

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT ELDORET**

**ELC CASE No. E072 OF 2025**

**WALTER                      OBONYO                      OGOLA                      .....**  
**PLAINTIFF/APPLICANT**

**VERSUS**

**JAMES                      WAFULA                      WANGILA                      .....                      1<sup>ST</sup>**  
**DEFENDANT/RESPONDENT**

**JOHANES                      BOY                      OKOBA                      .....                      2<sup>ND</sup>**  
**DEFENDANT/RESPONDENT**

**RULING:**

1. Before this court is a Notice of Motion Application dated 25<sup>th</sup> July, 2025 in which the Plaintiff/Applicant seeks the following orders:-
  - (i) Spent
  - (ii) Spent
  - (iii) THAT pending the hearing and determination of the main suit, this Honourable Court be pleased to issue a temporary injunction restraining the Respondents by themselves, their agents and/or servants from accessing, use, waste and/or trespassing of Land Parcel No. UASIN-GISHU/MOIBEN SCHEME 28.
  - (iv) THAT costs of this application be provided for.
  - (v) Any further order(s) that this Honourable Court may deem just and expedient to grant in the interest of justice.

2. The Motion is premised on the grounds on the face of it and the Plaintiff's Supporting Affidavit of even date, who averred that vide an agreement dated 25<sup>th</sup> February, 2025 he purchased Uasin-Gishu/Moiben Scheme/28 measuring 18.14Ha (the suit property herein) from the Respondents. That he obtained Land Control Board (LCB) Consent and was issued with a title deed. He accused the Defendants/Respondents of refusing to hand over vacant possession of the property as required under the Agreement. That instead, the Defendants have put up structures, fenced, ploughed and planted, among other activities that are detrimental to his interests as the owner.
3. The Plaintiff avers that he entered an addendum with the Defendants on 4<sup>th</sup> July, 2025 where they agreed to hand over possession within 14 days but they have not complied. The Plaintiff claims that he has been denied full enjoyment of the land hence the need for the injunction. He termed the Defendants' actions unlawful and illegal, and stated that the application was made timeously and in the interest of justice. He claimed that the Defendants will not be prejudiced if the application is allowed as the application is meritorious and made without malice. The Plaintiff pleaded that he has a prima facie case with a probability of success and he stands to suffer irreparable damage which cannot be compensated by way of damages if the orders are not granted, and his suit herein rendered nugatory.
4. The Application was served on the Defendants by Pella Amugune Tsisaga, a court process server who swore and filed two Affidavits of Service both dated 1<sup>st</sup> August, 2025. Despite

service as aforesaid, the Defendants did not enter appearance or file any responses to the Application.

**Submissions:**

5. On 29<sup>th</sup> September, 2025 when this matter was mentioned, the court directed the Plaintiff to file written submissions in support of his Application. The Plaintiff complied and filed submissions dated 14<sup>th</sup> October, 2025. In the said Submissions, Counsel for the Plaintiff cited Order 40 Rule 1(a) and the principles of injunctions laid down in **Giella vs Cassman Brown (1973) EA 358** and **Nguruman Limited vs Jan Bonde Nielsen & 2 Others CA No. 77 of 2012 (2014) eKLR.**
6. On the requirement for a prima facie case, Counsel submitted that the Plaintiff had established that he is the registered owner of the land. Further, that the Plaintiff had shown that the Defendants had refused to hand over possession as obligated under the agreement and the addendum thereto. Citing **Mrao vs First American bank of Kenya Limited (2003) eKLR,** Counsel submitted that the Plaintiff had established a prima facie case that the Defendants are trespassers on the suit property.
7. Counsel submitted that the Plaintiff has been denied enjoyment and peaceful possession of his land despite satisfying his obligations under the agreement. He argued that the Defendants actions on the land are detrimental to the Plaintiff's interest as the owner of the suit land. Counsel therefore submitted that the Plaintiff had demonstrated that he will suffer irreparable injury that is not capable of being compensated by way of damages, and he relied on **Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) eKLR.**

8. Counsel further submitted that the balance of convenience tilts in favour of the Plaintiff. Counsel argued that if the injunction is not granted, the Defendants will continue their illegal trespass causing the Plaintiff further loss and damage. That there is therefore a lower risk of injustice in granting the order of injunction than not granting it. Counsel concluded that the Plaintiff had met the threshold for grant of the interlocutory injunction. Counsel added that this court has the jurisdiction to entertain the application and is the proper forum to deal with the issue of trespass and infringement of the use and occupation of land. Counsel further cited **Paul Gitonga Wanjau vs Gathuthis Tea factory Company Ltd & 2 Others (2016) eKLR, Amir Suleiman vs Amboseli Resort Limited (2004) eKLR, Lydia Nyambura Mbugua vs Diamond Trust Bank Kenya Limited & Another (2018) eKLR.**
9. On costs of the Application, Counsel submitted that under Section 27 of the Civil Procedure Act, costs are granted at the discretion of the court. In addition, that they follow the event in that they are granted to the successful party. Counsel asked the court to grant the prayers sought in the application, and further prayed that the costs of the Application be awarded to the Plaintiff.

