



**Muchiri v Tharamba & 3 others (Environment and Land Appeal  
E007 of 2025) [2025] KEELC 6822 (KLR) (6 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 6822 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT AND LAND APPEAL E007 OF 2025  
LL NAIKUNI, J  
OCTOBER 6, 2025**

**BETWEEN**

**DORCAS WANJIKU MUCHIRI ..... APPELLANT**

**AND**

**JACK MIRITI THARAMBA ..... 1<sup>ST</sup> RESPONDENT**

**SYLVESTER M NZOKA ..... 2<sup>ND</sup> RESPONDENT**

**JACQUELINE M CLERK ..... 3<sup>RD</sup> RESPONDENT**

**ANDREAS HELMUT ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

**I. Introduction**

1. This Honorable Court was tasked to make a determination onto a Notice of Motion application dated 5<sup>th</sup> May 2025 by DORCAS WANJIKU MUCHIRI the Appellant/Applicant herein. The application was brought under the provision of Order 42 Rule 6, and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and under Sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act*.
2. Upon service of the said application, the 4<sup>th</sup> Respondent herein filed responses through a Replying Affidavit dated 22<sup>nd</sup> July 2025. The Honourable Court shall be dealing with it at a later stage of the Ruling.

**II. The Appellant/Applicant's Case.**

3. The Appellant/Applicant's sought for the following orders: -
  - a. Spent.



- b. That there be a stay of proceedings in Msambweni ELC No. 017 of 2021 pending the hearing and determination of this appeal.
  - c. That a temporary injunction do issue restraining the Respondents, their agents, servants or anyone acting on their behalf from entering, occupying, interfering with, alienating, fencing, or in any way dealing with the suit property (Kwale/Galu Kinondo/1456) pending the hearing and determination of the appeal.
  - d. That the costs of this application be provided for.
4. The application was premised on the grounds, testimonial facts and the averments made out under the fifteen (15) Paragraphed Supporting Affidavit of Dorcas Wanjiku Muchiri sworn and dated on 5<sup>th</sup> May 2025 and the three (3) annexures marked as “DWM - 1 – 3” annexed thereto. She averred as follows that: -
- a. The Respondents had instituted the Trial Suit against her, raising a live boundary dispute over registered land, in which they alleged that the boundaries of the suit property had been unlawfully interfered with.
  - b. She had raised a Preliminary Objection before the Trial Court, contending that the said court lacked jurisdiction to entertain the boundary dispute pursuant to Sections 18 and 19 of the [Land Registration Act](#), No. 3 of 2012.
  - c. It was her deposition that, on 29<sup>th</sup> April 2025, the Trial Court delivered a Ruling dismissing her Preliminary Objection which had challenged its jurisdiction to hear the boundary dispute. Annexed to her affidavit and marked as exhibit “DWM - 1” was a true copy of the said Ruling dated 29<sup>th</sup> April 2025.
  - d. The Trial Court had erroneously held that the Land Registrar had concluded a boundary fixing exercise, whereas in fact the said exercise had been frustrated and left incomplete.
  - e. Being dissatisfied with the Trial Court’s Ruling, she lodged an Appeal, before this court raising substantial triable issues, including the Trial Court’s improper assumption of jurisdiction in a matter statutorily reserved for the Land Registrar and the misapplication of the doctrine of exhaustion.
  - f. She had filed the Appeal on the grounds that she had “a prima facie case” with high chances of success, as the Trial Court’s Ruling was inconsistent with established precedent and the express wording of the law.
  - g. The Trial Suit was set to proceed for hearing, and that unless a stay of proceedings was granted, the Trial Court may adjudicate the matter and issue final orders, thereby potentially rendering her Appeal nugatory, moot, and otiose.
  - h. She was the registered proprietor of the suit property, being KWALE/GALU KINONDO/1457, and that under Article 40 of the [Constitution](#), she was entitled to quiet and peaceful possession of the same. Annexed to her affidavit and marked as exhibit “DWM - 2” was a true copy of the Certificate of Title of the suit property.
  - i. It was in the interest of substantive justice for this Honorable Court to grant a stay of proceedings and an injunction to preserve the suit property and prevent the Respondents from interfering with it during the pendency of the Appeal.



