

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**  
**ELC CASE NO. E116 OF 2025**

**RIVERSIDE FARM MALINDI LIMITED .....  
PLAINTIFF**

**VERSUS**

**GUYO BASHORA DALA & 81 OTHERS .....  
DEFENDANTS**

**RULING**

**THE APPLICATION**

1. Riverside Farm Malindi Limited filed the application dated 13<sup>th</sup> August 2025 seeking the following orders:

1. .... Spent.
2. Pending the hearing and determination of the suit herein the defendants, their servants and or agents be directed by order of mandatory injunction to remove the barbed wire fence and any other developments made by them on the remaining portion of land Plot Number M28 Malindi within 7 Days of service of the Honorable court order and failure of which the plaintiffs be at liberty to engage the services of a contractor who will remove the offending developments made by the defendants on the same land and the cost incurred thereby be paid by the 1<sup>st</sup> -77<sup>th</sup> defendants in any event within a time to be specified by the Honorable Court should become necessary;
3. Pending hearing and determination of the suit herein the honorable court be pleased to issue an order of injunction restraining the defendants their employees, servants or agents or any one of them from tilling, planting of crops, developing and or remaining or in any other way trespassing on to the respondents remaining portion of land Plot Number M28 Malindi;
4. Costs of and incidental to this application be provided for.

2. The application is supported by the affidavit of **Michael Mungindo** an employee of the plaintiff authorized to make the depositions by the plaintiff's board of directors.
3. The background to the present application is that the suit land herein was owned by Josphat Mwai Karani. Mary Njeri Mwai Karani obtained a grant of letters of administration to the estate of Josphat Mwai Karani in **Succession Cause No 948 Of 1997**. Riverside Farm Malindi Limited the plaintiff herein purchased the suit land from Mary Njeri Mwai Karani who was then the administrator of the estate of the late Josphat Mwai Karani vide an indenture of conveyance dated 23<sup>rd</sup> October 1997 which was registered as **Entry Number 24** in the land register. Later on, the grant to Mary was revoked by the court in **Cause No 948/99** - Nbi and a grant issued to Gloria Wambui Mwai who then effected a transfer of the suit property to James Kinyua Mwai the 80<sup>th</sup> defendant.
4. The 1<sup>st</sup> to 76<sup>th</sup> defendants lodged **Malindi ELC OS Number 63 Of 2019** claiming the suit land by adverse possession against the plaintiff herein but they were unsuccessful in their quest. It is averred that following that unsuccessful adverse possession claim, they began invading the suit land thus causing the plaintiff loss and damage. It is alleged that although there is a *status quo* order in **Succession Cause Number 948 Of 1997**, the 1<sup>st</sup> to 77<sup>th</sup> defendants are not parties to the said cause and their illegal actions cannot be made subject to those proceedings, hence the present suit.

5. The basis of the present suit and application is that the heirs of the late Josphat Mwai Karani fraudulently claimed that the properties still belonged to the deceased, took out a grant of letters of administration in the name of Gloria Wambui Mwai, got it confirmed, and used the same to procure registration of the land in favor of James Kinyua Mwai. It is alleged that revocation of the grant issued to Mary Njeri Mwai Karani did not void the transactions completed by her while she was exercising her powers as personal representative of the deceased; that had the succession court been informed that the suit property had already been sold, it would have excluded the property from the list of assets belonging to the Estate of the deceased. The plaintiff states that it has applied for the revocation of the grant of letters of administration issued to Gloria in **Succession Cause Number 948 Of 1997**. The plaintiff is apprehensive that the defendants will waste away the suit land and thus occasion it further loss and damage unless restrained by this court. It is alleged that on a visit by the court to the premises on 8<sup>th</sup> March 2023, it was evident that the land was largely vacant as the only settled area was on the 15 acres of the plaintiff had permitted the defendants to settle on. For this averment, the plaintiff relies on **paragraph 28 and 29** of the judgment of the Court in **Malindi ELC OS Number 63 Of 2019**. The current incursion is therefore, in the plaintiff's eyes, a new event calculated to create a semblance of long-term occupation which is tantamount to manufacturing

evidence, hence the quest for a mandatory injunction against the defendants.

