

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT ELDORET
ELC CASE NO. E038 OF 2025

FRANCIS PIUS OMWERI.....PLAINTIFF/APPLICANT

-VERSUS-

THE COUNTY GOVERNMENT OF

UASIN GISHU.....1ST

DEFENDANT/RESPONDENT

THE MINISTRY OF LANDS,

PUBLIC WORKS, HOUSING

& URBAN DEVELOPMENT.....2ND

DEFENDANT/RESPONDENT

THE ATTORNEY GENERAL.....3RD

DEFENDANT/RESPONDENT

VAGHJIYANI ENTERPRISES

LIMITED.....4TH DEFENDANT/RESPONDENT

RULING

1. The Plaintiff herein (hereinafter referred to as **“Applicant”**) filed a Notice of Motion Application dated 29.04.2025 (hereinafter referred to as **“the present Application”**) against the 1st to 4th Defendants (hereinafter referred to as **“the Respondents”**) seeking for the following Orders; -

a) THAT the matter be certified urgent. (SPENT)

b) THAT in the interim and pending the hearing and determination of this Application, the Honourable Court be pleased to issue a temporary injunction

restraining the 1st, 2nd , 3rd and 4th Defendants whether by themselves, their agents, servants and/or anybody claiming under them from evicting persons, tearing down structures, selling, transferring, leasing, disposing, allocating, tempering, engaging in any construction thereupon and/or in any other manner dealing with land parcel number ELDORET MUNICIPALITY/BLOCK 6/514. (SPENT)

c) THAT in the interim and pending the hearing and determination of this suit, the Honourable Court be pleased to issue a temporary injunction restraining the 1st, 2nd , 3rd and 4th Defendants whether by themselves, their agents, servants and/or anybody claiming under them from evicting persons, tearing down structures, selling, transferring, leasing, disposing, allocating, tempering, engaging in any construction thereupon and/or in any other manner dealing with land parcel number ELDORET MUNICIPALITY BLOCK 6/514.

d) THAT the costs of this Application be provided for.

e) Any other and further relief that this Honourable Court may deem fit and just to grant in the circumstances.

2. The facts in support of the prayers above can be summarised as follows; -

i) The Applicant is the registered owner of the property known as ELDORET MUNICIPALITY BLOCK6/514 (hereinafter referred to as **“the suit property”**) based on a Certificate of Lease dated 2018 for a period of 99 years commencing on 01.11.1993.

- ii) On the 02.03.2004, the 1st Respondent without any legal justification and/or ownership rights unlawfully entered into the suit property and demolished various structures constructed by the Applicant therein.
 - iii) The Applicant stated that the 1st Respondent in conjunction with the 2nd, 3rd and 4th Defendants intend to start construction of a market on the suit property to the detriment of the Applicant's ownership.
 - iv) The Applicant was of the considered view that the Respondents actions required to be prohibited by way of an injunction pending the hearing and determination of the suit before this Court.
3. The present Application was duly served on the Respondents who did enter appearance in the suit.
4. The 1st Respondent in opposition of the present Application did file a Replying Affidavit sworn on 09.05.2025 by one DANIEL KOECH which stated as follows; -
- (i) The Deponent thereof was the County Physical Planner in the employment of the 1st Respondent.
 - (ii) According to the County Physical Planner, the Eldoret Municipal Development Plan which was approved in 1970 shows the suit property is in a recreation zone and the Applicant's Certificate of Lease placed before the Court was obtained by fraud and misrepresentation as their records indicate that the Part Development Plan (PDP) used to create it was not approved.
 - (iii) The County Physical Planner further stated that the Lease Documents produced by the Applicant had not been signed by the Lessor.

