

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELCLC NO. E068 O 2025.

JUDITH AKINYI NJOGA PLAINTIFF/APPLICANT

VERSUS

SHABAN OPIYO KASSIM DEFENDANT/RESPONDENT

RULING

This ruling is in respect of the Notice of Motion application dated 4th November 2025 seeking for orders that; -

- i) Pending the hearing and determination of the suit, the court be pleased to issue an order of temporary injunction restraining the defendant/respondent, his servants, agents and employees from entering, remaining upon, cultivating, constructing on or in any other manner interfering with the plaintiff's quiet possession, occupation and enjoyment of land parcel No. KISUMU MUNICIPALITY/BLOCK 2/130
- ii) Pending the hearing and determination of the suit the court be pleased to stay proceedings in Land Acquisition Tribunal Case No. E099 of 2025 Shaban Opiyo Kassim -vs- Principal Secretary State Department of Lands & others as the land in question for which the respondent seeks compensation allegedly includes and encompasses the applicant's suit property as the issue of ownership must first be determined by this honourable court.

- iii) The OCS Dago Police Station be and is hereby directed to enforce compliance with the orders of this honourable court.
- iv) Costs of the applications be provided for.

The application was supported by the contents of the Supporting Affidavit sworn by the applicant.

The application was opposed vide the grounds of opposition contained in the Statement of Grounds of Opposition dated 21/11/2025- that the property which the plaintiff describes as Kisumu Municipality Block 2/130 does not exist on the ground, on the Registry Index Map for Kisumu Municipality Block 2 and on the Cadastral Map for Kisumu Municipality Block 2. That the sale agreement relied upon by the plaintiff is neither dated nor registered and is therefore not admissible. That there is no proof of payment of the alleged purchase price of ksh 7,000,000/=.

That the documents provided by the plaintiff to prove how she acquired the property such as the letter of allotment dated 7th January 1999 which does not refer to the suit property.

That the right to protection of property under article 40 of the Constitution does not extend to property that has been unlawfully acquired. That the plaintiff had made an application to be joined as a party in Land Acquisition Tribunal case No. E099 of 2025. That as at the time the plaintiff obtained the land which she describes as Kisumu Municipality Block 2/130 from Walter Ominde Ogutu, the defendant had obtained an order dated 15/7/2025

which restrained Walter Ominde Ogutu from trespassing onto, encroaching entering occupying, fencing, developing, leasing, selling, disposing of or in any other manner whatsoever interfering with the suit property. That the actions of the plaintiff and her accomplices leading to her possession of the certificate of lease are void and as such are in law a nullity.

The application was heard orally on 24/11/2025.

I have considered the application, the grounds of opposition and the oral submissions made.

The first relief sought is an interim order of temporary injunction. The grounds for grant of interlocutory injunction were set out in the case of Giella vs Cassman Brown Co. Ltd (1973) 358 that the applicant must establish a *prima facie* case with a probability of success, an interlocutory injunction will not normally be granted unless the applicant would suffer irreparable injury which would not adequately be compensated in damages and that when the court is in doubt, it will decide the application on a balance of convenience.

On what amounts to a *prima facie* case, the Court of Appeal in Mrao Ltd vs First American Bank Kenya Ltd & 2 Others [2003] eKLR 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.”

The grounds upon which the present application was brought are that the plaintiff is the registered owner of the suit land known as KISUMU MUNICIPALITY BLOCK 2/130 which he bought from one Walter Ominde Ogutu at Ksh 7,000,000/= . That the Defendant has without justification, trespassed onto the suit property and threatened the applicant and her agents with violence thereby preventing the applicant from enjoying her property. That the respondent’s continued presence on the suit land and threats have instilled fear and insecurity leading to interference with the applicant’s development plans. That the respondent has no claim to the property. That the plaintiff stands to suffer irreparable loss and damage if the orders sought are not granted so as to maintain the status quo. That the balance of convenience tilts in favour of the applicant who merely seeks to protect her rights pending hearing of the suit. To demonstrate her ownership of the land, the applicant annexed to the Supporting Affidavit a copy of Certificate of Lease dated 28th July 2025 in her name for Land parcel No. KISUMU MUNICIPALITY/BLOCK 2/130 for a term of 99 years running from 9th November 1999, a land sale agreement and certificate of official search dated 1st October 2025 showing that as at the said date the suit land was registered in the name of the applicant.

The Respondent's contention is that the suit land as described by the applicant does not exist on the ground or on the maps. There was no response by the applicant to this contention.

The court also notes from a copy of the complaint before the Tribunal which is annexed to the application that while the matter before the Land Acquisition Tribunal concerns land parcel No. Kisumu/Kogony/2688 measuring 6.5144 ha (16.0974) acres, the suit and the application herein concern land parcel No. Kisumu Municipality Block 2/130 measuring 0.5 Ha as shown in the certificate of official search annexed to the application. These are 2 different parcels of land. And although in paragraph 7 of the Supporting Affidavit the applicant claims that the land the subject matter before the Tribunal allegedly includes and encompasses her property, no evidence has been exhibited before this court to demonstrate this. There is no evidence, at least *prima facie*, that the land the respondent is alleged to have interfered with is the suit land herein.

Without demonstrating the nexus between the suit land herein and the land the subject matter of the complaint before the Land Acquisition Tribunal, I find that the applicant has not established a *prima facie* case with a probability of success.

Guided by the decision in Nguruman Limited vs Jan Bonde Nielson & 2 others [2014] eKLR that all the 3 conditions set in Giella vs Cassman Brown are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially,

I find that the applicant having failed to prove the first condition, the court need not interrogate whether the applicant will suffer irreparable injury if the order sought is not granted or the issue of the balance of convenience. The application for temporary injunction therefore fails.

The other relief sought is for an order of stay of execution of the proceedings before the Land Acquisition Tribunal. In the case of *Kenya Wildlife Services -vs- James Mutembei (2019)*eKLR the court held that stay of proceedings should not be confused with stay of execution pending appeal. That stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. That the test for stay of proceedings is higher and stringent.

In the present case, the applicant having failed to establish a nexus between the suit land herein and the land the subject matter of the proceedings sought to be stayed, the court finds no ground for granting an order of stay of proceedings.

The court finds that the application lacks merit and dismisses it. Each party to bear own costs of the application.

Orders accordingly.

Ruling dated and signed at Kisumu, delivered virtually this 20th day of January 2026.

E. ASATI,

JUDGE.

In the presence of:

Maureen -Court Assistant.

Mulwa for the Plaintiff/Applicant

Kojo for the Defendant/ respondent