- j. If the Respondents was permitted to proceed with dealings on the suit property, she was likely to suffer substantial loss and irreparable damage, given that the substratum of the Trial Suit related to encroachment of the suit property. Annexed to her affidavit and marked as exhibit “DWM - 3” was a true copy of the Plaint dated 9<sup>th</sup> November 2021.
- k. The balance of convenience tilted in her favor, as granting the stay and injunction will occasion no prejudice to the Respondents while this Honorable Court determines the issue of jurisdiction, which went to the root of the dispute before the Trial Court.
- l. Her application had been made promptly, in good faith, and in the interest of justice.
- m. This Honorable Court granted the stay of proceedings and injunction sought to preserve the subject matter of the suit and uphold the due process of law.

## **II. The Replying Affidavit by the 4<sup>th</sup> Respondent.**

- 5. The application was opposed through a filing of a eighteen (18) Paragraphed Replying Affidavit sworn by Andreas Helmut, dated 23<sup>rd</sup> July, 2025 together with seven (7) annexures marked as “AH 1 – 7” annexed thereto. The Deponent averred as follows that:-
  - a. He was the 4<sup>th</sup> Respondent in the instant matter, well-versed with the facts of the suit, and duly authorized to swear the affidavit on his own behalf as well as on behalf of the other Respondents.
  - b. He had read the application herein and wishes to oppose it in its entirety, on the grounds that it constituted a gross abuse of the court process and a desperate attempt to frustrate the hearing and determination of the main suit in the Lower Court at Msambweni, being MCELC No. E017 of 2021.
  - c. The suit in question was commenced in the year 2021, and that despite service of the pleadings upon the Applicant, the Applicant did not defend the matter, leading to it proceeding to Judgment, wherein it was ordered that the wall encroaching on the Respondents’ property be demolished.
  - d. Upon the Respondents commencing execution of the said Judgment, the Applicant moved the court seeking to set aside the “ex – parte” Judgment.
  - e. The said orders setting aside the Judgment were allowed, and the court directed that the matter be heard afresh.
  - f. The Respondents thereafter filed a Notice of Preliminary Objection dated 21<sup>st</sup> January 2025, which was subsequently dismissed by the Trial Court on 29<sup>th</sup> April 2025, thereby prompting the filing of the instant appeal.
  - g. The issues raised by the Applicant had been properly addressed by the Trial Court in its ruling, and that the appeal herein was intended to further delay the hearing and conclusion of the matter on its merits, as well as to frustrate the Respondents from enjoying the fruits of their Judgment.
  - h. The granting of a stay of proceedings was a draconian order that should only be issued as a matter of last resort.



- i. The Appellant/Applicant had failed to demonstrate sufficient grounds for a stay of the proceedings herein, emphasizing that the mere pendency of an appeal was not a sufficient ground for granting such a stay.
- j. The Appellant/Applicant would have her day in court to demonstrate that the boundary fixing exercise was not finalized, as alleged in Paragraph 6 of the Supporting Affidavit, and that the Court would thereafter make an informed decision based on the evidence adduced by the parties.
- k. The application herein was premature, and that the Appellant/Applicant ought to have ventilated the issues raised in the Trial Court, since those were questions of fact that could not be adequately addressed on appeal.
- l. Questions pertaining to the interrogation of survey reports and notices issued to the Applicant to attend the survey exercise could only be properly ventilated in the Trial Court, and that it would therefore be premature to stay the proceedings herein. Annexed to his affidavit and marked as exhibits "AH - 1, 2, 3, 4, 5, 6 & 7" were true copies of letters dated 13<sup>th</sup> March 2019, 4<sup>th</sup> April 2019 (with the attached survey report dated 2<sup>nd</sup> April 2019), 10<sup>th</sup> August 2020, 6<sup>th</sup> November 2020, 10<sup>th</sup> December 2020, and 3<sup>rd</sup> February 2021, respectively.)
- m. Based on the aforementioned letters, it was evidently clear that the survey office was involved in the matter, that the Land Registrar's office also participated and recommended the implementation of the survey report, and that the Appellant/Applicant had participated in the exercise in the presence of her own independent private surveyor.
- n. The implementation of the said report was frustrated by the Appellant/Applicant, who blocked the surveyor's access to the encroached area by having put up a perimeter wall.
- o. The Appellant/Applicant had not approached this Court of equity with clean hands, having failed to make full and material disclosure that she fully participated in the exercise, and instead resorting to lying on oath that no such exercise was conducted.
- p. This constituted a clear abuse of the court process, as the application had been filed with the intention of further staying the proceedings in the trial.
- q. He urged this Court to exercise its inherent discretion and dismiss the application with costs.