- (iv) That the market project commenced more than a year ago and there is no explanation why the Plaintiff did not move the court yet he is a resident of Uasin Gishu.
 - (v) That the project is a state investment and the Applicant's rights which have not been assured cannot supersede the right of the Citizens who are to benefit from it and asked the Court to allow the project to continue.
 - (vi) According to the County Physical Planner, the Applicant herein had not demonstrated the loss he will suffer if the orders are not allowed, and neither does he have a prima facie case and the interim orders should be vacated since the Plaintiff can be compensated in damages if his case succeeds.
 - (vii) The County Physical Planner added that if the orders are not vacated, the state will suffer loss in billions yet there was public participation for the said project.
 - (viii) The County Physical Planner pleaded that since the Part Development Plan was not approved, any subsequent processes and creation of title is a nullity.
 - (ix) In concluding his Replying Affidavit, the County Physical Planner was of the view that the suit property having been set aside for public use, it was not available for alienation.
5. The 2nd and 3rd Respondent did file two Replying Affidavits dated 05.05.2025 and 09.05.2025.
6. In the first Replying Affidavit dated 05.05.2025 and sworn by CHARLES HINGA, the Principal Secretary of the 2nd Respondent, the present Application was opposed on the following grounds; -
- i) The 2nd Respondent is a State Department tasked with the mandate to construct social infrastructure such as

markets in a move to improve the livelihoods of the citizen at the grassroots level in line with the Bottom-Up Economic Transformation Agenda (BETA).

- ii) The 2nd Respondent in collaboration with the 1st Respondent entered into an Intergovernmental Memorandum of Understanding in the 2023 for the construction and management of the Eldoret Ultra-Modern Market.
- iii) Based on the Memorandum of Understanding entered into in the year 2023, the 1st Respondent had a duty to identify and provide the ground upon which the said Ultra-Modern Market would be built and hand over the same to the 2nd Respondent.
- iv) The 2nd Respondent for purposes of executing the Memorandum of Understanding contracted the 4th Respondent herein as the constructor of the Ultra-Modern Market.
- v) The 2nd Respondent confirmed that the 4th Respondent indeed took possession of the suit property which was identified by the 1st Respondent as the portion of land which the Ultra-Modern Market was to be constructed and has begun the construction works thereof.
- vi) The 2nd Respondent pleaded that the 4th Respondent was fully mobilised to a sum of Kenyan Shillings Three Hundred and Fifteen Million (KShs.315,000,000/-) and is expected to complete the constructions within 24 months.
- vii) Consequently, any orders of injunction issued by the Court will result to penalties and interests which will have to be borne by the citizens of this country.

- viii) The 2nd Respondent was of the view that the construction of the Ultra-Market would lead to employment opportunity and if the same was to be stopped, then the residents of Uasin Gishu will suffer loss in legitimate expectation.
 - ix) In conclusion thereof, the 2nd Respondent stated that the Court should allow the project to continue for the interest of the public and whatever losses that may accrue to the Applicant, the same can be compensated by way of damages.
7. In the second Replying Affidavit sworn on 09.05.2025 by VERONICAH MUSEE, the Regional Physical Planner in Charge of Nandi, Uasin Gishu and Elgeyo Marakwet, the present Applicant was opposed on the following grounds; -
- i) According to the Regional Physical Planner, the suit property is within the Development Plan No. ELD/17/70/1 OF 1970 which was set -aside for an open space for recreation purposes and therefore was not available for reallocation for commercial use at indicated in the Applicant's title.
 - ii) The Regional Physical Planner stated that there was no records of any change of user over the suit property granted to the Applicant permitting the suit property to be used for any other purposes other than an open space for recreation purposes as intended in the 1970 Development Plan No. ELD/17/70/1.
 - iii) In addition to the above, the Regional Physical Planner pleaded that the Applicant had not provided for the Plan No. ELD 17/93/29 which was referred in the Letter of Allotment issued on the 17.09.1993 in favour of the

- Applicant because the same does not exist in the relevant offices.
- iv) The Regional Physical Planner disclosed that there was a sewer line that was passing through the suit property which was relocated to pave way for the construction of the Ultra-Modern Market.
 - v) The Regional Physical Planner informed the Court that sewer lines mostly passed through public land and if the same was to pass through a private property, then a wayleave would have to be created and an easement recorded in which none exists on the Applicant's Certificate of Title.
 - vi) The Regional Physical Planner insisted that if any change of user was to be undertaken, then the 1st Respondent or its predecessor would have been the one to approve the same which was not done.
 - vii) In essence, the Regional Physical Planner challenged the Commissioner of Lands authority to re-allocate the suit property to private property yet the same had been identified for public use hence the Applicant's title was deemed to be invalid.
 - viii) The Regional Physical Planner stated that if any structures on the suit property were demolished, then the exercise was done due to the fact that they were illegally on the suit property.
 - ix) In conclusion thereof, the Regional Physical Planner pleaded that the present Application was not merited and should be dismissed with costs.

