

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ELC NO. 23 [OS] OF 2021

PAUL CHAI TSUMA
EMMANUEL CHAI KALAMA
PLAINTIFFS

VERSUS

SEIF MOHAMED SAID (Sued on his own behalf and on behalf
Of the estate of Zeyana Binti Azzan)
THE BOARD OF DIRECTORS
TAWFIQ MUSLIM ACADEMY.....
DEFENDANTS

RULING

1. For determination is the 1st Defendants' notice of motion application dated 22/5/2025, brought under the provisions of section 1, 1A, 3, 3A, 63 (e) of the Civil Procedure Act and Order 40 of the Civil Procedure Rules.

The orders sought are: -

- 1)Spent;**
- 2)Spent;**
- 3)Spent;**
- 4) That pending hearing and determination of the counterclaim the Hon. Court be pleased to issue temporary injunction orders against the respondents, their agents, servants, employees, and or any other person acting on their behalf from demolishing, trespassing and/or interfering in any manner with Plot No. 159A Malindi;**
- 5) That the Officer Commanding Malindi Police Station to assist enforcing orders sought;**
- 6) That the costs of the application be provided for.**

2. The application is premised on the grounds set out in the Notice of Motion and is supported by the affidavit of **Seif Mohamed Said**, sworn on 22/5/2025. In the said affidavit, the deponent avers that the Plaintiffs have demonstrated disinterest in the suit property by filing a notice of withdrawal of the main suit. However, notwithstanding the said withdrawal, the Plaintiffs have allegedly commenced demolition of the fence enclosing the suit property. The deponent further states that there is a pending counterclaim yet to be determined, and unless the Plaintiffs are restrained by an order of this Court, there is a real risk that the character and status of the suit property will be altered.
3. Two replying affidavits were filed in response to the application. The first sworn by **Emmanuel Chai Kalama** on **3/6/2025** and the other by **Steven Kalama Nzaro**. The latter is undated. In the former, Emmanuel Chai Kalama states that the application lacks clarity regarding the respondents, causing confusion as to whom the orders would affect. He confirms that he, along with the 1st Plaintiff, initiated a claim of adverse possession against the 1st and 2nd Defendants. He refutes the claim of having lost interest in the suit, stating that a Notice of Withdrawal was not sanctioned or made known to him until the present application. He further states that the withdrawal notice has not been prosecuted and therefore has no effect.
4. Regarding allegations of demolition, Kalama denies any such actions by himself or anyone affiliated with him, asserting that the fence remains in

its original state as shown in annexed photos. He alleges that the 1st Defendant and his agents have been threatening to demolish and burn their houses, leading to police reports. Kalama emphasizes that the suit has not been withdrawn and that granting the orders sought in the application would prematurely conclude the case, thus denying the Plaintiffs a fair hearing and potentially displacing him from his home of twenty years

5. Steven Kalama Nzaro states that the 1st Defendant's application for an injunction to restrain respondents from demolishing or trespassing on **Plot Number 159A** is misguided. He argues that the application is poorly drafted, lacking specific mention of the respondents, which causes confusion as to whom the orders would affect. He notes that he was served with orders on 28/5/2025, for an application where he was not named as a respondent.
6. Nzaro denies allegations of fence demolition, asserting that the claim is a tactic by the 1st Defendant to mislead the court. He further alleges that the 1st Defendant and his agents have threatened to demolish and burn his house, leading to police reports. He also claims to have been assaulted by the 1st Defendant's agents, resulting in a broken arm.
7. Nzaro asserts lawful possession of the suit land, stating he has paid valuable consideration and that a portion of the property is part of his wages for **20** years of work. He contends that granting the prohibitory injunction sought by the 1st Defendant would effectively act as a

mandatory injunction, for which the criteria have not been met, and would prejudice him and his family by displacing them from their home. He requests that the court reject the 1st Defendant's application with costs.

8. The application was canvassed by way of written submissions.

The 1st Defendant's submissions

9. Counsel for the Defendant argues that the Plaintiffs' notice of withdrawal of the suit renders any pleadings filed by them *in vacuo*. He contends that the application is essentially linked to the counterclaim, which seeks an eviction order against the defendants in the counterclaim from **Plot Number 159A**, a permanent injunction preventing them from trespassing, entering, remaining, cultivating, building, alienating, selling, or dealing with the property, as well as general damages for trespass, *mesne profits*, and costs.

10. Counsel asserts that the supporting affidavit dated 22/5/2025 along with photographs and Occurrence Book (OB) abstracts, clearly demonstrate that the Plaintiffs/respondents are demolishing the perimeter wall. Counsel further submits that these actions constitute trespass and violate the applicants' proprietary rights, thus warranting court intervention to restrain them.

11. Citing the landmark case of **Giella v. Cassman Brown**, counsel contends that the counterclaim is unopposed and demonstrates a *prima facie* case with a high probability of success. He argues that the Plaintiffs lack the *locus standi* to rebut the evidence on record and that the balance of convenience favors the Defendant, given the Plaintiffs' alleged loss of interest in the property and their intent to frustrate the Defendant and vandalize their property. He also claims that the Defendant is likely to suffer irreparable loss not compensable by damages.
12. In conclusion, the applicants humbly pray that the suit premises be preserved until the full hearing and determination of the suit, asserting their entitlement to an injunction *ex debito justitiae*.

