

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MALINDI
ELCLCOS E001 OF 2024

KAHINDI THOYA SHANGWE & 21 OTHERS
PLAINTIFF

PISGAH LTD & ANOTHER
DEFENDANT

RULING

1. The application dated 10th September 2025 is seeking the following orders:
 - a.Spent;
 - b. That the honorable court be pleased to join the proposed intended 3rd respondent Mwanahamisi Hassan as the 3rd respondent in this suit;
 - c. That pending the *inter partes* hearing and determination of the application the court do issue a temporary injunction restraining the 1st respondent and the intended 3rd respondent by themselves or their agents from trespassing into occupying or continue with the construction of the permanent building on all their personal of land known as Portion Number 528 Group 6816 File Number Lt 32 Folio 744/18 File No 36099 or interfering with a suit property in any manner whatsoever;
 - d. (Same as number three above);
 - e. That pending the hearing and determination of this suit the court do issue a temporary injunction restraining the 1st respondent and the intended 3rd respondent by themselves or their agents from trespassing into occupying or continue with the construction of the permanent building on all their personal of land known as

Portion Number 528 Group 6816 File Number Lt 32 Folio 744/18 File No 36099 or interfering with the suit property in any manner whatsoever;

- f. That this court do make such consequential orders issue such writs and directions as it may deem appropriate to restrain the 1st respondent and the intended 3rd respondent by themselves or agents from further violating threatening and or breaching the applicants' rights and fundamental freedoms;**
- g. Cost of this application be provided for.**

2. The application, which is supported by the sworn affidavit of the 1st applicant, is premised on the following grounds: the applicants have discovered that the 1st respondent in total disregard of their rights clandestinely disposed of the suit land to the intended 3rd respondent through a sale agreement dated 25th September 2023, and the intended 3rd respondent has without regard to the applicants claim over the suit land has commenced construction of a permanent structure thereon which, to the applicants, is premeditated to defeat the applicants' legitimate claim and thus frustrate the due determination of the suit, the actions of the respondent and the intended 3rd respondent will occasion the applicants irreparable harm and substantial injustice; that the disposal of the suit land was concealed from the applicants and it has only recently come to light and they deserve the court's protection.
3. The 1st respondent replied to their application wide their affidavit of **Mercy Wanjiku Gachiengo**, director of the 1st respondent, dated 6th November 2025 and whose gist is as follows: **Plot Number 528 Group 6816 Malindi Title Number Lt3240 of 744 File 3699** belongs to the 1st respondent and the applicants now claim adverse possession to the same. The applicants lack *locus standi* in view of **Order 1 Rule 13** which is couched in mandatory terms that a written authority should be filed; that the claim does not meet the essentials of adverse possession. The applicants do not reside in the property and have nothing to show that they have been in actual occupation use and enjoyment of the suit land. There is erected on the suit property a one story three-bedroom flat and a two-bedroom servant quarters,

three boreholes and a well which still exist and of which Caxton Katana (the ninth applicant,) was once a foreman at the site.

4. The building has been leased to tenants. The 1st respondent has subdivided the property to five plots each measuring 50 ft by 100 ft. The suit property has been in exclusive use, possession and ownership of the 1st respondent and after subdivision, the company entered into an agreement with the intended 3rd respondent with respect to one of the subdivisions known as **plot number 64**, a portion measuring 50 by 100 ft. The 1st respondent had engaged a village elder **John Sanga Mwangala** to act as it's caretaker of the suit property and the developments thereon.
5. The application was disposed of by way of written submissions. Only the Applicants and the 1st respondent filed their submissions.
6. The applicants' submissions are dated 13th October 2025. Citing **Giella Versus Cassman Brown & Company Limited 1973 EA 358 Mrao versus First American Bank of Kenya Limited and 2 others 2003 eKLR** the Applicants submitted that they have established a *prima facie* case; that by an agreement for sale the 1st respondent, fully aware of the applicants' claim, fraudulently sold and transferred the suit land to the Intended 3rd Respondent; that their right is protected by **Article 40** of the Constitution and the respondents' actions amount to unlawful deprivation of land rights. They also stated that they stand to suffer irreparable harm if the respondents are allowed to continue with construction and occupation and that once the land is developed its character will be permanently changed to rendering a judgment in favor of the applicants to be hollow. They state that monetary compensation would not be adequate to redress the deprivation of land ownership or the destruction of what they deem to be their ancestral property. They cite the **Kenya Commercial Finance Company Limited Versus Afraha Education Society 2001 Volume 1 EA 86** where the court stated that once land changes ownership or is permanently altered, damages cannot adequately compensate the aggrieved party. They also maintained that the balance of convenience tilts in favour of maintaining the *status quo* of the suit property pending determination of the suit; that the respondents will suffer no prejudice if they are restrained temporarily while for the applicants, they risk total loss of their claim and interest if the injunction is denied.
7. The 1st respondent's submissions are dated 11th November 2025. It states that the applicants have not met the threshold for the injunctive