## **II. Submissions**

6. On 18<sup>th</sup> September 2025 while all the parties were in Court directions were granted on the disposal of the Notice of Motion application dated 5<sup>th</sup> May 2025 by way of written submissions. Pursuant to that all parties fully obliged and the Honourable Court reserved 6<sup>th</sup> October 2025 as the date to deliver its Ruling thereof.

### **A. The Skeleton Submission by the Appellant/Applicant**

7. The Appellant/Applicant through the Law firm of Messrs. L.M. Mulago & Company Advocates filed their written submissions dated 10<sup>th</sup> September 2025. M/s. Mulago Advocate urged this Honourable Court to grant the following orders: firstly, a stay of proceedings in "Msambweni ELC No. E017 of 2021" pending the determination of the appeal; and secondly, a temporary injunction restraining the Respondents from interfering with the suit property, being Kwale/Galu Kinondo/1457, pending the hearing and determination of the appeal.



8. The Learned Counsel framed the issues for determination as follows:-
  - i. Whether this Honourable Court should grant a stay of proceedings?
  - ii. Whether continuation of the proceedings will render the Appeal nugatory?
  - iii. Whether the Appeal has high chances of success?
9. On whether this Honourable Court should grant a stay of proceedings. It was submitted that the Appeal raised substantial questions of law, specifically, the Appeal challenges the jurisdiction of the trial court to entertain a boundary dispute before the Land Registrar had fulfilled their statutory mandate under the provision of Sections 18 and 19 of the *Land Registration Act*, No. 3 of 2012. This, it was argued, constituted a pure question of law that struck at the very competence of the trial court to hear the matter from the outset.
10. The Appellant/Applicant contended that:
  - (i) No boundary fixing exercise had been concluded by the Land Registrar;
  - (ii) The statutory procedure had been bypassed; and
  - (iii) The trial court had misconstrued its mandate by assuming jurisdiction prematurely.
11. The Learned Counsel argued that this fundamental issue impacted the validity of the entire proceedings and met the threshold for a substantial and arguable legal issue. On whether continuation of the proceedings would render the Appeal nugatory? The Learned Counsel submitted that it was a settled principle that where proceedings persisted in a Court whose jurisdiction was under challenge on appeal, the resulting processes and decisions may become moot, unenforceable, or invalid. If this Honourable Court does not stay the proceedings at the trial court, the Appellant risked:-
  - (i) Engaging in proceedings that may later be declared null and void;
  - (ii) Enduring irreversible processes and orders issued under a contested jurisdiction.
12. Therefore, the Appellant/Applicant stood to suffer prejudice, and scarce judicial resources would be wasted, potentially embarrassing the trial court if its actions were subsequently declared void. In support of this contention, the Learned Counsel relied on the decisions of “Stanley Kangethe Kinyanjui – Versus - Tony Ketter & 5 others [2013] eKECA 378 (KLR)” and ”Makena – Versus - Nahwa (Civil Appeal E127 of 2024) [2024] KEHC 13086 (KLR)”, submitting that where jurisdiction was in dispute, proceedings must be halted to protect the appellate process and prevent an academic exercise.
13. The Learned Counsel further argued that there was a risk of conflicting orders being issued, especially in relation to interlocutory reliefs, if the two courts proceed concurrently on the same matter.
14. On whether the Appeal has high chances of success. The Learned Counsel contended that the Appeal was grounded on the trial court’s evident misinterpretation of the provision of Sections 18 and 19 of the *Land Registration Act*, No. 3 of 2012 as well as its misapplication of the doctrine of exhaustion. It was submitted that the trial court erroneously found that a boundary identification exercise had been conducted and adopted, despite the absence of any cadastral map, survey report, or documented boundary determination on record.
15. Therefore, the Respondents would benefit from ongoing proceedings whose jurisdiction was under appeal. Further, that this Honourable Court should safeguard the integrity of the appellate process. The Learned Counsel’s position was bolstered by binding precedent, such as “Peter Kamonda



