



REPUBLIC OF KENYA



**Musembi v Nazziwa Investments Limited & another (Environment and Land
Case E392 of 2025) [2026] KEELC 642 (KLR) (6 February 2026) (Ruling)**

Neutral citation: [2026] KEELC 642 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE E392 OF 2025
TW MURIGI, J
FEBRUARY 6, 2026**

BETWEEN

EUNICE MBINYA MUSEMBI PLAINTIFF

AND

NAZZIWA INVESTMENTS LIMITED 1ST DEFENDANT

GRACE KERUBO OMWEGA ALIAS GRACE KERUBO

ORIOKI 2ND DEFENDANT

RULING

1. By a Notice of Motion dated 1st August 2025, brought Articles 40 and 159 (2) (d) of *the Constitution* of Kenya, Section 13(2) and 13(7) of the Environment and *Land Act*, Section 1A & 3A of the *Civil Procedure Act*, Order 51 Rule 1 and Order 3 of the Civil Procedure Rules, the Plaintiff/Applicant seek the following orders:
 - i. Spent
 - ii. Spent
 - iii. Spent
 - iv. That an order do issue compelling I&M Bank K to transfer Kenya Shillings Sixty Five Million (Kshs. 65,000,000/=) to an interest-earning joint account to be held between the Plaintiff/Applicant and the Defendants' Advocates pending the hearing and determination of the main suit.
 - v. That a temporary injunction do issue against the Defendants, their servants, agents and their aides from selling, transferring or in any way dealing with Villa No. 3 erected on L.R.No. 3734/1444 (Original L.R.No. 3734/373) in Kileleshwa Area in Nairobi County pending the hearing and determination of the suit.



- vi. That the costs of this application be provided for.
2. The application is based on the grounds appearing on its face together with the supporting affidavit of Eunice Mbinya Musembi, sworn on even date.

The Applicant's Case

3. The Applicant averred that she entered into a sale agreement dated 1st August 2024 with the Defendants for the purchase of Villa No. 3 erected on L.R. No. 3734/1444 (Original No. 3734/373). She further averred that the agreement was terminated through acknowledged completion notices issued on 15th and 16th January 2025, following alleged misrepresentation of material defects in the property, denial of access for inspection, and the Defendants' failure to remedy the disclosed defects.
4. She deposed that prior to termination, efforts to engage the Defendants or their advocates proved futile, heightening her apprehension of fraudulent conduct. She averred that before termination, she had paid a total of Kshs. 65,000,000/= towards the purchase price into an account designated in the agreement, which the Defendants acknowledged receipt but refused to refund following the termination of the agreement, despite repeated demands.
5. She further deposed that her concerns were compounded by communications from the Defendants' advocates suggesting that the 2nd Defendant was not the vendor in the transaction, and by the Defendants' re-advertisement of the suit property for sale on 13th January 2025 before the dispute was resolved.
6. The Applicant is apprehensive that the Defendants may dissipate the funds while continuing to market the property after the freezing orders expire, which could cause her irreparable harm. Based on the foregoing, she urged the Court to allow the application as prayed.

The Defendant's Case

8. The Defendant filed Grounds of Opposition and a replying affidavit, both dated 12th August 2025, opposing the application. She contended that the application is based on falsehoods and misrepresentations and constitutes an abuse of the Court process. She also denied the Applicant's claim that she was deceived into entering the transaction.
9. She acknowledged that the parties had entered into a sale agreement for the subject property, which stipulated a ninety-day completion period, with the completion date set for October 31, 2024.
10. She averred that prior to the transaction, the Applicant and her husband were her friends and neighbours in Kaputei Estate, and had visited the property on several occasions before the agreement was executed.
11. She relied on clause 12 of the sale agreement, which acknowledged that the Applicant had inspected the property and taken notice of its condition before execution. She denied receiving any notice from the Applicant identifying alleged breaches that required rectification under the agreement.
12. In response to the grounds for termination, the Defendant contended that the sale agreement did not permit termination for alleged misrepresentation, denial of access, or refusal to remedy defects. She further deposed that correspondence between the parties, including letters and WhatsApp messages, did not support the Applicant's allegations.
13. She maintained that the purported termination was invalid as it was grounded on matters not contemplated by the agreement.