The Plaintiffs' submissions

13. The Plaintiffs submit that the application is both procedurally defective and substantively unmeritorious and ought to be dismissed with costs.
14. On the effectiveness of the Notice of Withdrawal of Suit, the Plaintiffs argue that the notice filed by them has not taken effect in law. They rely on **Order 25 Rule 2** of the Civil Procedure Rules, which stipulates that where a suit has been set down for hearing, a plaintiff may only discontinue the suit with either the written consent of all parties or with leave of the Court.
15. In the present case, the matter had already been fixed for hearing, and the notice of withdrawal was filed without such consent or leave. They also rely on the holding by Etyang J. (as he then was) in **Theluji Dry**

Cleaners v Muchiri & Others [2002] 2 KLR 764, where the Court stated that a notice of withdrawal does not take effect upon filing, but only when adopted and endorsed as an order of the Court.

16. In addition, the Plaintiffs cite **Beijing Industrial Designing and Researching Institute v Lagoon Development Limited [2015] eKLR**, where the Court of Appeal laid out three scenarios for withdrawal: (1) before hearing, with absolute right by notice; (2) after hearing, by written consent; and (3) after hearing, by leave of court. The instant case falls under the latter two scenarios, and as no consent or leave has been obtained, the withdrawal remains ineffective.

17. On the identification of parties, it is submitted that the application fails to specify who the Respondents are. The Notice of Motion simply lists “*Plaintiffs*” and “*Defendants*” without identifying who among them the orders are directed at. Crucially, the Defendant in the Counterclaim is not mentioned at all, despite being a necessary party. The Plaintiffs rely on **Order 2 Rule 15** of the Civil Procedure Rules, which allows the Court to strike out pleadings that are vague or prejudicial to a fair trial.

18. They further invoke jurisprudence from the Tanzanian Court of Appeal in **Salim Said Mtomekela v Mohamed Abdallah Mohamed, Civil Appeal No. 149 of 2019**, where it was held that pleadings must precisely identify parties and issues. This position is echoed in **Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR and Independent Electoral and Boundaries Commission & Another v**

Stephen Mutinda Mule & 3 Others [2014] eKLR, where it was reaffirmed that parties are bound by their pleadings and may not depart from them. Citing **Barclays Bank (T) Ltd v Jacob Muro, Civil Appeal No. 357 of 2018, as applied in Ogando v Watu Credit Limited & Another [2024] KEHC 3074 (KLR)**, the Plaintiffs urge that a court cannot fill in gaps in ambiguous pleadings.

19. On whether the Defendant has satisfied the conditions for grant of an injunction, the Plaintiffs submit that the application fails to meet the test in **Giella v Cassman Brown & Co. Ltd [1973] EA 358** and as reiterated in **Nguruman Limited v Jan Bonde Nielsen & 2 Others, Civil Appeal No. 77 of 2012**, firstly: prima facie case with probability of success. The Plaintiffs argue that the 1st Defendant has not demonstrated a legally protectable interest in the suit land. On the contrary, the Plaintiffs and the Defendant in the Counterclaim have been in continuous occupation of a three-acre portion of **Plot No. 159A Malindi** for over **20** years, having constructed homes and settled with their families. The Plaintiffs rely on **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR**, where it was held that a *prima facie* case must be more than an arguable case; that it must disclose an infringement of a right that calls for explanation or rebuttal.

20. They also rely on **Kenleb Cons Ltd v New Gatitu Service Station Ltd & Another [1990] eKLR**, where the Court stated that a party

seeking an injunction must demonstrate a right requiring protection. The Plaintiffs argue that the Defendant has failed to establish any such right.

21. On irreparable harm, it is submitted that the Defendant has not demonstrated any form of injury he stands to suffer that cannot be compensated in damages. Conversely, the Plaintiffs argue that if the injunction is granted, they stand to suffer substantial loss as they risk being evicted from a property they have developed and resided on for over two decades. They rely on **Kenya Commercial Finance Co. Ltd v Afraha Education Society [2001] EA 86**, where it was held that if damages are an adequate remedy, no interlocutory injunction should be granted.

22. The Plaintiffs further submit that the balance of convenience clearly tilts in their favour, as they are in actual possession and have developed the land over many years. The Defendant, by contrast, is not in occupation, and no evidence has been presented to show that he has used or relied on the property in any meaningful way. Granting an injunction would, in effect, operate as a mandatory injunction, an order that requires a higher legal threshold, which has not been met in the present case.

23. Finally, the Plaintiffs note that the 1st Defendant failed to acknowledge or engage with the defence to the counterclaim filed on **3/6/2024**, over a year prior to the application. They submit that the application is an

attempt to mislead the Court by presenting the matter as unopposed, which is inaccurate.