## **RESPONSES**

### **1<sup>st</sup> To 77<sup>th</sup> Defendants' Response**

6. 1<sup>st</sup> -77<sup>th</sup> and defendants filed grounds of opposition through the firm of Michira Messah Company Advocate in which they stated as follows:

- a. The prayers in the application and the plaint are ambiguous;
- b. The applicant has no *locus standi* to institute the suit here in since it is not the current registered owner;
- c. There is pending litigation between the applicant plaintiff and the 79<sup>th</sup> respondent to be adjudicated by the court;
- d. Unless the said dispute is hard and determined on merit, the genuine proprietor of the suit property cannot be established in this suit;
- e. That the resolution filed in the current suit was meant for litigation in Malindi ELC OS number 63 of 2019;
- f. an order of injunction cannot be issued against the first to 76<sup>th</sup> respondents were already in possession and in occupation of the school property;
- g. The application as filed is an abuse of court process.

### **78<sup>th</sup> Respondents' Response**

7. The 78<sup>th</sup> respondent, Gloria Wambui Mwai, filed a replying through John Kebaso and Company Advocates. The gist of her response is as follows: that it is not known how the transfer of the suit land to the plaintiff was effected because the property had not been transmitted to the beneficiaries since Mary Njeri Mwai Karani was only holding the properties administrator of the estate in trust for the beneficiaries; that when the grant to Mary was revoked Gloria, with been consent of all beneficiaries in **Succession Cause Number 948 Of 1997** obtained a grant, and the

property was subsequently included in the certificate of confirmation of grant issued on 28<sup>th</sup> March 2000. The property was finally transferred to James Kinyua Mwai who was the rightful beneficiary vide the certificate of confirmation of grant and he still remains the current registered owner. James however died on the 10<sup>th</sup> July 2024, about 5 months from the date of transfer, and consequently Gloria and her other siblings have filed for a grant of letters of administration to his estate in succession the **Mombasa Chief Magistrates Court Cause Number 120 of 2024**; that Mary Njeri Mwai Karani was not the registered owner of the suit property when she is purported to sell the suit property to the plaintiff as she did not have capacity to sell but was only a trustee for the beneficiaries. The plaintiff is thus not the owner of the suit property as the transfer to it was null and void. The agreement to compensate and settle the squatters was allegedly made between two parties who had no colour of right or ownership of the suit property; that the annulment of the grant to Mary was issued by a competent Court and for the valid reason that Mary was not administering the estate according to law. It is also averred that **Malindi ELC Number 63 of 2019** was decided long after the suit property had been transferred to the rightful beneficiary and the respondent in that suit (the plaintiff herein) was not the legitimate owner of the suit property at the time and lacked capacity to participate in the proceedings. The foregoing matters were also made the gist of the 78<sup>th</sup> defendant's defence dated 9<sup>th</sup> October 2025 in this matter. The 1<sup>st</sup> to 77<sup>th</sup>

defendant also filed statement of defence dated 28<sup>th</sup> October 2025. They state in their defence that they recently conducted due diligence and established that the plaintiff herein is not the registered owner of the suit property and that it was registered in the name of the 80<sup>th</sup> Defendant. They claim to have lived on the land for more than **50** years and that they have acquired adverse possession rights and are thus not trespassers, and that they can only claim as against the 8<sup>th</sup> defendant and not the plaintiff herein. They aver that their appeal is pending as against the decision in **Malindi ELC OS Number 63 of 2019** hence the plaintiff cannot sustain a new suit against them as the same is *res judicata*.

### **SUBMISSIONS.**

8. The 1<sup>st</sup> to 77 defendants filed submissions dated 16<sup>th</sup> October 2025. The 78<sup>th</sup> defendant filed submissions dated 21<sup>st</sup> October 2025. I have considered the said submissions in the preparation of the present ruling.