- Njaguna – Versus - Paul Ng'ang'a Gachie [2020] eKLR, where the Court of Appeal confirmed that jurisdiction over boundary disputes initially vested with the Land Registrar. On the facts, the Appellant/Applicant's appeal demonstrated a strong case with genuine prospects of success.
16. On whether the Appellant/Applicant had established grounds for the grant of a temporary injunction. On the first limb, it was submitted that the Appellant/Applicant has established a strong prima facie case by demonstrating that the trial court assumed jurisdiction contrary to the provision of Sections 18 and 19 of the Land Registration Act, No. 3 of 2012. Thus, the appeal raised substantial legal questions with high prospects of success, as jurisdiction in boundary disputes lies first with the Land Registrar, thereby strengthening the Appellant/Applicant's position.
  17. Regarding irreparable harm, the Counsel argued that the suit property was land, and the Appellant/Applicant, as the registered proprietor under the provision of Article 40 of the Constitution, was entitled to quiet enjoyment thereof. Should the Respondents interfere with, develop, or alienate the property during the pendency of the appeal, the subject matter would be permanently altered. Monetary compensation would not suffice to redress the violation of proprietary rights or the destruction of the substratum of the dispute.
  18. On the balance of convenience. It was submitted that it clearly tilted in favour of the Appellant/Applicant. Granting an injunction would preserve the status quo and protect the property until the Court determined the jurisdictional issue on appeal. The Respondents would suffer no prejudice from a temporary restraint, whereas the Appellant/Applicant faced the risk of losing her proprietary rights and the substratum of the appeal if no injunctive relief was granted.
  19. In conclusion, the Appellant/Applicant respectfully urged this Honourable Court to exercise its discretion in favour of the application. She had demonstrated that allowing the proceedings to continue would render the appeal nugatory and has met the legal thresholds for both a stay and an injunction. It was in the interests of justice that the orders sought in the Application dated 5<sup>th</sup> May 2025 be granted.

## **B. The Skeleton Submission by the Respondents**

20. opposing the Appellant/Applicant's Notice of Motion Application dated 5<sup>th</sup> May 2025, the Respondents, through the Law Firm of Messrs. Mungai Kamau & Company Advocates, filed written submissions dated 26<sup>th</sup> September 2025. Mr. Mungai Kamau Advocate commenced his submissions by providing a brief background of the matter. He urged this Honourable Court to dismiss the Application in its entirety on grounds that it lacked merit and amounted to an abuse of the court process.
21. The Learned Counsel framed two ( 2 ) central issues for determination. These were, firstly whether the Applicant/Applicant had met the mandatory grounds for grant of injunction. The Respondents argued that the Applicant had failed to demonstrate that the appeal would be rendered nugatory if stay of proceedings was not granted. Relying on "Stanley Kangethe Kinyanjui – Versus - Tony Ketter & 5 Others [2013] eKLR, it was submitted that the Applicant had not shown that the subject matter could not be reversed or adequately compensated by damages if the appeal succeeded stayed
22. To support their legal point, they further relied on the case of: "Kenya Shell Limited – Versus - Benjamin Karuga Kibiru [1986] eKLR, emphasizing that substantial loss was the cornerstone for granting stay, yet the Applicant had not demonstrated any substantial loss. The disputed portion of land, being a strip, was quantifiable, and compensation by value was possible if the appeal succeeded. Thus, no irreparable harm had been proved