24. The Plaintiffs therefore urge the Court to find that the application is procedurally incompetent, substantively lacking in merit, and brought in bad faith. They pray that the application be dismissed in its entirety with costs to both the Plaintiffs and the Defendant in the Counterclaim.

ANALYSIS AND DETERMINATION

25. There is a Notice of Withdrawal dated **3/6/2024**. The CTS record reveals that the same was filed by the firm of K. Lughanje & Co. Advocates, counsel on record for the Plaintiffs, on **20/9/2024**. Under **Order 25 Rule 1** of the Civil Procedure Rules, a Plaintiff may withdraw the suit without leave if the suit has not been set down for hearing. Accordingly, the proceedings reveal that the suit had not been fixed for hearing at the time of withdrawal. Thus, the withdrawal was valid and effective upon filing and service.

26. However, it is notable that a counterclaim had already been filed. It is trite that the withdrawal of a main suit does not extinguish a counterclaim. As per **Order 7 Rule 13**, the counterclaim proceeds independently. Therefore, the Court retains jurisdiction over the counterclaim and all interlocutory applications related thereto, including the present one.

27. The equitable remedy of injunction, particularly interlocutory or interim injunctions, is governed by well-established principles laid down in **Giella**

v Cassman Brown & Co. Ltd [1973] EA 358, and further developed in subsequent decisions. The conditions that an applicant must satisfy are: -

i. Establishment of a prima facie case with a probability of success.

ii. Demonstration that irreparable injury would be suffered if the injunction is not granted.

iii. If the court is in doubt, it should decide the application on a balance of convenience.

28. These principles have been reiterated in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [supra]**, where the Court of Appeal clarified that these conditions are sequential and not to be applied as stand-alone or alternative tests. The Court observed:

“If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”

29. A *prima facie* case means more than an arguable case; it must show that the applicant has a right which has been infringed or is under threat of being infringed, as discussed in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [supra]**. It was a case which, on the material presented to the court, a tribunal properly directing itself would conclude that there existed a right which had apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

30. In this case, the 1st Defendant, Plaintiff in the counterclaim, seeks injunctive relief against the Plaintiffs, who are alleged to have trespassed upon **Plot No. 159A Malindi**, despite the Defendant being the registered owner jointly with others. The Plaintiffs had filed an originating summons herein claiming ownership by adverse possession, a suit that directly challenged the Defendant's registered title. The effect of that withdrawal is that there is no longer any active suit by the Plaintiffs challenging the Defendant's title. one would be tempted to conclude forthwith that in the absence of such a claim, their continued presence on the land becomes *prima facie* unlawful, but caution must be taken not to hurry to such conclusion as the counterclaim is yet to be heard and determined.
31. The withdrawal of the suit claiming adverse possession, whether tactical or otherwise, effectively undermines the Plaintiffs' legal basis to remain on the suit property. In the case of **Wambugu v Njuguna [1983] KLR 172**, the Court held that adverse possession is not automatic; it must be asserted and proved through judicial proceedings.
32. The 1st Defendant has demonstrated a *prima facie* case as a registered owner. The Applicants have also annexed photographic and police evidence to show recent acts of destruction and interference with boundary structures, which if not restrained could escalate into permanent damage or change of status of the suit property.
33. On irreparable harm, the nature of land as a finite and unique resource means that interference with possession especially where permanent

structures may be affected cannot always be adequately compensated by damages. Furthermore, if the injunction is denied, the risk is that the Plaintiffs, whose case for adverse possession has already been withdrawn, may take advantage of the legal vacuum to entrench themselves further or alienate parts of the land.

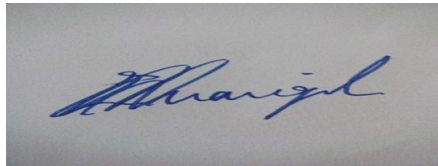
34. Even on the balance of convenience, the scales tip in favour of the 1st Defendant. The counterclaim remains active. The status of the land prevailing as at the date of this ruling and order should be preserved pending its determination, and any orders issued herein should endeavour to maintain it. The Defendant stands to suffer far greater prejudice if the alleged destruction continues unchecked than the Plaintiffs would suffer by being restrained from altering the status of land they have not yet established title to.

35. Accordingly, I find that the threshold for grant of interlocutory injunctive relief is met. The outcome is that the application dated **22/5/2025** is merited. It is hereby allowed in the following terms:

a. Pending the hearing and determination of the counterclaim herein an order of temporary injunction is hereby issued restraining the respondents their agents servants employees and /or any other persons acting on their behalf from demolishing or wasting in any manner all that property known as plot number 159A Malindi;

- b. The rest of the issues shall be determined at the hearing of the counterclaim which shall be expedited;**
- c. The suit shall be mentioned on 12/11/2025 for issuance of a hearing date.**

Dated, signed and delivered at Malindi via electronic mail on this 15th day of October 2025.

A rectangular box containing a handwritten signature in blue ink. The signature is cursive and appears to read 'Mwangi Njoroge'.

**MWANGI NJOROGE
JUDGE, ELC, MALINDI.**