8. Upon service of the two Replying Affidavits, the Court gave directions that the present Application would be canvassed by way of written submissions.
9. The Applicant filed his submissions dated 04.07.2025 while the Respondents 29.07.2025.
10. The Court has carefully perused the present Application, the Replying Affidavits and the submissions filed and identifies the following issues for determination.

ISSUE NO. 1- WHETHER OR NOT THE COURT HAS JURISDICTION IN THIS MATTER?

ISSUE NO. 2- IS THE APPLICANT ENTITLED TO AN ORDER OF INJUNCTION AGAINST THE RESPONDENTS HEREIN?

ISSUE NO.2- IS THE PRESENT APPLICATION MERITED OR NOT?

ISSUE NO. 3- WHO BEARS THE COSTS OF THE PRESENT APPLICATION?

11. The Court having identified the above issues for discussion, the same are considered as herein below.

ISSUE No. 1 - WHETHER THIS COURT HAS JURISDICTION TO ENTERTAIN THIS SUIT?

12. The first issue for determination is whether the Court has jurisdiction of the proceedings before it or not.

13. The Jurisdiction was raised in the 1st Defendant's in their submissions.
14. The 1st Respondent submitted that the Court did not have jurisdiction of entertain the present Application as the same was time barred.
15. An issue of jurisdiction is ideally one that goes to the core mandate of the judicial function of this Court.
16. Consequently, once the same is raised by any party, the Court must satisfy itself that indeed it is couched with jurisdiction before proceedings with the matter at hand.
17. In the case of **KAKUTA MAIMAI HAMISI-VERSUS- PERIS PESI TOBIKO & 2 OTHER (2013) eKLR**, the Court of Appeal observed as follows; -

“So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de sac. Courts, like nature, must not sit in vain.”

18. Unfortunately, although the 1st Respondent submitted that the Plaintiff's claim is time barred, it did not indicate what provision of the law it's claim is premised on.
19. The Court takes note that this claim is for recovery of land by the Plaintiff for which he is registered as the proprietor.
20. Since it is not clear what provision the claim of time limit is premised on, and the 1st Defendant did not make any further

submissions on the same, any further deliberation on the same will have the court conduct a fishing expedition to prove the 1st Defendant's claim, which is not the business of this court.

21. The claim that the suit is time barred thus fails.

ISSUE No. 2 - WHETHER THE PLAINTIFF HAS ESTABLISHED A BASIS FOR THE GRANT OF THE INJUNCTION SOUGHT?

22. The main prayer in the present application is for a temporary injunction barring the Respondents from interfering with the Applicant's suit property pending the hearing and determination of the pending suit.

23. According to the provision of Order 40 of the Civil Procedure Rules, 2010, the Court has a discretion to issue injunctive orders where there is a likelihood of the suit property being wasted and/or interfered with during the pendency of a litigation.

24. However, this discretion is one that must be exercised judicially and based on the established principles applicable in granting an order of temporary injunction.

25. In the case of **GIELLA-VERSUS- CASSMAN BROWN & COMPANY LIMITED (1973) EA 358**, the Court outlined the principles of granting an Injunction as follows; -

(a) The Applicant must demonstrate that they have a prima facie case with a probability of success.

(b) The applicant must show that they are likely to suffer irreparable harm if injunction is not granted, which cannot be compensated by way of damages

(c)If the court is in doubt, it is to should determine the application on a balance of probability.

26. Based on the above ingredients, this Court will now evaluate the facts of the present Application against the responses filed by the Respondents and make its determination of the same.

ESTABLISHMENT OF A PRIMA FACIE CASE

27. The first ingredient to be established is whether or not the Applicant has established a prima facie case before the Court.
28. In case of **MRAO LIMITED-VERSUS- FIRST AMERICAN BANK OF KENYA & 2 OTHERS (2003) KLR 125**, the Court described a prima facie case to be one which based on the material placed before the Court demonstrates the existence of a legal right which has likely been infringed or there is a likelihood for the same to be infringed and requires the opposite side to be called for an explanation or rebuttal.
29. In the present Application, the Applicant pleads that he is the lawful and registered owner of the suit property.
30. The Applicant in support of this position has placed before the Court the Letter of Allotment dated 17.09.1993, the Lease Agreement registered by the County Land Registrar, Uasin Gishu dated 27.10.2005, the actual Certificate of Lease dated 09.02.2018, an Extract of the Register to the suit property dated 12.03.2025 and a Copy of an official search of the suit property in his name dated 08.03.2024.
31. The Respondents on the other hand dispute the registration and ownership of the Applicant on the basis that according to the Development Plan No. ELD/17/70/1 approved in the year 1970, the suit property was set-aside as an open space for recreational purposes and was therefore not available for re-allocation for any commercial purposes.