23. The Learned Counsel contended that the Applicant misled the Court by alleging that no boundary identification exercise had been carried out. They maintained that such an exercise had indeed taken place before the institution of the trial proceedings. For this reason, the Applicant had not approached the Court with clean hands and was undeserving of equitable relief. On this aspect, reliance was placed on the case of:- “Satya Bhama Gandhi v Director of Public Prosecutions & 3 others [2018] eKLR”, which highlighted the Court’s inherent jurisdiction to prevent abuse of its process
24. The Respondents submitted that the Applicant’s conduct—failing to defend the main suit until judgment was entered, then filing multiple applications after eviction orders were issued—amounted to a calculated attempt to delay the hearing and determination of the matter. This was characterized as a gross abuse of the Court process and waste of judicial time.
25. Secondly, whether the proceedings in MCELC No. E017 of 2021 should be stayed. The Respondents argued that stay of proceedings was a grave judicial action which interferes with a litigant’s right to expeditious access to justice under the provision of Article 48 of the *Constitution*. They submitted that the Applicant’s motion sought to unjustly delay the Respondents’ right to have their dispute heard and determined on its merits
26. They relied on the case of:- “Kenya Wildlife Service – Versus - James Mutembei [2019] eKLR”, where the Court held that the test for stay of proceedings was stringent and should only be exercised sparingly in exceptional cases. Further, they invoked Halsbury’s Laws of England, 4<sup>th</sup> Edition, Vol. 37, noting that stay of proceedings should not be imposed unless it was beyond reasonable doubt that the proceedings ought not to continue
27. The Learned Counsel averred that the present case was neither frivolous nor groundless and that the Applicant had failed to demonstrate any exceptional circumstances warranting a halt of proceedings. They also cited “Republic – Versus - Attorney General & 4 Others Ex parte Peter Kenneth Kariuki Gathii [2014] eKLR”, to underscore that stay is only justified where proceedings are manifestly groundless or constitute abuse of process.
28. In conclusion, the Respondents urged the Court to dismiss the Application with costs, terming it frivolous, vexatious, and intended to delay the trial court proceedings contrary to the constitutional principles of access to justice and the right to fair trial.

## **V. Analysis and Determination**

29. As indicated above, I have keenly considered the pleadings filed by all the parties, the elaborate and robust skeleton submissions by the Learned Counsel, the myriad of cited authorities the relevant provisions of the *Constitution* of Kenya, 2010 and the statutes.
30. For the Honourable Court to reach an informed, reasonable and Equitable decision, it has framed the following three issues for its determination. These are as follows:-
  - a. Whether the Notice of Motion application dated 5<sup>th</sup> May 2025 by the Appellant/Applicant has any merit whatsoever and if the Honourable Court should issue a stay of the proceedings in Msambweni ELC No. 017 of 2021 pending the hearing and determination of this appeal.
  - b. Whether the Notice of Motion dated 5<sup>th</sup> May 2025 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.
  - c. Who bears the costs of the Notice of Motion application dated 5<sup>th</sup> May 2025?



**Issue No. a). Whether the Notice of Motion application dated 5<sup>th</sup> May 2025 by the Appellant/Applicant has any merit whatsoever and if the Honourable Court should issue a stay of the proceedings in Msambweni ELC No. 017 of 2021 pending the hearing and determination of this appeal.**

