



Mokaya & 16 others v Emco Billets and Steel Limited; Co-operative Bank of Kenya Limited (Interested Party) (Environmental and Land Originating Summons E038 of 2025) [2026] KEELC 221 (KLR) (21 January 2026) (Ruling)

Neutral citation: [2026] KEELC 221 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E038 OF 2025
MN KULLOW, J
JANUARY 21, 2026**

BETWEEN

DANIEL NYANCHOGA MOKAYA & 16 OTHERS & 16 OTHERS PLAINTIFF

AND

EMCO BILLETS AND STEEL LIMITED DEFENDANT

AND

THE CO-OPERATIVE BANK OF KENYA LIMITED INTERESTED PARTY

RULING

1. The matter is in relation to suit property LR NO 12034/3(I.R 195069). The applicant has filed an originating summons application dated 28th June 2025 for orders of adverse possession together with a notice of motion application dated an even date. The notice of motion application sought for injunctive orders to restrain the defendants from interfering with the suit premises until the determination of the application. The court on the 2nd July 2025 issued orders in favour of the applicant where the temporary orders were issued. It is on the basis of the said orders, that the notice of motion application dated 1st October 2025 before this court was filed seeking to have the orders of 2nd July 2025 discharged and set aside. The application was supported by an affidavit sworn by Diamond Hashsm Lalji where he deponed that the injunctive orders were obtained through concealment of material facts therefor misleading the court,
2. Prayers in the application
 1. Spent



2. The ex parte interlocutory injunctive orders issued by the honourable court in favour of the plaintiffs on the 2nd July 2025 be discharged, varied, and or set aside suo moto and the plaintiffs application dated 28th June 2025 be struck out summarily
3. The defendant be condemned to bear costs of the application

Reply

3. The plaintiff's in response filed their replying affidavit sworn by Daniel Nyanchoga Mokaya sworn on the 15th October 2025 and further affidavit on the 21st October 2025 denying concealment of facts and insisting that the injunctive orders were necessary as the defendant was in the process of subdividing the suit property which was the substratum of the suit. That the issues raised in the application were irrelevant to warrant the court to set aside the injunctive orders
4. The application was canvassed by way of written submissions with the applicant filing its submissions dated 12th November 2025 whereas the respondent had not filed its submissions as at the time of drafting this opinion.

Issues raised in the submissions

1. Whether the interlocutory injunctive orders issued on 2nd July 2025 should be discharged
2. Who should bear the costs?
5. From the issues raised the sole issue for determination is whether the applicant has established valid grounds to set aside the orders of injunction issued on the 2nd July 2025
6. After an order of injunction has been issued, the party subject to the injunction can apply to the Court to vary, discharge or set it aside. Courts have power to discharge, vary or set aside any interlocutory order granted under Order 40. In particular, Order 40 Rule 7 provides that:
 - . Order for injunction may be discharged, varied, or set aside [Order 40, rule 7]Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.”
7. The above provision does not stipulate the conditions under which an order of injunction may be discharged, varied, or set aside. Courts have through case law developed and prescribed the conditions to be considered before an injunction is discharged, varied or set aside. In the case of *Ochola Kamili Holding Limited vs Guardian Bank Limited* (2018) eKLR for instance, the court stated that:-
8. The court is alive to the fact that interlocutory injunction, being an equitable remedy, would be discharged upon being shown the person's conduct with respect to matter pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter and especially where a party upon getting injunction orders sits on the matter and uses the orders to the prejudice of the opponent. The orders of injunction are mainly intended to preserve the subject matter with a view to have expeditious determination but not to oppress another party nor should an injunction be used to economically oppress the other party, or to deny justified repayment of outstanding loan. That once such a post injunction behaviour is exposed it would in my view be a ground to discharge an injunction because the order obtained would be an abuse of the purpose for which the injunction was granted. No court would allow its orders to be used to defeat the ends of justice”



