



**Kivila & another v Kimenye & 5 others (Environment and Land Case 398 of 2017) [2025] KEELC 8165 (KLR) (25 November 2025) (Ruling)**

Neutral citation: [2025] KEELC 8165 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND CASE 398 OF 2017  
NA MATHEKA, J  
NOVEMBER 25, 2025**

**BETWEEN**

**AGNES MUENI KIVILA ..... 1<sup>ST</sup> PLAINTIFF**

**EVANS MASAI MUTUKU KIVILA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**GRACE MWELU KIMENYE ..... 1<sup>ST</sup> DEFENDANT**

**MALILI RANCHING LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**PATRICK MUINDU MUTISYA ..... 3<sup>RD</sup> DEFENDANT**

**JULIANA MUMBUA NZUNGO ..... 4<sup>TH</sup> DEFENDANT**

**ELIZABETH NTHENYA MULANDI ..... 5<sup>TH</sup> DEFENDANT**

**KIOKO MANDI ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

The application is dated 27<sup>th</sup> February 2024 and is brought under Order 40 Rule 1 (a) of the Civil Procedure Rules 2010 seeking the following orders;

1. That this application be certified as urgent and heard ex-parte in the first instance and prayer 2 below be granted in the interim.
2. That pending hearing and determination of this application the defendants be restrained either by themselves or through their agents, servants, proxies or representatives from selling, transferring, charging, encumbering, alienating or in any other way interfering with the status, registration, ownership or use of all those parcels of land known as Konza North Konza North Block 2 (Malili) 13153, Konza North Konza North Block 2 (Malili) 13623, Konza North Konza North Block 2 (Malili) 13624, Konza North Konza North Block 2 (Malili) 13626, Konza North Konza North Block 2 (Malili)



13627, Konza North Konza North Block 2 (Mali1i) 14369, Konza North Konza North Block 2 (Mali1i) 14370, Konza North Konza North Block 2 (Malili) 14371, Konza North Konza North Block 2 (Malili) 14372, Konza North Konza North Block 2 (Malili) 14373, Konza North Konza North Block 2 (Mali1i) 14374, Konza North Konza North Block 2 (Mali1i) 14375, Konza North Konza North Block 2 (Malili) 14376, Konza North Konza North Block 2 (Malili) 14835, Konza North Konza North Block 2 (Malili) 14836, Konza North Konza North Block 2 (Malili) 14837, Konza North Konza North Block 2 (Malili) 14839, Konza North Konza North Block 2 (Malili) 14840, Konza North Konza North Block 2 (Malili) 14841 or any other parcel which traces its origin from Konza North Konza North Block 2 (Mali1i) 482.

3. That pending hearing and determination of this suit the defendants be restrained either by themselves or through their agents, servants, proxies or representatives from selling, transferring, charging, encumbering, alienating or in any other way interfering with the status, registration, ownership or use of all those parcels of land known as Konza North Konza North Block 2 (Malili) 13153, Konza North Konza North Block 2 (Malili) 13623, Konza North Konza North Block 2 (Malili) 13624, Konza North Konza North Block 2 (Malili) 13626, Konza North Konza North Block 2 (Malili) 13627, Konza North Konza North Block 2 (Malili) 14369, Konza North Konza North Block 2 (Malili) 14370, Konza North Konza North Block 2 (Malili) 14371, Konza North Konza North Block 2 (Mali1i) 14372, Konza North Konza North Block 2 (Mali1i) 14373, Konza North Konza North Block 2 (Mali1i) 14374, Konza North Konza North Block 2 (Mali1i) 14375, Konza North Konza North Block 2 (Malili) 14376, Konza North Konza North Block 2 (Malili) 14835, Konza North Konza North Block 2 (Malili) 14836, Konza North Konza North Block 2 (Mali1i) 14837, Konza North Konza North Block 2 (Mali1i) 14839, Konza North Konza North Block 2 (Malili) 14840, Konza North Konza North Block 2 (Malili) 14841 or any other parcel which traces its origin from Konza North Konza North Block 2 (Mali1i) 482.
4. That Monicah Wambui Mwangi, Moses Mwangi, Onesmus Kamuti Mwanzia, Antony Wambua Mwololo, Kaluki Mutisya, Ruth Njeri Kinyua, Joyce Wairimu Wanyoike, John Mutinda Kisyula, Raphael Kyalo Mulavai, Anastasia Nduku Sevu, James Mutua Mwololo, Elijha Mutavi Mutiso, Elijah Ndunda Wambua and Faith Mumbua Ndivo be added as defendants in this suit.
5. That the plaintiffs be allowed to amend their plaint in terms of the draft amended plaint annexed to the supporting affidavit to this application.
6. That the defendants do pay costs of this application.

It is supported by the annexed affidavit of AGNES MUENI KIVILA and based on the following grounds that the Plaintiffs are administrators of the estate of the late Benjamin Mutuku Kivila who had purchased 5.8 acres in plot known as number 545 in parent land registered to the 2<sup>nd</sup> defendant. The estate of the aforesaid Benjamin Mutuku Masai Kivila in Machakos Chief Magistrate's Court Succession Cause Number 188 of 2016 was distributed and the said plot transmitted to the 1<sup>st</sup> Plaintiff. This court issued an order on 5<sup>th</sup> October, 2017 restraining the Defendants from registering, transferring, selling and occupying the said plot. The order was served upon the Defendants herein.