31. Under this sub - title, the main substratum from the filed application by the Appellant/Applicant is on granting stay of proceedings pending the hearing and final determination of the pending appeal. From the very onset, there will be need to point out the major difference between the orders of Stay of execution with the orders of Stay of proceedings. While the former connotes legal powers to effect the decision of Court at the conclusion of any litigation or legal action, the former tends to curtail the right of a hearing of a case in its midst stage. They each bear severe and distinct consequences. It is now well established that these orders are at the discretion of the Court save to say that the unfettered powers should be exercised judicially and not capriciously at the whim of the Court. The legal principles for granting a stay of execution and stay of proceedings are fairly well settled in Kenya.
32. Legally speaking, first and foremost, the basic principle is set of clearly in the case of:- “Kenya Wildlife Service – Versus - James Mutembei [Supra]” the Honourable Judge espoused stay of proceedings as opposed to stay of execution when held as follows: -
- “Stay of proceeding should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent...”
33. Ringera J in the case of “Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000” persuasively stated thus:-
- “As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”.
34. With regard to the stay of execution, the statutory basis is the provision of Order 42 of the Civil Procedure Rules, 2010. Rule 6 (2) of the said order provides as follows:
- “No order for stay of execution shall be made under subrule (1) unless –
- a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
  - b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”



35. In the case of “National Oil Corporation of Kenya – Versus - Real Energy Limited [2017] eKLR”, the court considered the principles for stay of proceedings in paragraph 9 as hereunder:
- “9. In the case of Global Tours & Travels Ltd; Nairobi High Court Winding up Cause No. 43 of 2000 which was cited with approval in Gichuki Macharia & Another – Versus - Kiai Mbaki & 2 Others (Supra), Ringera J as he then was stated as already stated above.
36. There is another important consideration to be taken into account which was considered in the case of “Butt – Versus - Rent Restriction Tribunal [1979] eKLR”. It was put thus by the Court of Appeal: -
- “It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett LJ in *Wilson Vs Church* (No 2) 12 Ch. D ([1879] 454 at P 459. In the same case, Cotton LJ said at P 458:
- “I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”
37. From the record, the instant case involves a land dispute instituted in the trial court which concerns an alleged encroachment and boundary demarcation. The Appellant/Applicant contends that the survey exercise relied upon by the Respondents was not properly finalized, that she was not accorded a fair opportunity to challenge it, and that the trial court failed to properly address these issues when dismissing her preliminary objection. The trial Court rendered its decision on the said objection and which the Applicant got aggrieved on and hence the subject of the impugned appeal before this Court.
38. The appeal raises substantive questions: (a) whether the survey process met the statutory threshold under the *Land Registration Act*; (b) whether the notices issued and the participation of parties were legally adequate; and (c) whether the trial court prematurely shut out issues of jurisdiction and legality by dismissing the preliminary objection.
39. The Applicant contends that these are arguable grounds which merit full interrogation by this Court at the appellate stage.
40. If the trial court proceeds with hearing and determination of MCELC No. E017 of 2021 before this appeal is heard, there is a real risk that the Appellant/Applicant’s appeal will be rendered nugatory. The trial court may make final determinations based on the disputed survey exercise, effectively preempting the appeal and occasioning multiplicity of proceedings.
41. On the other hand, the Respondents argue that the application is intended to delay a matter filed in 2021. While delay in conclusion of disputes is a relevant consideration, the Court must equally safeguard the constitutional right to a fair hearing and appeal. A short stay to preserve the subject matter and enable the appellate court to pronounce itself on the legal issues raised is, in my view, the lesser prejudice compared to allowing the trial to proceed and risk rendering the appeal an academic exercise.
42. From the records, the Honourable Court is satisfied that there substantial loss likely to be incurred by the Applicant should the orders not be granted. I also note that the Applicant moved this Court promptly after the dismissal of the preliminary objection on 29<sup>th</sup> April 2025. The application was



filed on 5<sup>th</sup> May 2025, less than a week later. This demonstrates diligence and timeliness, satisfying the requirement that an application for stay be made without unreasonable delay.

43. On the balance of convenience, I find that the prejudice to the Respondents (in terms of delay) can be compensated by costs, whereas the prejudice to the Applicant (loss of her right to effectively pursue an appeal) cannot be remedied if the proceedings continue in the lower court.

**Issue No. b). Whether the Notice of Motion application dated 5<sup>th</sup> May 2025 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.**

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

Order 40, Rule 1

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

- a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
  - b) that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.
45. Fundamentally, the principles applicable in an application for an injunction were laid out in the celebrated case of “Giella – Versus - Cassman Brown & Co Limited (Supra)”, where it was stated: -

“First an applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

46. The three conditions set out in “Giella (supra)”, need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of “Nguruman Limited – Versus - Jan Bonde Nielsen (Supra)”:-

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Limited - Versus - Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally



be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between".

