



Muyu v Kivaya; Land Registrar, Makueni (Interested Party) (Environment and Land Case E052 of 2024) [2025] KEMC 237 (KLR) (9 September 2025) (Ruling)

Neutral citation: [2025] KEMC 237 (KLR)

**REPUBLIC OF KENYA
IN THE MAKINDU LAW COURTS
ENVIRONMENT AND LAND CASE E052 OF 2024
YA SHIKANDA, SPM
SEPTEMBER 9, 2025**

BETWEEN

JAMES MULINGE MUYU PLAINTIFF

AND

DANIEL KIVAYA DEFENDANT

AND

THE LAND REGISTRAR, MAKUENI INTERESTED PARTY

RULING

1. The application before me is dated 23/12/2024. It was filed on the same day. The plaintiff seeks the following main orders, other prayers having been spent:
 1. That this honourable court be pleased to issue orders of injunction restraining the defendant either by himself, his servant, agents or any other person whomsoever from trespassing, entering into, alienating, constructing, or in any other manner howsoever, interfering with the plaintiff's ownership, possession, use or quiet enjoyment of the suit property herein;
 2. That the OCS Emali do enforce compliance with the order of this Honourable court;
 3. That the defendant do bear the costs of this application.
2. The application is supported by an affidavit sworn by the Plaintiff and is premised on the following grounds:
 - a. The plaintiff is the original allottee of all that parcel of land known as Makueni/Nguu Ranch/1538;



- b. The said parcel was part of parcel number LR 12134 previously owned by Nguu Dairy Ranching and Cooperative, who surrendered title of the same to the Government on 16/7/1994;
 - c. On 2/10/2006, a local verification process was commissioned by the Permanent Secretary in charge of lands and settlement and the plaintiff was found on the ground having constructed and in possession of the suit property;
 - d. In October, 2018 a second local verification exercise was conducted jointly between the National and County Governments and the plaintiff was re-confirmed to be in possession of the suit property;
 - e. The plaintiff had been in possession and use of the suit property for over 31 years and has borne and brought up 6 children thereon;
 - f. Sometime in January, 2024 the defendant appeared with a manufactured title deed and demanded that the plaintiff vacates the land;
 - g. The defendant erected a fence around the suit property thereby curtailing the plaintiff's right to ingress and egress;
 - h. The defendant has served the plaintiff with an eviction notice and threatens to eject him out of the suit property thereby rendering him homeless and internally displaced.
3. In the affidavit in support of the application, the Plaintiff reiterated the grounds on the face of the application and annexed copies of documents in support of the application.

The Defendant's Response

4. The Defendant opposed the application by filing a Replying affidavit sworn by himself. He indicated that his name was Daniel Itumo Kibaya. That the plaintiff's application was frivolous and an abuse of the process of the court. The defendant deposed that the plaintiff was being economical with the truth and had not disclosed all the material particulars. The defendant argued that the prayers sought in the plaint and the application are the same and as such, allowing the application would be tantamount to disposing of the matter in a summary manner without a full hearing.
5. The defendant averred that no committee was ever formed and confirmed ownership of the suit land by the plaintiff. That the defendant was allotted the land in 1995 and he followed all the relevant procedures for purposes of processing the title deed. The defendant deposed that the land was vacant when it was allotted to him. That after completing the exercise and paying all the requisite charges, the defendant was issued with a title deed on 12/11/2003. It was alleged by the defendant that the plaintiff recently entered the suit land and has declined to vacate despite promising to do so. The defendant has been in occupation and use of the suit property. The defendant further averred that the plaintiff damaged his fence and was even charged with the offence of malicious damage. That the plaintiff has denied the defendant quiet use, possession and development of the suit property. The defendant attached several documents to support his position.

Main Issues for Determination

6. In my view, the main issues for determination are:
 - a. Whether the plaintiff is entitled to orders of injunction as against the defendant as prayed for in the application;



- b. Who should bear costs of the application?

