

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 64 OF 2020

JAMES NGANGA KUNGU

MYRA WANJIRU KUNGU SADIQ alias
MONICA WANJIRU KUNGU

As Administrators of the Estate of

DAMIAN COSMAS KUNGU alias
DAMIAN COSMAS KUNGU MUHINJA (Deceased) ..

PLAINTIFFS

VERSUS

KIBAGARE SLUMS ASSOCIATION Sued through

ABDI GODANA DIDA & DAVID M. NYAGA,

ITS OFFICIALS AND TRUSTEES

DEFENDANTS

AND

NATIONAL LAND COMMISSION(NLC) INTERESTED

PARTY

RULING

ELC NO. 64 OF 2020

Ruling

1. What is before the Court for determination is the Plaintiffs' Notice of Motion dated 24th March 2025 and the Defendants' Notice of Preliminary Objection dated 9th June 2025. The Plaintiffs seek the following Orders in their application dated the 24th March 2025:

a) Spent.

b) Spent.

c) That pending the hearing and determination of this suit, a temporary injunction be and is hereby issued restraining the Defendants/Respondents, whether by themselves, their agents, servants, or any person acting under their instructions, from constructing, building, developing, erecting permanent or temporary structures, or other forms of development, fencing, selling, transferring, alienating, charging, or in any other manner dealing with the parcel of land known as LR No. 209/9002/2 and LR No. 209/9002/3, which are the subject of the present dispute.

- d) That this Honourable Court be pleased to order that the Defendants/Respondents' officials and trustees, Abdi Godana Dida and David M. Nyaga be committed to civil jail and Industrial Area Remand Prison for a period of not less than six (6) months for blatant disobedience of the Court Order issued on 12th May 2020.**
- e) That the Officer Commanding Station (OCS) Spring Valley Police Station be and is hereby directed to supervise and ensure compliance with the strict terms of the orders issued herein at the expense of the Defendants/Respondents.**
- f) That this Honourable Court be pleased to grant the Applicants leave to institute contempt of court proceedings against the Defendants/Respondents for willful disobedience of the orders of this Court issued on 12.05.2020.**
- g) That the costs of this application be provided for.**

2. The application is premised on grounds on its face and on the supporting affidavit of James Nganga Kungu. He avers that

the Defendants have commenced construction of permanent structures on LR No. 209/9002/2 and LR No. 209/9002/3, hereinafter referred to as the 'suit property', whereby they are; excavating and clearing additional portions of the land, erecting concrete pillars and walls, roofing and installing utility services. Further, that the said actions, undertaken without the Plaintiffs' consent violate their proprietary rights in contempt of valid court orders issued on 12th May 2020 restraining any development, occupation, or dealing with the suit property pending the determination of the dispute herein.

3. He claims that the Defendants have also introduced third parties, including construction workers and prospective occupants into the suit property and if they are not restrained forthwith, their actions will fundamentally alter the character of the said suit property, render the Plaintiffs' claim nugatory and occasion them irreparable harm and loss,

which cannot be adequately compensated by way of damages.

4. In opposing the instant application, the Defendants filed a Notice of Preliminary Objection dated 9th June 2025. They contend that the application fails for want of properly invoking this Court's jurisdiction as it seeks to enforce injunctive orders issued more than one (1) year ago, on 12th May 2020, contrary to Order 40 Rule 6 of the Civil Procedure Rules.
5. The instant Notice of Preliminary Objection and Notice of Motion application were canvassed jointly through written submissions.

Submissions

6. The Plaintiffs submit that they have demonstrated a prima facie case to warrant issuance of the Orders sought as the Defendants have embarked on a fast paced construction of permanent structures on the suit property despite this

Court's Orders issued on 12th May 2020, which were extended during the hearing of the suit restraining any construction and despite the suit being past midstream. They submit that where ownership of a parcel is in dispute and a party proceeds to erect permanent structures thereon, Courts will issue a temporary injunction barring the construction. Further, that there is real risk that the nature of the suit property will be permanently altered by the permanent structures, which can only be removed from the said land through demolition. Further, that an award of damages may not adequately compensate them for the harm they would suffer. They also submit that the preliminary objection is unmerited as Order 40 Rule 6 of the Civil Procedure Rules, 2010 militates against the simplistic proposition that an interlocutory injunction automatically lapses by the mere passage of twelve (12) months. They insist that a Court Order is binding on the party against whom it is addressed and until set aside remains valid and it is to be complied with.

7. To support their averments, they relied on the following decisions: **Purity Muthoni Plain v Peter Mwangi Ndiritu [2024] KEELC 3509; Patrick Kingoi Gituku v Charles Nga'nga' Waithaka & another [2024] KEELC; Ubhi HSC v Mohamed [2024] KEELC 157 (KLR) and Trusted Society of Human Rights Alliance v Cabinet Secretary for Devolution and Planning & 3 Others [2017] eKLR.**
8. On their part, the Defendants submit that the Plaintiffs have not met the requirements for the grant of an interlocutory injunction as set out in the case of **Giella v Cassman Brown & Co. Ltd [1973] EA 358** as their allegations have no factual basis since they improperly rely on Court Orders issued on 12th May 2020, which have lapsed by operation of law pursuant to Order 40 Rule 6 of the Civil Procedure Rules. To buttress their averments, they relied on the following decisions: **David Wambua Ngii v Abed Silas Akimbi & 6 Others [2014] eKLR; Barclays Bank of Kenya Limited v Henry Ndungu Kinuthia & another [2018] KECA 213**

(KLR) and Erick Kimingichi Wapang'ana & another v Equity Bank Limited & another [2015] eKLR.