32. The Respondents further stated that the Applicant's Letter of Allotment dated 17.09.1993 was based on a Plan No. ELD 17/93/29 which had not been approved and therefore could not be used to allocate the suit property to the Applicant.
33. In essence, the Respondents were of the view that the Applicants registration documents were fraudulent, irregular and therefore did not vest any lawful ownership to the Applicant herein.
34. In response to the above allegations by the Respondent, the Applicant filed a Further Affidavit in which he attached the Approved Plan No. 422 confirming that indeed the Part Development Plan No. ELD 17/93/29 was a lawful and legitimate document issued by the Department of Survey.
35. Looking at the facts and documentary evidence placed before the Court, it is clear that the Applicant is in possession of a Certificate of Lease dated 09.02.2018 based on the Lease registered on the 27.10.2005.
36. The provisions of Section 24 and 25 of the Land Registration Act, No. 3 of 2012 provides that the ownership of land is bestowed on the person or entity whose name appears on the Register of the suit property held by the County Land Registrar.
37. The Extract of the Register relating to the suit property certified by the County Land Registrar, Uasin Gishu on the 12.03.2024 provides that the Applicant herein is the lawful registered owner of the suit property.
38. To re-emphasize this position, the Applicant also provided a Copy of an Official search dated 08.03.2024 relating to the suit property which also states that the Applicant is the lawful registered owner of the suit property.

39. Interestingly, none of these documents in particular the Lease Agreement registered on the 27.10.2005, the Certificate of Lease dated 09.02.2018, the Extract of the Register Certified on the 12.03.2024 and the Copy of the Official Search dated 08.03.2024 were disputed by the Respondents.
40. The only issue that the Respondents had was that allocation of the suit property from public use to commercial use was not properly done and therefore the Applicant's ownership was fraudulent.
41. While the Respondents position might be true, the same must be proved through a trial to be undertaken later in this suit.
42. However, at this moment in time, the Court is guided by the provisions of Section 24 and 25 of the Land Registration Act, No. 3 of 2012.
43. Based on the above provisions of the Land Registration Act, No. 3 of 2012, the person who is recognized as the legitimate and lawful owner of the suit property in accordance to the documents with the Department of Lands is the Applicant.
44. As such, the Applicant has established the ownership of legal rights over the suit property as required in this ingredient and the Court is satisfied that he has established a prima facie case against the Respondents herein.

DOES THE APPLICANT STAND TO SUFFER IRREPARABLE INJURY AND/OR HARM IF THE INJUNCTION IS NOT ISSUED?

45. The second aspect that the Court should consider in an Application for Injunction is what kind of injury the Applicant stands to suffer if the injunction is not issued.
46. The Court is required to look at the facts and determine whether the injury being occasioned to the Applicant is one that can be compensated by damages or not.

47. If the injury occasioned is one that can be compensated by damages, then the Court need not to issue an injunction at the interlocutory stage.
48. The Applicant before Court pleaded that the Respondents actions of invading into his property is in fact contravening the provisions of Article 40 of the Kenyan Constitution.
49. Article 40 of the Kenyan Constitution guarantees every citizen with the right to own property and particular Sub-Article (3) prohibits the State from depriving a person of his property unless lawfully acquired through Sub-Article 3 (a) and (b).
50. Secondly, the Applicant states that upon entry into the suit property, the 1st Respondent demolished various structures that were on the suit property without any justification or legal basis thereby causing substantial loss in terms of the developments erected therein as well as the income that accrued from the said developments.
51. The Applicant's submission is that if the Respondents are permitted to continue with their illegal development, there will be no possibility of the suit property ever reverting back to the Applicant.
52. The Respondents on the other hand are of a contrary view.
53. The Respondents pleaded that the development being undertaken is a joint project between the County Government and the National Government which is geared towards the benefit of the people of Uasin Gishu and empowerment of the youth and women.
54. Consequently, the Respondents were of the view that any injury caused to the Applicant can be compensated by way of damages.

