

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. EP. PET. NO. E001 OF 2025

JOSEPHINE A WASONGA PETITIONER

VERSUS

KHALID MOHAMMED ALI 1ST RESPONDENT

RUTH MUKAGATI 2ND RESPONDENT

RULING

1. By the Notice of Motion dated 13th February 2025, Josephine A. Wasonga (the Petitioner) prays for an order that the Respondents be restrained from carrying out any construction works or making any modification on House No. 21 erected on LR. No. CR 19397 (plot No. MN/1/4850) located in Ratna Estate, Mtopanga area of Mombasa. In addition, the Petitioner prays for an order restraining the 2nd Respondent in particular from trespassing, entering onto and/or interfering with the said property.
2. The application is supported by an Affidavit sworn by the Petitioner and is premised on the grounds:

- i. That the Petitioner and the 1st Respondent entered into a Lease Agreement dated 1st August, 2022 to lease House No. 21 for a period of two (2) years lapsing on 31st July, 2024;**
- ii. That sometime in February 2024, the Petitioner realised that the Respondents had constructed a two-storey structure on the suit property. The Petitioner then instructed the 1st Respondent to cease all the construction and excavation works on the suit property;**
- iii. That the 1st Respondent proceeded to sublet or sell the suit property to the 2nd Respondent who then proceeded to make more modifications on the house;**
- iv. That the Respondents have altered the structure of the house, conducted excavation works, dug holes and cut down palm trees without the consent of the Petitioner;**
- v. That the 2nd Respondent, without any lawful justification, has allowed unknown persons to enter freely into the suit property and to do damage to the same;**

5. By this application before the court, the Petitioner prays for an order of temporary injunction to issue against the Respondents, their servants and/or agents restraining them from carrying out any construction works or making any modifications on House No. 21 erected on LR No. CR 19397 (Plot No. MN/1/4850) located in Ratna Estate, Mtopanga in Mombasa. In addition, the Petitioner in particular urges the court to restrain the 2nd Respondent, her agents and/or servants from trespassing, entering into and/or interfering with the said property.
6. In opposing the application, the 2nd Respondent avers that she had purchased the suit property from the 1st Respondent. It is further her case that she carried out the developments on the property with the consent of the 1st Respondent and that the property belonged to the Petitioner.
7. In regard to temporary injunctions, Order 40 Rule 1 of the Civil Procedure Rules provides as follows:

“Where in any suit it is proved by affidavit or otherwise-

- a) That any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b) That the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

8. The conditions for the grant of an interlocutory injunction were long set out by the Court of Appeal for East Africa in the celebrated case of ***Giella -vs- Cassman Brown (1973) EA. 358*** where Spry V.P. held 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 be normally 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.”

9. As to what would amount to a *prima facie* case in a matter such as this, the Court of Appeal offered guidance in the case of ***Mrao -vs- First American Bank of Kenya Limited & 2 Others (2003) KLR*** where it was held that:

“.....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.”

10. In the matter before me, it is the Petitioner's position that she is the registered proprietor of the suit property and that she has leased the same to the 1st Respondent for a period of two years effective 1st August 2022. In support of that position the Petitioner has attached a Certificate of Postal Search dated 24th January 2025 which shows that she is indeed the registered proprietor of the property. In addition, the Petitioner has annexed a copy of the Lease Agreement between herself and the 1st Respondent.

11. The 2nd Respondent does not deny that the Petitioner is the registered proprietor of the suit property. She states as follows at paragraph 4 to 6 of her Affidavit in Reply:

"4. That in response to paragraph 2 of the supporting affidavit, I would like to state that all along I never knew that the property belonged to the Petitioner herein as the 1st Respondent had made me believe that the property was his;

5. That in response to paragraph 3 and 4 of the supporting affidavit, I would like to state that I did the renovations and extensions on the house over a period of two (2) years having

been given permission by the 1st Respondent who purportedly sold the suit property to me sometimes in July, 2022; and

6. That in response to paragraph 4 of the supporting affidavit, I would like to state that I never knew that there was a lease Agreement between the Petitioner and the 1st Respondent until when she came to the suit property and gave it to me.”

12. Those words are a clear indication to me that if indeed the 2nd Respondent had no knowledge that the suit property belonged to the Petitioner, she was now fully in the know and should have taken steps to mitigate her circumstances. If she did not know the 1st Respondent was a mere Lessee of the suit premises, the 2nd Respondent was now in possession of the Lease Agreement executed between the Petitioner and the 1st Respondent on 1st August 2022.

13. At Clauses h, l and p of the Lease Agreement, the parties agreed as follows:

“h. The Lessee shall not erect any structures in the premises without the consent of the Lessor;

- I. The Lessee shall not make any alterations or additions to the premises or drive any nails, screws, bolts, wedges or other fasteners in the floors, walls, doors or ceiling without the consent of the Lessor in writing; and**
- p. The Lessee shall not sublet the said premises during his period of term.”**

14. It was self-evident that the 1st Respondent had contravened those terms of the lease. That must explain his failure to respond to this application. The 1st Respondent had not only sublet the premises to the 2nd Respondent but the 2nd Respondent had gone ahead, from her own admission, to construct a two storey structure and to excavate the premises.
15. Arising from the foregoing, I was persuaded that the Petitioner has demonstrated a clear and unmistakable right which is directly threatened by the acts of the Respondents. The 1st Respondent had not only acted in contravention of the Lease which has since expired but the 2nd Respondent had on the basis of purported misrepresentations made to herself

trespassed onto the property and was now engaged in acts that can only damage or waste the property.

16. In the circumstances herein, I am persuaded that the Petitioner stands to suffer loss and damage that could not be adequately compensated by an award of damages. It was further evident to me that the balance of convenience tilts in her favour as the registered proprietor of the premises the Lease between herself and the 1st Respondent having expired.

17. In the premises, I find merit in the Motion dated 13th February 2025 and I allow the same in terms of prayers 4 and 5 thereof with costs.

Ruling dated, signed and delivered in open court and virtually at Mombasa this 11th day of December, 2025

.....
J.O. OLOLA
JUDGE

In the presence of:

- a) Ms. Firdaus Court Assistant.
- b) Mr. Kioko Advocate for the Petitioners
- c) Mr. Bunde Advocate the 2nd Respondents