



REPUBLIC OF KENYA



KENYA LAW
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**Ndolo v Mbolu & 3 others (Land Case E028 of 2024)
[2025] KEELC 8046 (KLR) (20 November 2025) (Ruling)**

Neutral citation: [2025] KEELC 8046 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
LAND CASE E028 OF 2024
EO OBAGA, J
NOVEMBER 20, 2025**

BETWEEN

ANDREW NDOLA NDOLO PLAINTIFF

AND

PENINAH MBOLU 1ST DEFENDANT

JAMES K. MBALUKA 2ND DEFENDANT

ALEXANDER KYULE 3RD DEFENDANT

JUSTUS KASUNI 4TH DEFENDANT

RULING

1. Before this court for determination is the application dated 17th July, 2024 in which the Plaintiff/Applicant seeks issuance of the following orders: -
 1. [spent]
 2. [Spent]
 3. That this Honourable Court be pleased to issue a permanent injunction restraining the Defendants/Respondents whether by themselves, their servants and/or agents from entering, trespassing upon, constructing, developing or in any way interfering with the properties Land Reference Numbers 1757/29 (I.R. 213183) and 1757/20 (I.R. 213184) or any part thereof pending the hearing and determination of this suit.
 4. That the costs of this application be provided.
2. The application is premised on the grounds appearing on its face and the supporting affidavit of Andrew Ndola Ndolo sworn on even date. The Applicant averred that he is the registered holder of



a power of attorney donated to him by Elizabeth Kamene Ndolo who is the registered owner of land Parcel Nos. 1757/29 and 1757/30.

3. He further averred that after undertaking an audit of the suit properties on 23/11/2023, he sent out letters to the occupants thereof requesting them to submit sale agreements, acknowledgment receipts for payment of the full purchase price, copies of identity cards and pin certificate as well as passport size photos for purposes of verification with a view to processing title deeds. The Applicant contended that the Respondents were unable to furnish any documents to justify their occupation of the suit properties resulting in the present suit.
4. He added that the Respondents have recently begun fencing off the respective portions they are in occupation of while also constructing structures thereon without the authority of the registered owner. The Applicant contended that the Respondents intend to continue with their trespass and commission of acts of waste on the suit property and it is therefore just that the application herein be allowed.
5. Opposing the application, the 1st Defendant filed a replying affidavit sworn by herself on 1st April, 2025. She averred that she had not trespassed into the Plaintiff's land as alleged as the Plaintiff has also not clearly defined what portion or size of land has been trespassed into. She further contended that she is the buyer of 22 acres of the suit property which she bought in the year 2010 and has been occupation of the same to date.
6. The 1st Defendant averred that upon receiving the Plaintiff's demand letter dated 30/5/2019, she responded vide a letter dated 15/7/2019 informing the Plaintiff that she had already settled the balance of the purchase price being Kshs.180,000/= and not Kshs.1,816,540/= as demanded. She further averred that she forwarded proof of payment to the Plaintiff. She contended that the application is devoid of merit and that it ought to be dismissed with costs.
7. The 2nd – 4th Defendants did not file their respective replies to the application.
8. The application was canvassed by way of written submissions.
9. In the 1st Defendant's submissions dated 8th July, 2025, Counsel submitted on the principles enunciated in the case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 on whether the Plaintiff is entitled to injunctive orders.
10. On whether the Plaintiff has established a prima facie case, Counsel was of the opinion that the 1st Defendant provided the sale agreement and proof of payment to the Plaintiff which justify her ownership of the suit property. Counsel submitted that in light of the 1st Defendant's ownership documents, the Plaintiff does not have a legitimate claim to the 1st Defendant's portion of the land and hence, he had not established a prima facie case which raises arguable issues.
11. On irreparable harm, Counsel submitted that the Plaintiff had not demonstrated how he is set to suffer irreparable harm if the orders sought are not granted. Counsel contended that the 1st Defendant has been residing in the suit property since the year 2010 wherein she has made vast developments and thus issuance of the orders sought will amount to an eviction. Counsel opined that the Applicant had not demonstrated that he would suffer irreparable harm.
12. On balance of convenience, Counsel contended that since the 1st Defendant has been in possession of the suit property since 2010 to date, then the balance of convenience tilts in her favour. Counsel urged the court dismiss the application with costs.
13. The sole issue arising for determination is whether the Plaintiff/Applicant is entitled to orders of permanent injunction against the Defendants.