55. The Respondents further averred that the 2nd Respondent had already contracted the 4th Respondent to undertake the project and mobilized to a tune of Kenya Shillings Three Hundred and Fifteen Million (KShs.315,000,000/-).
56. In essence, if the Court was to grant any injunction against the project, the National Government stands the risk of losing a lot of public funds in terms of penalties and interested to be charged by the 4th Respondent.
57. The element of Substantial Loss was described in **HALSBURY'S LAWS OF ENGLAND, THIRD EDITION, VOLUME 21, PARA 739 ON PAGE 352** as follows; -

“It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question...”

58. To begin with, it is clear based on the documents placed before the Court that the suit property is one which is located within Eldoret City.

59. The fact that the suit property is one that was even chosen by the County Government and the National Government to be ideal for constructing an Ultra-Modern Market demonstrated the strategical location it is placed within Eldoret City.
60. This being the case, then it would be next to impossible for the Applicant to acquire a plot of a similar nature within the same city even if the Respondents would compensate him.
61. In addition to the above, the manner in which the Respondent has invaded and taken over the Applicant's suit property is one that contravenes the express provision of Article 40 of the Kenyan Constitution.
62. It is important to state that any Government is expected to be a defender of the law.
63. While the Respondents allege that the Applicant's ownership documents are irregular and fraudulent, it is this Court's expectation that it would have taken the corrective measures and/or steps to challenge the said ownership documents before the Court of Law before undertaking the alleged project.
64. Regardless of how meaningful the Respondents project is to the people of Uasin Gishu, the Applicant's rights should not be thrown out the window.
65. In the case of **JOSEPH SIRO MOSIOMA-VERSUS- HOUSING FINANCE COMPANY OF KENYA LIMITED (2008) eKLR**, the Court stated as follows; -

“... damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substituted for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a

factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction.”

66. Based on the above discussion, this Court is of the considered view and finding that the injury being caused by the Respondents on the suit property is one that cannot be compensated by way of damages as alleged by the Respondents.

IN WHOSE FAVOUR DOES THE BALANCE OF CONVENIENCE TILT?

67. The last consideration is that where the Court is in doubt of any of the two principles above, it should determine the Application on a balance of convenience.

68. The Court in determination of the first and second principles hereinabove made finds to the effect that the Applicant had established a prima facie case and demonstrated how damages with not suffice based on the injuries being caused by the Respondents, this Court is of the considered view and finding that the balance of convenience tilts in favour of the Applicant herein.

CONCLUSION

69. In conclusion, this Court hereby makes the following Orders in determination of the present Application; -

A. THE NOTICE OF MOTION DATED 29.04.2025 IS MERITED.

B. THAT A TEMPORARY INJUNCTION BE AND IS HEREBY ISSUED PENDING THE HEARING AND DETERMINATION OF THE SUIT RESTRAINING THE 1ST, 2ND, 3RD AND 4TH RESPONDENTS EITHER THROUGH THEIR AGENTS, EMPLOYEES, SERVANTS

AND/OR ANY PERSON OR ENTITY DIRECTED BY THE RESPONDENTS HEREIN FROM ENTERING, EVICTING, CONSTRUCTING, REMOVING, TAMPERING, INTERFERING, DEVELOPING, ERECTING AND/OR IN ANY MANNER WHATSOEVER DEALING WITH THE SUIT PROPERTY KNOWN AS ELDORET MUNICIPALITY BLOCK 6/514 HENCEFORTH.

C. THE APPLICANT IS AWARDED COSTS OF THIS APPLICATION PAYABLE BY THE RESPONDENTS HEREIN EITHER JOINTLY AND/OR SEVERALLY.

DATED, SIGNED & DELIVERED Virtually at **ELDORET ELC** on this **24TH DAY OF NOVEMBER 2025.**

EMMANUEL.M. WASHE
JUDGE

IN THE PRESENCE OF:

COURT ASSISTANT: Brian

APPLICANT: Ms. Martina

RESPONDENT: Mr. Kutei holding brief Ms. Cheruiyot for 2nd and 3rd Respondents
Mr. Kahara for 4th Respondent
Mr. Mitei holding brief Mr. Keter for 1st Respondent