### **ANALYSIS AND DETERMINATION.**

9. The issues that arise for determination in the present suit are as follows:
  - a. **Whether a mandatory injunction should issue as prayed;**
  - b. **Whether an order of temporary injunction should issue as prayed.**
10. I have been referred to previous litigation regarding the suit land **Bashora & 75 others v Riverside Farm Malindi Limited [2024] KEELC 5150 (KLR)**, and I have found it helpful in the determination of the above issues. It was stated as follows in that case:

“27. It is also my finding that the letter dated 30th April 2015 by three of the Applicants herein shows that they respected that the land belonged to the Respondent. The Applicants’ witnesses denied the said letter in their testimony, and the three undersigned in the letter were their representatives. I noted that the three - Andrew Manyeso Randu, Philip Safari Malau, and Albert Karisa Charo, were referred to by the Applicants’ witnesses as neighbors. The three would have given the best testimony and disowned the letter. It was not explained why they did not testify, even if it was to disown the letter and place the record straight on the issue of compensation and the resettlement as undertaken by the Respondent.

28. During the site visit, it was clear that the Applicants occupied the residential area while the rest of the land was unoccupied. In addition, a fence, which had been pulled down, demarcated the residential area from the remainder of the land for the Respondent. The Court was shown a demolished structure that allegedly had been placed by the Respondents. The issue was reported to the police. Therefore, it is questionable how the Applicants occupied the said land when it was vacant.

29. The history of the land and the occupation by the Applicants cannot be said to be continuous and uninterrupted since after the Applicants were compensated, a buffer was placed between the land allotted to them and the balance left for the Respondent. Incursions to the suit property have always been reported to the police. Their occupation, therefore, has not been with the acquiescence of the Respondent.”

11. Mandatory injunctions are sparingly issued at the interlocutory stage in proceedings before courts as per the holding in *Locabail International Finance Ltd. V. Agroexport and others* [1986] 1 ALL ER 901. *Kenya Breweries Limited & another v Washington O. Okeyo* [2002] KECA 284 (KLR) cited Vol. 24 Halsbury’s Laws of England 4th Edn. para 948 as follows:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff ..... a mandatory injunction will be granted on an interlocutory application”.

12. It is this court's opinion that there is very little probability that any amount of evidence to be adduced in future will erase the fact that the trial court in **Bashora (supra)** found for a fact that the plaintiffs in that case who are said to be the 1<sup>st</sup> -77<sup>th</sup> defendants in the present case were not in occupation of the suit land. Photographic evidence in the present case has only reinforced the evidence that the said defendants are in the process of establishing a foothold on the vacant portion of the suit land which remained after the resettlement of squatter exercise that happened earlier.
13. This court does not find the said defendants to be denying that they were settled on a portion of the suit land long ago. If they manage to settle on the remaining portion of land during the pendency of the present litigation, the situation on the ground will have substantially altered. It is pointless for them to state that their claim would be against the 80<sup>th</sup> defendant in this matter and not the plaintiff; their invasion is bound to prejudice at least one of the other parties to the suit.
14. As regards their assertion that the plaintiff lacks *locus* for lack of title to the land, I refer to the bundle of exhibits attached to the supporting affidavit and observe that the dealings with the suit land render it proper to conclude that the plaintiff has a *prima facie* case against all the parties herein. Further, the claim of *res judicata* can not stand in this court's view for the plain reason that it is their renewed invasion of the land that is sought to be averted. On the basis of the foregoing, I find that whether

their adverse possession claim will be targeted at the plaintiff or at the 80<sup>th</sup> defendant, they are attempting to gain an unfair advantage against either of those parties by their attempts to invade the land. The issue that now arises is what orders should issue.

15. This case is yet to be heard. Mandatory orders of injunction are draconian in nature. They involve compulsion of action that possesses a final tone while litigation is still pending, and they are usually eschewed by courts for the reason that the final outcome of the litigation is yet unknown, and all parties require to be heard on the merits of their case before judgment is pronounced.

16. Having regard to the circumstances herein, this court is of the view that a temporary injunction should be as efficacious a remedy for the plaintiff as would a mandatory injunction. Besides, it is observed that the incursions of the squatters have always been reported to the police and dealt with in the past. It is quite possible to deal with the present invaders, as they are known persons, through issuance of an interim injunction if the threshold for issuance of such an order has been established by the applicant.

