land comprised in the title dispute and thereof has not demonstrated that it has a prima facie case with a probability of success no interlocutory injunction would be available.”

17. The Applicants have sought leave to file their defence. The Applicants have not sought to have the judgment varied or set aside.

18. In the end, I find that the application dated 20th May 2025 is devoid of merit and the same is hereby dismissed with costs.

.....
HON. T. MURIGI
JUDGE

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS
THIS 8th DAY OF OCTOBER, 2025.**

IN THE PRESENCE OF:

In the absence of the parties

Ahmed – court assistant