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

"So, what is a prima facie case, I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself would conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter"

48. On the first condition of a prima facie case, the Applicant has demonstrated that the Respondents instituted the Trial Suit raising a live boundary dispute over her registered land, wherein they alleged unlawful interference with boundaries. The Applicant raised a Preliminary Objection on jurisdiction, citing the provision of Sections 18 and 19 of the Land Registration Act No. 3 of 2012, but the Trial Court dismissed it by a Ruling delivered on 29th April 2025 (annexed as DWM-1). She contends that the Trial Court erroneously assumed jurisdiction in a matter statutorily reserved for the Land Registrar, despite the fact that the boundary fixing exercise had been frustrated and left incomplete. Dissatisfied, she filed an Appeal raising triable issues on jurisdiction and misapplication of the doctrine of exhaustion.

49. The Applicant has annexed evidence of ownership of the suit property Kwale/Galu Kinondo/1457, being the registered proprietor being a Certificate of title deed - DMM - 2 which is protected under the provision of Article 40 of the Constitution of Kenya and Sections 24, 25 and 26 of the Land registration Act, No. 3 of 2012. By virtue of this proprietorship, she enjoys the right to quiet and peaceful possession. The pleadings in the Trial Suit demonstrate that the substratum of the dispute concerns alleged encroachment on her land. On these facts, the Applicant has shown a prima facie case with a high probability of success as the Trial Court's ruling appears inconsistent with statute and precedent.

50. In the case of "Mbuthia – Versus - Jimba credit Corporation Limited 988 KLR 1", the court held that:-

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

51. Similarly, in the case of:- "Edwin Kamau Muniu – Versus - Barclays Bank of Kenya Limited" the court held that:-

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

52. In the present case, it is clear that the Appellant feel threatened by the actions of the Respondents, who according to the Appellant was trying to deprive the Appellant of the suit property. Regarding this first condition though, the Appellant/ Applicant has demonstrated a prima facie case with a probability of success at the trial as enunciated in the case of "Giella -Versus - Cassman Brown & Co. Ltd (Supra)".



53. The court has further considered the annexures on record against the second principle for the grant of an injunction, that is, whether the Appellant/Applicant might suffer irreparable injury which cannot be adequately compensated by an award of monetary damages. With regards to the second limb of the Court of Appeal in “Nguruman Limited (supra)”, held that,

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima 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 applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

54. On the issue whether the Applicant will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Applicants must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. The Applicant avers that unless a stay and injunction are granted, the Trial Court may proceed with hearing and issue final orders, thereby rendering her Appeal nugatory, moot, or otiose. She further deposes that if the Respondents are permitted to continue interfering with the property, she will suffer substantial and irreparable loss in respect of encroachment, given that her proprietary rights are under direct threat. The Appellant/Applicant has to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of “Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (2018) eKLR” provides an explanation for what is meant by irreparable injury and it states:-“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

55. Quite clearly, the Applicant would not be able to be compensated through damages if the Appeal is rendered nugatory. That if the Respondents are permitted to proceed with dealings on the suit property, she is likely to suffer substantial loss and irreparable damage, given that the substratum of the Trial Suit relates to encroachment of the suit property. The Applicant has therefore satisfied the second condition as laid down in “Giella’s case”.

56. Thirdly, the Applicant has to demonstrate that the balance of convenience tilts in their favour. In the case of:-“Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (Supra)” which defined the concept of balance of convenience as:-

“The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.



In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.