17. As per the holding in the renowned *Giella Vs Cassman Brown* 1973 EA 358, the principles applicable for a temporary injunction to issue are the presence of a *prima facie* case and the proof of likelihood of loss that can not be compensated for by way of damages. In the end if a court is in doubt as to the first two criteria, it is entitled to rule on a balance of

convenience. It was held by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya and 2 others* [2003] eKLR as follows regarding a *prima facie* case:

“a *prima facie* case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

18. This court does not have to proceed to the balance of convenience in this case for one reason: if the invaders succeed in settling on the land any party herein who may finally have to defend their intended adverse possession claim would be prejudiced by an invasion that happened during the pendency of this litigation. That is a state of affairs this court should not condone.

19. Secondly, there is also the environmental aspect of this dispute. A case has been made out that the land is so situated by the banks of a river such that serious environmental damage may occur if settlement and associated activities are undertaken by the said invaders. The provisions of **Section 5(1)** of the **Environmental Management and Coordination Act** (EMCA) contain the Precautionary Principle so widely infused into environmental law and practice worldwide. That section provides as follows:

(5) In exercising the jurisdiction conferred upon it under subsection (3), the Environment and Land Court shall be guided by the following principles of sustainable development—  
(a) the principle of public participation in the development of policies, plans and processes for the management of the environment;

- (b)the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law;
- (c)the principle of international co-operation in the management of environmental resources shared by two or more states;
- (d)the principles of intergenerational and intragenerational equity;
- (e)the polluter-pays principle; and
- (f)the pre-cautionary principle.

20. Section 2 of EMCA defines the principle as follows:

"precautionary principle" is the principle that where there are threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation;"

21. In Malindi ELC Appeal No 6 of 2019 - Amu Power Company Ltd vs Save Lamu and Others it was stated as follows:

"Courts in Kenya can not wring their hands and restrain themselves from acting in favour of the environment where the impact of a proposed project is uncertain, for the precautionary principle is ingrained into our environmental law. The court should be guided by that principle, which is only one of the principles that seek to protect the environment as contained in Section 3(5) of EMCA."

22. Under the Precautionary Principle actual loss or damage does not have to be proved by the person seeking to have the environment protected. The provisions of **Article 70 (1)** and **(3)** incorporate the precautionary principle in providing that any person may approach the court for relief when they think that the environment is under threat, and that such a person does not have to demonstrate that any person has incurred loss or suffered injury. Under **Article 69(2)** every person is under a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of

natural resources. **Article 70** and **Article 69(2)** are fleshed out by the EMCA at **Section 4** where it provides as follows:

“(3)If a person alleges that the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest may apply to the Environment and Land Court for redress and the Environment and Land Court may make such orders, issue such writs or give such directions as it may deem appropriate to—

- (a)prevent, stop or discontinue any act or omission deleterious to the environment;
- (b)compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment;
- (c)require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act;
- (d)compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and
- (e)provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing.”

23. Settlement of many people in an ecologically sensitive zone is an activity that ought to be appropriately planned for so that it may not generate serious environmental hazards. There is no indication that the 1<sup>st</sup> -77<sup>th</sup> defendants’ attempted occupation of the remaining portion of the suit land has been authorized or planned for by any governmental authority and all tentative indications herein are that it has no such sanction. When such an issue has been raised at this stage, all the court has to consider is the likelihood of damage to the environment occurring. It is obvious that implementation of settlements normally involves breaking up of soil and clearing of vegetation which in themselves are

renowned causes of soil erosion and loss of biodiversity. It is not strange that the theme of environmental conservation is increasingly being factored into private litigation nowadays as destruction of the environment affects not just nations and the globe on a macro scale but also the individual human in the affected ecosystem. It is the collective suffering witnessed by individuals in such environmentally degraded zones in the first place that has galvanized the world into progressively serious climate action. Consequently, I am of the view that probability of loss that can not be compensated by way of damages has been proved. The two ingredients having been proved, this court is of the view that an interim injunction is deserved by the plaintiff.

24. Accordingly, I allow the application dated **13/8/25** in terms of **prayer no 3** thereof.

25. The costs of the application shall be in the cause. The parties shall ensure that they comply with the Civil Procedure Rules on the filing and exchange of documents, lists and statements, the plaintiff shall so comply within 30 days of this order and the defendants within 60 days, the timelines running concurrently, and the matter shall be mentioned on **10/2/2026** for pretrial.

**Dated, signed and delivered at Malindi on this 18<sup>th</sup> day of November, 2025.**



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