In breach of the aforesaid order which is still in force, the Defendants discretely went on to register the plot as Konza North Konza North Block 2 (Malili) 482 and thereafter subdivided the said parcel into aggregate of 19 plots as indicated in the 2<sup>nd</sup> and 3<sup>rd</sup> prayers above and transferred them to persons named in prayer 4 above. Going by the antecedents of the Defendants, it is very likely that the parcels in dispute may be alienated further and make any outcome of this suit an academic exercise. The orders sought by the Plaintiff are necessary in assisting the court adjudicate on issues in this matter. The Defendants' contemptuous acts mentioned above were meant to lose track of ownership of the land and make this suit nugatory. The persons sought to be added as Defendants are the current registered owners of the



said plots and they are likely to depose the same unless an order of this court is issued and registered. Unless the court hears the application urgently and issues orders sought, the Plaintiffs stand to suffer irreparable damages.

This court has considered the application and the supporting affidavit therein. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella vs Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that;

in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially.”

Consequently, the Plaintiff ought to, first, establish a prima facie case. In *Mrao Ltd vs First American Bank of Kenya Ltd* (2003) eKLR the Court of Appeal gave a determination on a prima facie case. The court stated that;

... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

In support of his application, the Plaintiff Applicant stated that that the Plaintiffs are administrators of the estate of the late Benjamin Mutuku Kivila who had purchased 5.8 acres in plot known as number 545 in parent land registered to the 2<sup>nd</sup> defendant. The estate of the aforesaid Benjamin Mutuku Masai Kivila in Machakos Chief Magistrate’s Court Succession Cause Number 188 of 2016 was distributed and the said plot transmitted to the 1<sup>st</sup> Plaintiff. This court issued an order on 5<sup>th</sup> October, 2017 restraining the Defendants from registering, transferring, selling and occupying the said plot. The order was served upon the Defendants herein.

Secondly, The Plaintiffs have 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 vs 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.

The Applicants stated that the Defendants discretely went on to register the plot as Konza North Konza North Block 2 (Malili) 482 and thereafter subdivided the said parcel into aggregate of 19 plots as indicated in the 2<sup>nd</sup> and 3<sup>rd</sup> prayers above and transferred them to persons named in prayer 4 above. Going by the antecedents of the Defendants, it is very likely that the parcels in dispute may be alienated further and make any outcome of this suit an academic exercise. That the Defendants Respondents



will continue to sub-divide the suit land and transfer the same to third parties to the detriment of the Plaintiffs Applicants.

Thirdly, the Plaintiffs have to demonstrate that the balance of convenience tilts in their favour. In the case of *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* (2018) EKLK 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.”

In the case of *Paul Gitonga Wanjau vs Gathuthis Tea Factor Company Ltd & 2 others* (2016) eKLR, 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.”

The Applicants contend that the balance of convenience tilts in their favour because if the orders sought herein are not granted there is danger of the Respondents continuing to subdivide the suit land to the detriment of the Applicants which will in turn lead to the violation of the Applicants’ proprietary rights. I find that without the intervention of this Court, the Applicants herein may suffer irreparable loss and damage.

The decision of *Amir Suleiman vs 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.”

The Applicant alleges that the Respondent illegally transferred the same to third parties and continues to subdivide. Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit 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 current situation on the ground. I have also not had the opportunity to interrogate the annexures therein.



In Robert Mugo Wa Karanja vs 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...”

In view of the foregoing, I find that the application is merited and order that the status quo be maintained pending the hearing and determination of this suit. Costs to be in the cause.

As to whether the Applicant ought to be enjoined in the suit as a Plaintiff, Defendant or an Interested Party, the Court is guided by Order 1 Rule 10(2) of the Civil Procedure Rules which states;

The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

The Supreme Court decision in Communications Commission of Kenya and 4 Others vs Royal Media Services Limited & 7 Others Petition No. 15 OF (2014) eKLR where the Court pronounced itself on who an Interested Party is and held as follows:

In determining whether the applicant should be admitted into these proceedings as an interested party, we are guided by this Court’s decision in the Mumo Matemo case where the court (at paragraphs 14 and 18) held:

“ An interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. Similarly in the case of Meme v. Republic, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

- (i) Joinder of a person because his presence will result in the complete settlement of all the question involved in the proceedings;
- (ii) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- (iii) Joinder to prevent a likely course of proliferated litigation.

We ask ourselves the following questions:

- a) what is the intended party’s state and relevance in the proceedings and



- b) will the intended interested party suffer any prejudice if denied joinder?”

It is therefore clear that the parties who should be made parties to a suit are persons who are necessary for a complete and effectual adjudication of disputes before the court.

The Applicants claim that parties in prayer 4 of the application have been registered as owners of the suit properties and have annexed a copies of search certificate marked AKI5 showing the same. I find that the joinder is necessary to enable this court determine the real issues in dispute. Be that as it may, I find they have a stake in the proceedings and are necessary parties in this matter. I find that the joinder will not occasion any prejudice upon the existing parties. I find this application has merit and grant prayer 4 and 5 as well. Costs of this application to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 25<sup>TH</sup> DAY OF NOVEMBER 2025.**

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**N.A. MATHEKA**

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**JUDGE**