**Analysis and Determination:**

10. I have considered the application, supporting affidavit and the submissions filed herein and find that the only issue for determination is whether the order of interlocutory injunction sought by the Plaintiff should issue.

11. In determining an application for an interlocutory injunction, the court must consider whether the Applicant has met the principles laid out by the Court of Appeal in **Giella vs Cassman Brown & Co. Ltd (1973) E.A. 358**, where it was held that:-

***“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.”***

12. Taken at face value, the Plaintiff mainly seeks an interlocutory injunction restraining the Defendants from accessing, use, waste and/or trespassing on the suit property pending hearing and determination of the suit. However, as noted on the record in the proceedings of 29<sup>th</sup> September, 2025 although this is an interlocutory application, the order sought by the Plaintiff is of a mandatory nature. This is especially so because if the injunction is granted at this stage, it will be akin to evicting the Defendants from the land without them being heard first.

13. The distinction between a mere prohibitory injunction and a mandatory injunction was given in **Kenya Airports Authority vs Paul Njogu Mungai & 2 Others (1997) KECA 261 (KLR)**, where the Court of Appeal explained that:-

***“... a temporary mandatory injunction can only be granted in exceptional and in the clearest of cases.***

***This test was laid down in the case of Kamau Mucuha vs The Ripples Limited, Civil Application No. NAI 186 of 1992, unreported, by this court wherein it approved and applied the distinction between a prohibitory and a mandatory injunction drawn by Megary J. (as he then was) in the case of Shepherd Homes vs Sandham (1979) 3 W.L.R. 348. Megary J. there said:***

***‘Whereas a prohibitory injunction merely requires abstention from acting, a mandatory injunction requires the taking of positive steps, and may (as in the present case) require the dismantling or destruction of something already effected or constructed. This will result in a consequent waste of time, money and materials if it is ultimately, established that the defendant was entitled to retain the erection.’***

***The above passage shows that an order which results in granting a major relief claimed in the suit, which may not be granted at final hearing, ought not to be granted at an interlocutory stage.”***

14. As to whether a mandatory injunction can be granted at the interlocutory stage, in ***Kenya Breweries Limited & another vs Washington O. Okeyo (2002) KECA 284 (KLR)***, the Court of Appeal held that:-

***“The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury’s Laws of England 4<sup>th</sup> Edn. para 948 which reads:***

***'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.'***

***Also in Locabail International Finance Ltd. vs Agroexport & Others (1986) 1 ALL ER 901 at pg. 901 it was stated:-***

***'A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction'.***

15. The principles governing grant of mandatory injunctions are similar to the guiding principles applied in granting prohibitory

injunctions as enunciated in **Giella vs Cassman Brown (Supra)**. However, due to the serious nature of the mandatory injunction, and in some cases such as this present one, may lead to granting a major relief at the interlocutory stage, the court must only grant it in the most clear of cases and where a party has demonstrated special circumstances.

16. In this case therefore, the court is to first establish whether the Plaintiff has met the three requirements above for grant of a prohibitory injunction. Thereafter, the court will consider whether the case is clear enough and/or there are special circumstances to warrant the mandatory injunction.
17. The first step in this instance therefore is to determine whether the Plaintiff has established that he has a prima facie case with a probability of success. The Court in **Mrao Ltd. vs First American Bank of Kenya Ltd & 2 others [2003] KLR 125** fashioned a definition for “prima facie case” in civil cases in the following words:-