Analysis and Determination

9. Upon consideration of the instant Notice of Motion application including the Notice of Preliminary Objection as well as the rivalling submissions, the only issue for determination is whether the Defendants should be restrained from interfering with the suit property or not.
10. The Plaintiffs claim that the Defendants have commenced fresh construction on the suit property in defiance of an earlier restraining Order issued on 12th May 2020, thereby violating their proprietary rights and risking permanent alteration of the said land's character. On their part, the Defendants argue that the injunctive orders issued on 12th May 2020 have lapsed by operation of law by dint of Order 40 Rule 6 of the Civil Procedure Rules. In line with the principles established in the case of **Giella v Cassman Brown & Co.**

Ltd [1973] EA 358, I will proceed to decipher whether the Plaintiffs have established a prima facie case to warrant the orders of interlocutory injunction as sought.

11. On injunctions, Order 40 Rule 6 of the Civil Procedure Rules provides that:

“Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the Court orders otherwise.”

12. The Court of Appeal stated as follows in **Barclays Bank of Kenya Limited v Henry Ndungu Kinuthia & Another [2018] KECA 213 (KLR)**;

“[28] We conclude that the orders of injunction made on 22nd February 2011 lapsed after 12 months and the contemnors could not be said to have been in contempt of orders that had ceased to exist by operation of law....”

13. On perusal of the Court record, I note on the 1st October, 2020, Justice Obaga had issued orders of interlocutory injunction restraining the Defendants from interfering with LR No. 209/9001, Grant No. I.R. 34184 pending the hearing and determination of this suit. I note the Judge also dismissed the Defendant's Application dated the 28th May, 2020 where it sought to vary orders of interlocutory injunction. Further, this matter commenced for hearing but the Defendant filed an application seeking to strike out the suit which was dismissed by Justice Lucy Mbugua, on 14th November 2024.

14. The Defendant has not denied that they have commenced utilizing the suit land despite the pendency of this suit and changed its character. The Defendant is now arguing that by dint of Order 40 of the Civil Procedure Rules, the Orders of injunction lapsed by operation of law. I note the Defendant never filed an application to vary the terms of the Orders issued by Justice Obaga to indicate the Orders of injunction

were issued pending outcome of the suit. The question we need to ponder is that even if the Orders of injunction lapsed by operation of law, during pendency of suit, does one party proceed to deal with the suit property adversely so as to change the character of the substratum of the said suit.

15. In the case of **Cieni Plains Company Limited & 2 others versus Ecobank Kenya Limited [2017] eKLR**, Onguto J, stated that:

“The doctrine of lis pendens often expressed in the maxim pendente lite nihil in novature (during litigation nothing should be changed): see Blacks’ Law Dictionary 9th Ed, was until May, 2012 part of our statute law. With regard to real property, section 52 of the now repealed Indian Transfer of Property Act 1882 provided that during the pendency in any court having authority in Kenya of any suit in which the right to immovable property was directly and specifically in question, the immovable property was not to be transferred or dealt with by any party to the suit or proceedings so as to affect the rights of any other

party thereto under any decree or order that would be ultimately made, except with the authority of the court and on terms.” Emphasis

Mine

16. Based on the facts before me while associating myself with the decisions cited, I opine that even though the Orders of injunction lapsed by operation of law after twelve (12) months, while invoking the doctrine of lis pendens, I find that the Defendant did not have a legal right to proceed to change the character of the suit property, while the dispute herein is yet to be determined. In my view the Defendant was acting in bad faith to defeat the course of justice including this suit. In the foregoing, I will invoke the provisions of Order 40 Rule 6 of the Civil Procedure Rules and restore the injunctive orders issued on the 1st October, 2020, that were deemed to have lapsed pending the hearing and determination of this suit. However, I am not able to grant the Order for citing the officials of the Defendants for contempt since the Orders that were supposed to have been violated had lapsed.

17. In the circumstances, I find the instant Notice of Motion application partially merited and will allow it. I proceed to make the following final Orders:

i. That pending the hearing and determination of this suit, a temporary injunction be and is hereby issued restraining the Defendants/Respondents, whether by themselves, their agents, servants, or any person acting under their instructions, from constructing, building, developing, erecting permanent or temporary structures, or other forms of development, fencing, selling, transferring, alienating, charging, or in any other manner dealing with the parcel of land known as LR No. 209/9002/2 and LR No. 209/9002/3, which are the subject of the present dispute.

ii. That the Officer Commanding Station (OCS) Spring Valley Police Station be and is hereby directed to supervise and ensure compliance with the strict terms of the orders issued herein at the expense of the Defendants/Respondents.

iii. The costs of the application is awarded to the Plaintiffs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF NOVEMBER, 2025

CHRISTINE OCHIENG
JUDGE

In the presence of:

Kimiti for Plaintiffs

Mutungu Makau for Defendant

Court Assistant: Joan