57. In the case of “Paul Gitonga Wanjau – Versus - Gathuthis Tea Factor Company Ltd & 2 others (Supra)”, the court dealing with the issue of balance of convenience expressed itself thus: -

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

58. The balance of convenience tilts in the favour of the Applicants who will be prejudiced if the Respondents proceed with the Trial Suit before the appeal herein is heard and determined on merit. That the balance of convenience tilts in her favor, as granting the stay and injunction will occasion no prejudice to the Respondents while this Honorable Court determines the issue of jurisdiction, which goes to the root of the dispute before the Trial Court. The decision of “Amir Suleiman – Versus - Amboseli Resort Limited [2004] eKLR” where the Learned Judge offered further elaboration on what is meant by “balance of convenience” and stated; -

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

59. The balance of convenience lies with the Appellant/Applicant in this case. Bearing this in mind, I am convinced that there is a lower risk in granting orders of stay of proceedings and temporary injunction than not granting them, as I wait to hear the appeal on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the claim of the Appellant/Applicant and it will be in the interest of both the Applicant and the Respondents that the suit property is preserved until the hearing and determination of the appeal. That it is in the interest of substantive justice for this Honorable Court to grant a stay of proceedings and an injunction to preserve the suit property and prevent the Respondents from interfering with it during the pendency of the Appeal.

60. In the case of: - “Robert Mugo wa Karanja – Versus - Ecobank (Kenya) Limited & Another [2019] eKLR” where the court in deciding on an injunction application stated:-

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



61. I am convinced that if orders of stay of proceedings and temporary injunction are not granted in this appeal, the property in dispute might be in danger of being dealt in the manner set out in the application and apprehended by the Appellant/Applicant. In view of the foregoing, I strongly find that the Appellant/Applicant has met the criteria for grant of orders of stay of proceedings and temporary injunction. That her application has been made promptly, in good faith, and in the interest of justice. That this Honorable Court grants the stay of proceedings and injunction sought to preserve the subject matter of the suit and uphold the due process of law.

**Issue No. c). Who bears the costs of the Notice of Motion application dated 29<sup>th</sup> September, 2023 and the Notice of Preliminary objection dated 10<sup>th</sup> February, 2024**

62. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh – Versus - Tarchalan Singh” eKLR (2014) and Cecilia Karuru Ngayo – Versus - Barclays Bank of Kenya Limited, eKLR (2014).

63. In this case, taking that, the application dated 5<sup>th</sup> May 2025 by the Appellant/Applicant has been successful, it is in the interest of Justice and reasonable ground, hence they are entitled to be awarded costs of this application to abide the outcome of the appeal.

**VII. Conclusion & Disposition**

64. The upshot of the foregoing is that the Appellant/Applicant has made out a compelling case for the grant of a stay of proceedings and an interlocutory injunction pending the determination of the appeal. For the avoidance of doubt, I therefore proceed to make the following findings:-

- a. That the Notice of Motion Application dated 5<sup>th</sup> May 2025 be and is hereby found to have merit thus its is allowed.
- b. That there be a stay of proceedings in Msambweni ELC No. 017 of 2021 pending the hearing and determination of this Appeal or until further orders of this Honorable Court.
- c. That an interlocutory injunction is hereby granted restraining the Respondents, their servants, agents, or any other persons acting under their authority from interfering with, wasting, damaging, alienating, or otherwise dealing with the suit property, being Kwale/Galu Kinondo/1457, pending the hearing and determination of the Appeal or until further orders of this Honorable Court.
- d. That the Appellant/Applicant directed to compile, file and serve a well paginated and bound Records of Appeal within the next 21 days from this date herein.
- e. That the matter be set down for mention on 26<sup>th</sup> November, 2025 for the Admission and direction on the disposal of Appeal & further directions under the provision of Section 79B of the *Civil Procedure Act*, Cap. 21 and Order 42 Rules 11, 13 and 16 of the Civil Procedure Rules, 2010 on the expeditious hearing and final disposal of the Appeal.
- f. That costs of this application shall abide the outcome of the Appeal.

It is ordered accordingly.



**RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT KWALE THIS 6<sup>TH</sup> DAY OF OCTOBER 2025.**

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**HON. 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. Wandera Advocate holding brief for Mr. Rago for the Appellant/Applicant.
- c. M/s. Washalla Advocate holding brief for Mr. Mungai Kamau Advocate the Respondents.