***“In civil cases, a prima facie case is a case in 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”***

18. From the material presented before this court, there is an agreement for sale dated 25<sup>th</sup> February, 2025 between the Plaintiff herein as the purchaser, and the Defendants as the sellers. The agreement relates to the sale of land known as Uasin-Gishu/Moiben Scheme/28 measuring 18.14Ha, which is the suit property herein, for KShs. 49,305,300/-. The Plaintiff paid KShs. 35,400,000/- upon execution of the agreement, while the balance was to be paid upon the Defendants delivering the duly executed completion documents.
19. At clause 8 of the Agreement, the Defendants undertook the responsibility of handing over the suit property to the Plaintiff. After purchase, the Plaintiff obtained LCB Consent to transfer the land from the Defendants to himself, and thereafter the Plaintiff acquired a title deed to the land, which is dated 14<sup>th</sup> March, 2025. The LCB Consent as well as the Title deed are all annexed to the Plaintiff's Supporting Affidavit.
20. In addition to these documents, the Plaintiff also annexed an Addendum dated 4<sup>th</sup> July, 2025. In this document, the Defendants admitted that the Plaintiff had been issued with a title deed to the property. The Defendants further agreed that they would ensure the Plaintiff would get vacant and peaceful possession of the suit land within 14 days from the date of its execution. The Plaintiff has proved that he has an interest in the land, which has been acknowledged by the Defendants. The Plaintiff has thus demonstrated that he has a prima facie case.
21. The second requirement is for the Plaintiff to demonstrate that he stands to suffer irreparable injury if the injunction is not

granted. Irreparable injury was defined in **Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) KEELC 2424 (KLR)** as follows:-

***“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 defendant has been collecting rent since the year 2005 and therefore the issue of irreparable harm if injunction is not granted should not arise so long as the matter is fast-tracked for hearing.”***

22. The Plaintiff is the registered owner of the suit land. He purchased it and dully paid the purchase price, and he obtained a title deed thereafter, which this court has seen. As the registered owner, he is entitled to have ownership and peaceful possession and/or enjoyment of the land. There is no doubt that when the Plaintiff agreed to purchase the land from the Defendants, he expected to be allowed to actually occupy and possess it. However, he is yet to be put in possession of the land. The Defendants presence and activities on the land are therefore detrimental to the Plaintiff’s interests and contrary to his rights thereon. This in my opinion satisfies the requirement for irreparable injury.

23. On the balance of convenience, from the above analysis, it is evident that the same tilts on favour of granting the injunctions as sought by the Plaintiff. But as already stated above, where a party seeks an interlocutory mandatory injunction, aside from the above three requirements, a different and higher standard is applied before the order is granted. The party seeking the injunction must show the existence of exceptional and special circumstances, since a temporary mandatory injunction can only be granted in exceptional and in the clearest of cases.
24. In this instance, the Defendants in the Addendum dated 4<sup>th</sup> July, 2025 did admit that the Plaintiff had been issued with a title deed but had not been given vacant possession nor peaceful use and/or possession of the land. The Defendants undertook to ensure that the Plaintiff gets vacant possession within 14 days of the Addendum. They also agreed that the Purchaser would only pay the balance found due and owing to them after vacant and peaceful use and possession if the suit land had been given to the purchaser.
25. It is not clear at this stage that there was indeed a balance due and owing on the purchase price or how much it was from the wording of the Addendum. However, the said addendum is clear that any such balance was to be paid once the Plaintiff had been granted vacant and peaceful possession of the land. Therefore, even if there is a balance to be settled, the said balance if unpaid, cannot be used to justify the failure by the Defendants to give the Plaintiff herein vacant possession of the land.

26. The Defendants having admitted the registration of the Plaintiff and undertaken to hand over possession to the Plaintiff, they should have done so to pave way for payment of any dues owing to them from the Plaintiff. This admission, and the clear failure by the Defendants to honour the terms of the agreement dated 25<sup>th</sup> February, 2025 as well as the Addendum of 4<sup>th</sup> July, 2025 to me constitutes special and clear circumstances as enumerated by the Court of Appeal in the afore-mentioned cases. That being the case, I am convinced that the Plaintiff has met all the requirements for grant of the order of injunction sought at this interlocutory stage.

**Orders:-**

27. Consequently therefore, the Plaintiff's Notice of Motion Application dated 25<sup>th</sup> July, 2025 has merit and is allowed in the following terms:-

(i) THAT pending the hearing and determination of the main suit, this Honourable Court be pleased to issue a temporary injunction restraining the Respondents by themselves, their agents and/or servants from accessing, use, waste and/or trespassing of Land Parcel No. UASIN-GISHU/MOIBEN SCHEME 28.

(ii) The costs of the Application shall be costs in the cause.

28. Orders accordingly.

**DATED, SIGNED and DELIVERED** virtually at **ELDORET** on this **11<sup>TH</sup>** day of **DECEMBER, 2025** vide Microsoft Teams.

**HON. C. K. YANO**

**ELC, JUDGE**

In the virtual presence of;

Mr. Chepkwony for Plaintiff/Applicant.

No appearance for Defendants/Respondents.

Court Assistant - Edwin

ORIGINAL