Submissions on behalf of the Plaintiff/Applicant

7. The plaintiff's submissions were a replica of the grounds and averments made in the affidavit in support of the application. I need not reproduce them here. The plaintiff urged the court to find that he had established a prima facie case to warrant the granting of the injunction sought. The plaintiff argued that since he has been in occupation of the suit land for many years, he stands to suffer substantial loss if the orders of injunction are not granted. That no prejudice will be occasioned to the defendant who has not furnished evidence to show that he has been in occupation and use of the suit property. The plaintiff argued that the balance of convenience tilts in his favour as he has been in occupation and use of the property unlike the defendant who has never been on the property. The plaintiff quoted several authorities but did not bother to attach copies thereof.

Submissions on behalf of the Defendant

8. The defendant also filed unsigned written submissions. He reiterated the grounds contained in his Replying affidavit. The defendant argued that the Plaintiff has not established any prima facie case by way of any evidence at all to support his allegations that he was the original allottee or the lawful owner of land parcel number Nguu Ranch /1538. That the documents relied upon by the plaintiff do not point in any manner whatsoever to his being entitled to any land whatsoever. The documents' authenticity or source cannot be ascertained. They are pieces of match and fix type of thing whose author and or maker cannot be verified.
9. The defendant contended that by granting the orders sought by the applicant, the court will be helping him to legitimize the illegality that he has perpetuated and as the maxim of law says he who seeks an equitable relief must come to the equity with clean hands. That the balance of convenience lays in declining to grant any orders sought by the Applicant at this point. The defendant argued that the ends of justice will be met by ordering status quo to be maintained in that the applicant shall not touch the defendant's materials on the suit land including the fence thereon, that he shall not develop the suit land in any manner whatsoever and that he shall not waste and or deal with the suit land in any manner that has the potential to change the character of the land and all the materials thereon pending the hearing and determination of the suit. The defendant also cited authorities but did not bother to attach copies thereof.

Analysis And Determination

The Legal provisions

10. Section 1A of the *Civil Procedure Act* provides as follows:
- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
 - (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
 - (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court".

Section 1B provides as thus:



- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims— (a) the just determination of the proceedings;
- (b) the efficient disposal of the business of the Court;
- (c) the efficient use of the available judicial and administrative resources;
- (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
- (e) the use of suitable technology”.

Section 3A provides:

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

Order 40 rule 2 provides as follows:

- (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.
- (2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit”.

11. I have carefully considered the application together with the documents in support thereof as well as the response by the defendant. I have further considered submissions by the parties and directed my mind to the applicable law. In the case of *Assand v Pettitt* [1989] KLR 241, it was held that the object of a temporary injunction is to keep things in status quo so that if at the hearing the plaintiff obtains a judgment in his favour, the defendant will have been prevented from dealing in the meantime with the property in such a way as to make that judgment ineffectual.
12. The principles to be considered by the court when considering an application for a temporary injunction were laid down in the leading authority of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358. The principles are that:
 - i. The applicant must establish a prima facie case with a probability of success;



- ii. The applicant must show that he will suffer irreparable harm which cannot be adequately compensated by an award of damages;
 - iii. If the court is in doubt, it should decide the application on the balance of convenience.
13. However, in considering such an application, the court should be careful not to decide substantive issues at the interlocutory stage. My view is fortified by the Court of Appeal's finding in the case of *Shitakha v Mwamodo & 4 Others* [1986] KLR 445. A similar view was held by the same court in the case of *Mbuthia v Jimba Credit Finance Corporation & Another* [1988] KLR 1 where the court held that the correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions. The court further held that where the disputed facts raised doubt in the court's mind as to which party would be proved right at the trial, the court would comfortably consider the balance of convenience.
14. The Court of Appeal in the case of *Mureithi v City Council of Nairobi*, Nairobi Civil Appeal No. 5 of 1979 (UR) held that the power to grant or deny an application for a temporary injunction is within the discretion of the court but such discretion must be exercised judiciously. It is a fundamental rule that the court will grant an injunction only to support a legal right. This position was buttressed in the English case of *Montgomery v Montgomery* [1964] 2 ALL ER 22. It has been held that the injunction sought must relate to the claim in the suit or rather the relief sought in the suit. The case of *Winstone v Winstone* [1953] 3 ALL ER 580 is germane on this point. In the said case, Winn J held as follows:

In my view these words are to be construed and understood as limited to the granting of an injunction ancillary to and comprised within the scope of the substantive relief sought in the proceedings in which the application for injunction is made ".
15. A similar view was made in the case of *McGibbon v McGibbon* [1973] 2 ALL ER 836, where it was held that an injunction must bear some relationship to the cause of action.
16. From the above authorities, it is my considered view that while considering an application for a temporary injunction, the court must consider the pleadings and the statement of defence alongside the affidavits in support of or in opposition to the application. The injunction must be based on the relief claimed by the plaintiff in the pleadings. Numerous court decisions have held the position that an interlocutory injunction ought not to be granted if the prayers in the application are at variance with the pleadings. The leading case on this point appears to be the case of *Dismas Oduor Owuor v Housing Finance Co. (K) Ltd & Another*, HCCC No. 630 of 2001 where Ringera J (as he then was) held as follows:

The plaintiff's interlocutory application of 7th June, 2001 is inconsistent with the prayers sought in the suit. Whereas in the suit he is seeking an injunction to restrain the sale of the charged property, in the application he is seeking to restrain the transfer of the said property to the auction purchaser and other consequential or subsequent dealings with the property. The plaintiff, in my opinion, cannot be granted interlocutory orders, which are at variance with the permanent orders sought. I think he goofed in not amending his pleadings before amending the chamber summons. He could not be allowed to injunct a transfer by the chargee to the auction purchaser without amending his pleadings to challenge the auction sale complained of..."
17. I have perused the pleadings and find that the prayers sought have a bearing on the application. The Supreme Court of India in the case of *State of Orissa v Madan Gopal Rungta* [1952] AIR 12, 1952 SCR 28 held that it was a well stated principle of law that an interim relief can always be granted in the aid of and as ancillary to the main relief available to the party on final determination of his rights in a



suit or any other proceeding. The foundation of an interlocutory application such as the instant one is the plaint. I have considered the averments made by both parties. The following stand out:

- a. The defendant is the registered proprietor of the suit land, although his title is disputed;
 - b. The plaintiff is in occupation of the suit land;
 - c. Both parties claim ownership of the suit land. There is even a counter-claim by the defendant.
18. One thing is clear to me. That there is need to preserve the suit property pending the hearing and determination of the suit. The court must however be cautious with the extent of the preservation. In my view, neither party will be prejudiced if the suit property is preserved in a manner that will not cause hardship to the parties. Given the circumstances of the case, it would be difficult to restrain the defendant in the manner proposed by the plaintiff. The defendant's proposal on maintenance of the status quo is reasonable but there is a conflict on whether or not the defendant is in physical occupation of the suit land.

Disposition

19. In view of the foregoing and in the interest of justice, I make the following orders:
- a. The application dated 23/12/2024 is hereby compromised in the following terms;
 - b. Both parties are hereby restrained either by themselves, their agents, servants, employees or anyone acting on their behalf, from sub-dividing, selling, alienating or in any other manner substantially changing the character of land parcel No. MAKUENI/NGUU RANCH/1538, pending the hearing and determination of the suit;
 - c. No further developments such as constructions should be undertaken by either party pending the hearing and determination of the suit;
 - d. No party should interfere with the other's property currently on the suit land pending the hearing and determination of the suit;
 - e. Parties are directed to keep the peace and should there be a breach of the same, the aggrieved party will be at liberty to move the court appropriately or the relevant authorities for redress;
 - f. The costs of the application shall abide by the outcome of the suit.

DATED, SIGNED AND DELIVERED VIA CTS THIS 9TH DAY OF SEPTEMBER, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