9. To further address the issue at hand, I would place reliance on what was stated by Justice Munyao Sila in *Filista Chemaiyo Sosten vs Samson Mutai* (2012) eKLR, in which he stated;
10. In *James Juma Muchemi & Partners Ltd vs Barclays Bank of Kenya & Another* (Nairobi HCCC No.339 of 2011 (2012) eKLR, my brother Mabeya J, expressed the view that the jurisdiction under Order 40 Rule 7 was discretionary and like in all other discretions, the same must be exercised judiciously although there are no firm rules of law or practice that have been set down. In *Ragui vs Barclays Bank of Kenya* (2002) 1 KLR 647, Ringera J stated that: -
- “It is settled law that if an interlocutory injunction has been obtained by means of misrepresentation or concealment of material facts, the same will on the application of the party aggrieved be discharged”.
11. I hold the view that the discretion under Order 40 Rule 7 ought to be sparingly used so as to avoid a situation where it would appear as if the same is being used as a tool for appeal. This is because before issuing the injunction, the court must have been satisfied that it was necessary to grant the same. If it were not satisfied, the court would not have issued the injunction in the 1st place. However, if the injunction was obtained by concealing facts which if put to the judge in first instance would have affected his judgment on whether or not to give the injunction, then a court can be inclined to vary or vacate the injunction in light of the new facts. So too if the circumstances of the suit have radically changed so that it is no longer necessary to have the injunction.”
12. The question then left to answer is What then should the court consider when faced with an application for setting aside an injunction? In the case of *Atlas Copco Customer Finance AB vs Polarize Enterprises* (2016) eKLR, the court distilled the factors that may be considered when faced with a question of discharge, varying or setting aside of an injunction. The court held as follows:
- it is now trite that some of the factors that guide the exercise of the courts' discretion in this area of law are, but not limited to:
- a. proof that the injunction was obtained by concealment of facts which if presented would have worked against the granting of the injunction;
 - b. a radical change in the circumstances of the suit, such that it is no longer necessary to have the injunction;
 - c. proof that the general conduct of the holder of injunction is such that the court is impelled to discharge the injunction, for instance, where the injunction is being used to intimidate the Defendant or achieve an ulterior purpose;
 - d. proof that the sustenance of the injunction would cause an injustice.”
13. In the present case the applicant avers that the orders were issued on concealment of facts, which if the court knew, would not have granted the orders which have been listed in the application are as below
- i. That the applicant and the plaintiffs had entered into a sale agreement dated 30th January 2025 that sort to regularize the stay on the suit property and hence based on this, there is no way the applicant could go against the agreement they had committed to
 - ii. That the subdivision process that the plaintiff wants to prevent to be happened way before the orders of 2nd July 2025 were issued hence there was no event to be restrained as it had happened already.



- iii. That the plaintiffs failed to let the court know that the applicant had a steel factory operating on 26.6774 acres which formed part of the suit property whereas the that the plaintiffs claimed possession over 45.99 acres and the orders of injunction would prevent the applicants from lawful occupation of their property.
 - iv. That the plaintiff had not met the threshold for claiming adverse possession and hence the orders for the interlocutory injunction were not supported
14. The plaintiffs in their replying affidavit dated 15th October 2025 have not controverted the issues as raised above. If anything, the deponent confirms that indeed there is a steel factory on the suit property. The issue of them entering into negotiations through a sale agreement has not been denied either which points out to say that the same is true.
15. The language of the deponent when it comes to the issue of acreage which the claim as in the replying affidavit is dismissive where in fact the issue of acreage is very vital as it points out to the fact that there are two sections on the suit property, one being occupied by the plaintiffs and the other by the applicant. The failure to disclose the correct acreage and real position on the ground, can be said to be misleading as court in granting the injunction did so in relation to the whole of the suit property not conscious that it was infringing on the 26.6774 acres legitimately occupied by the applicant.
16. Having submitted as above and being guided by the above listed case laws, I hold the view that indeed there was concealment of facts to the court which if facts had been in the knowledge of the court, the reasoning of the court would be different.

Conclusion:

17. The upshot of the foregoing is that the applicant's application is merited and the ex parte interlocutory injunctive orders are hereby set aside.

Each party to bear their costs.

It is so ordered!

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 21ST DAY OF JANUARY, 2026.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

Mr. Omuga for the Applicant

Mr. Okeyo Kevin holding brief for Wanjohi for the Defendant

Mr. Oderi for the Interested Party

Philomena W. Court Assistant