14. The prerequisite conditions for a grant of injunctive orders under Order 40 Rule 1(a) of the Civil Procedure Rules, 2010 were articulated in the celebrated case of *Giella v Cassman Brown & Co Ltd* [1973] 1 EA 358 at 360 (CAK) as follows: -

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (*E.A. Industries v. Trufoods*, [1972] E.A. 420.)”

15. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR the Court of Appeal defined a prima facie case in the following terms: -

“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.”

16. It is not in dispute that the Plaintiff is the holder of a power of attorney No. 69702/1 which was donated to him by Elizabeth Kamene Ndolo, the registered owner of the suit properties parcel Nos. 1757/29 and 1757/30. It is also not in dispute that the 1st Defendant is in possession of a portion of the suit property by virtue of several sale agreements which were executed by herself and David Ngau Ndolo between the years 2010 and 2012.

17. What is in dispute is the actual area which the Defendants have taken occupation of and whether they have unlawfully encroached into the Plaintiff's land.

18. An avid perusal of the present application shows that the Plaintiff has couched his prayers against the Defendants seeking permanent orders of injunction against them.

19. In the case of *Kenya Consortium To Fight Aids, Tb & Malaria & Another V Brigitte Mukui Kitenge & 4 Others* [2013] KEHC 3731 (KLR), the court reasserted the position that permanent injunctions should not be sought at an interim stage making reference to two decisions as follows: -

“In *The Headmaster Kiembeni Baptist Primary School & Another vs. The Pastor of Kiembeni Baptists Church Mombasa HCCA No. 103 of 2004*, Maraga, J (as he then was) held that when dealing with applications for interlocutory injunctions it is wrong to grant a permanent injunction whose effect is to conclusively decide the suit as issues of fact should be decided after hearing evidence and that Courts should be wary of parties who make applications for interlocutory injunctive orders which if granted as prayed would have the effect of granting permanent or mandatory injunctions and sometimes even eviction orders as order 39 does not provide for grant of permanent injunctions at interlocutory stage. The same position was taken by Tanui, J in *The Official Receiver ex parte Paul Rotich Cheor vs. Barclays Bank of Kenya Kisumu HCCC No. 17 of 2004* and *Samuel Benjamin Obura vs. Kenya Commercial Bank Ltd Kisumu HCCC No. 91 of 2003*. In the said cases the learned Judge variously held that Order 39 [now Order 40] of the Civil Procedure Rules does not empower the Court to grant a permanent injunction and an application seeking such orders is incompetent and that where an application for injunction is couched in words which



appear to convey that the application is for perpetual injunction such an application is for dismissal.”

20. The Plaintiff has not argued out his case against the Defendants on the preponderance of evidence to determine whether there has been an infringement of his proprietary rights to the suit property. In view of the foregoing, the Plaintiff has evidently not established a prima facie case against the Defendants which would warrant grant of permanent orders of injunction.

21. According to Snell’s Principles of Equity (21st Edn) by R E Megarry and P V Baker at page 578: -

“A perpetual injunction is granted only after the plaintiff has established his right and the actual or threatened infringement of it by the defendant. An interlocutory (or interim) injunction, on the other hand, is granted before the trial of an action; its object is to keep things in status quo until the question at issue between the parties can be determined. Accordingly, the plaintiff may obtain it without making out a case which will necessarily entitle him to a perpetual injunction. It follows that a perpetual injunction is so called because it is granted at the final determination of the parties’ rights and not because its operation will necessarily last forever. For example a perpetual injunction may continue only during the currency of a lease”.

22. Similarly, the Court of Appeal in the case of Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR opined as follows: -

“...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 stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... if the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”

23. Having failed to demonstrate a prima facie case against the Defendant, it is clear that the present application is devoid of merit and the same is dismissed with costs.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 20TH DAY OF NOVEMBER, 2025.

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HON. E. O. OBAGA

JUDGE

In the absence of parties who were aware of the date of delivery of ruling.

Court assistant - Nelima