reliefs sought and they give reasons as follows: citing **Order 40**, they state that in the instant case, the applicants in their attempt to justify the granting of the injunctive orders have struggled to put forth a few justifications which fall short of the three pronged test in **Giella Vs Cassman Brown (supra)** and **Paul Gitonga Wanjau Versus Gathuthi Tea Factory Company Limited and Two Others 2016 eKLR**; that there is no *prima facie* case with probability of success; that there is not an iota of evidence placed before the court by the applicants demonstrating that they would suffer irreparable injury which cannot be adequately compensated by damages if they injunctive orders are not granted; that even if the court is in doubt, the balance of convenience does not tilt in favor of the applicants at all. The 1st respondent avers that ownership is determined at the trial, and thus granting an injunctive order to persons considered as strangers to the suit land would the floodgates for any person without interest to rush to court and obtain injunctive orders; that on the other hand, no possible amount of damages could compensate the 1st respondent for the violation of their constitutional rights to property under Article 40 of the Constitution and the injunctive orders are therefore not deserved. The case of **Robert Mugo wa Karanja Versus Ecobank Kenya Limited and Another 2019 eKLR** is also relied on by the 1st respondent.

ANALYSIS AND DETERMINATION.

8. The issue arising for determination in the present application is whether the application has attained the threshold for the grant of orders of injunction sought. In the *locus classicus* case of **Giella Vs Cassman Brown (supra)** a three pronged test was laid by the court, which is still applicable to date, for the determination as to whether interim injunction ought to be granted pending hearing and determination of a suit. In that case it was stated as follows:

“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 be adequately compensated by an award of

damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

9. Therefore, the test is as to whether:
 - a. The applicant has established a *prima facie* case with probability of success;**
 - b. The applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages; and**
 - c. If the court is in doubt regarding the first two limbs of the test, then it ought to determine the application on a balance of convenience.**
10. This court has considered the application before it. I have not noted any opposition to the grant of **Prayer No 2** thereof and I grant the same and I order on a preliminary basis that the intended 3rd respondent Mwanahamisi Hassan is hereby joined to the present suit as the 3rd respondent forthwith.
11. As to whether the applicants have demonstrated a *prima facie* case exists, the affidavit in support of the application is threadbare of any evidence as to whether the applicants are in occupation of the suit land or not. They do not demonstrate any developments on the suit land which have been erected thereon by them. On the other hand, the 1st respondent has brought to court evidence of its developments on the suit land. It is clear that in the circumstances no *prima facie* case has been established by the applicants.
12. Regarding irreparable loss that can not be compensated by way of damages the court notes that there being no proof of the developments of the applicants on the suit land, there is no risk of such loss.
13. However, the suit is already before it, and the court is of the view that to grant every party a chance to prove their claims, the suit land ought to be preserved as it is as at the date of this ruling so that its character should not be altered. In disposing of the application dated 10th September 2025 therefore, the court therefore orders that the *status quo* prevailing with regard to the suit land as at the date of this ruling shall be observed by all the parties pending the hearing and determination of the suit.

14. The parties shall ensure compliance with the Civil Procedure Rules, with the plaintiff enjoying the **first 30 days** from the date of this ruling and the defendants taking up the **30 days thereafter** for the filing of all their respective trial bundles, witness statements and lists and the matter shall be mentioned on **18th February 2026** for confirmation of compliance and issuance of a hearing date. Parties shall strictly abide by the timelines issued herein to ensure an expedited end to this litigation.

Dated, signed and delivered at Malindi on this 16th day of December 2025.

A rectangular box containing a handwritten signature in blue ink, which appears to read 'Mwangi Njoroge'.

**MWANGI NJOROGE
JUDGE, ELC, MALINDI**