14. She contended that the Applicant had acted in bad faith by rejecting remedial measures recommended in the Applicant's own structural engineer's report, which, according to the Defendant, did not conclude that the property was uninhabitable. The Defendant further averred that the Applicant had prematurely characterized the property as uninhabitable before the engineer's report was finalized.
15. She denied that the 2nd Respondent was a party to the sale agreement, stating that the agreement was solely between her and the Applicant. She also denied any knowledge of or involvement in the alleged re-advertisement of the property for sale.
16. It was further deposed that the Applicant had failed to fulfill its obligation to pay the full purchase price as stipulated in the agreement. The Defendant maintained that the Applicant's allegations were fabricated and intended to evade her contractual responsibilities.
17. The Defendant maintained that the application was based on a misrepresentation of facts and sought to rescind a valid agreement outside the framework agreed upon by the parties, and urged the Court to dismiss it.
18. The application was canvassed by way of written submissions.

The Plaintiffs Submissions

19. The Plaintiff filed her submissions dated 7th November 2025.
20. Counsel submitted that the Plaintiff had satisfied the requirements for the grant of an injunction set out in *Giella v Cassman Brown* (1973) EA 358 and affirmed by the Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 others* (2014) eKLR and in *Kenya Commercial Finance Co. Ltd v Afraha Education Society* [2001] 1E.A. 86.
21. Counsel submitted that the Plaintiff had paid approximately 90 percent of the purchase price, amounting to Kshs. 65 million, yet neither had possession of the property nor had the purchase price been refunded.
22. Counsel contended that the Defendants retained both the property and the money paid and were in the process of selling the property to third parties, thereby exposing the Plaintiff to irreparable harm if the orders sought were not granted. Based on the foregoing, Counsel submitted that the Plaintiff had established a prima facie case, would suffer irreparable harm, and that the balance of convenience favoured the preservation of the status quo.
23. Counsel further asserted that the purpose of a temporary injunction is to preserve the subject matter of the dispute and regulate the parties' conduct pending the determination of the suit, thereby ensuring that justice is not rendered illusory. Counsel contended that the doctrine of *lis pendens* applies and that, without interim protection, the proceedings would be rendered futile.
24. In the alternative, Counsel urged the Court to order that the deposit be held in a joint interest-earning account maintained by the parties' advocates pending the determination of the suit.
25. Regarding costs, Counsel invoked Section 27(1) of the *Civil Procedure Act* to submit that costs follow the event. It was contended that the Plaintiff, having been compelled to approach the Court to safeguard her interests, is entitled to recover the costs incurred in the application.

The 1st And 2nd Defendants' Submissions

26. The 1st and 2nd Defendants filed their Submissions dated 20th November 2025.



27. On behalf of the 1st and 2nd Defendants, Counsel submitted that the application is without merit due to material non-disclosure and misrepresentation regarding the circumstances surrounding the execution of the sale agreement, particularly the allegation that the Plaintiff and her agents were denied access to inspect the property before the contract was executed.
28. Counsel submitted that clause 12 of the sale agreement expressly acknowledged that the Plaintiff had inspected the property and accepted its condition before execution. This position was further supported by evidence that the Plaintiff and her husband visited the property on several occasions before signing the agreement, including a WhatsApp message in which the Plaintiff thanked the Defendant for hosting them. It was contended that no evidence had been produced showing that the Plaintiff ever sought and was denied access to the property before execution of the agreement.
29. Counsel further submitted that the allegation that they refused to address defects was false, contending that the record shows the Defendants' proposals to investigate and remedy the concerns raised were rejected by the Plaintiff, who instead sought to terminate the agreement. Counsel further submitted that the Plaintiff's own engineer's report did not conclude that the property was structurally unsound but instead recommended further investigations, which the Plaintiff declined to pursue.
30. Counsel contended that the dispute centered on the Plaintiff's failure to pay the purchase price by the agreed completion date, and that the application was an attempt to evade contractual obligations by recasting the matter as one of misrepresentation and fraud. Counsel further argued that no full and frank disclosure was made when the interim freezing orders were obtained, including the Plaintiff's own breach of the agreement. To support this point, Counsel relied on *Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others-Civil Appeal No. 36 of 1996* and *Owners of the motor vessel Lilian v Caltex Oil (Kenya) Ltd-Civil Appeal No. 50 of 1989 (KE CA 48(KLR))*.
31. Regarding preservation of funds and restraint against dealing with the property, Counsel submitted that, having repudiated the contract, the Plaintiff cannot restrain the Defendants from dealing with the property. It was further argued that the Plaintiff had no legitimate interest in the property, particularly given her assertion that it was uninhabitable, and that the funds paid had already been preserved by court orders. To support this point, Counsel relied on the case of *Ashworth vs Royal National Theatre Board Ltd (1985) eKLR*, where the court stated that a party who repudiates a contract cannot seek to restrain the innocent party from acting on that Application.

Analysis And Determination

32. Having considered the application, the affidavits on record, and the rival submissions, the following issues arise for determination
 - a. Whether mandatory injunction orders should issue; and
 - b. Whether an injunction should issue with respect to the suit property.
33. Regarding the first issue, the Plaintiff seeks an order compelling I&M Bank Kenya to transfer Kshs. 65,000,000/= into an interest-earning joint account held in the names of the parties' advocates, pending the hearing and determination of the suit.
34. The nature of the order sought is a mandatory injunction to preserve the monetary subject matter of the dispute.



35. The principles governing the grant of a mandatory injunction at the interlocutory stage are well settled. In *Maher Unissa Karim v Edward Oluoch Odumbe* [2015] eKLR, the Court of Appeal held that:

'The test for granting a mandatory injunction is different from that enunciated in the *Giella v Cassman Brown* case, which is the *locus classicus* case of prohibitory injunctions. The threshold in mandatory injunctions is higher than in the case of prohibitory injunctions, and the court of appeal in the case of *Kenya Breweries Ltd v Washington Okeyo* [2002] EA 109 had occasion to discuss and consider the principles that govern the grant of mandatory injunctions. The Court of Appeal held that the test for the grant of a mandatory injunction was correctly stated in Vol 24 of *Halsbury's Laws of England* 4th Edition paragraph 948, which states as follows;

'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 simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application.'

36. Similarly, in *Kenya Breweries Limited v Washington Okeyo* [2002] 1 EA 109, the Court of Appeal held that:

"Moreover, before granting a mandatory 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 on a different and higher standard than was required for a prohibitory injunction."

37. It is common ground that the Plaintiff and the 1st Defendant executed a sale agreement dated 1st August 2024 for Villa Number 3 on LR No. 3734/1444 (Original No. 3734/373) at a purchase price of Kshs. 75,500,000. It is not disputed that payments under the agreement were to be made into Account No. 03001028052110 at I&M Bank Kenya, held in the name of the 2nd Defendant.

38. The Defendants contend that the agreement did not permit termination on the grounds asserted by the Plaintiff. The Court notes that the agreement contained provisions addressing termination and default, particularly Clauses 15 and 20, which set out notice mechanisms and consequences when a party alleged to be in breach fails to remedy the default within the stipulated period. Whether those provisions were properly invoked, complied with, or applicable in this case can only be determined during the trial.

39. The Plaintiff has placed before the Court correspondence from her advocates dated 15th January 2025, drawing the Defendants' attention to defects identified by engineers and invoking the termination mechanism under Clause 15. A further letter dated 16th January 2025 formally issued a twenty-one-day completion notice and demanded a refund within thirty days of its expiration. Subsequent reminders were issued on 11th March 2025 and 9th April 2025.

40. The Plaintiff also produced documentary evidence acknowledging receipt of payments, including a letter dated 15th August 2024 confirming receipt of Kshs. 10,000,000. It is not disputed that the total sum of Kshs. 65,000,000 was paid pursuant to the agreement.

41. The Defendants challenged the Plaintiff's assertions regarding the condition of the property and contended that the Plaintiff was attempting to evade the transaction. At this juncture, the issue is not



whether the Plaintiff was entitled to terminate the agreement, but whether the funds paid are at risk of dissipation pending trial.

42. It is not in dispute that the sum of Kshs. 65,000,000/= is the subject matter of the suit. If the funds are released to or remain under the unilateral control of one party, there is a real risk that the substratum of the suit may be lost, thereby rendering any eventual judgment nugatory.
43. The order sought merely places the disputed funds in neutral custody in an interest-earning joint account, thereby preserving them for whichever party ultimately prevails. Such an order is reversible and does not prejudice the Defendants beyond a temporary loss of control over the disputed funds.
44. Based on the foregoing, I find that the Plaintiff has met the threshold for the grant of a mandatory interlocutory order.
45. Regarding the second issue, the law governing applications for injunction is premised under Order 40 Rule 1 of the Civil Procedure Rules 2010, which provides that:
 1. 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 a 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.

46. The principles applicable in an application for injunction were set out in the case of *Giella Vs Cassman Brown & Co Ltd* 1973 EA 358 as follows:

First, the 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 harm which would not be adequately compensated by an award of damages.

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

47. The first issue for determination is whether the Applicant has made out a prima facie case with a probability of success to warrant the grant of an injunction.

A prima facie case was defined by the Court of Appeal in *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* (2003) eKLR as follows;

“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.”



48. The Plaintiff asserts that the sale agreement was terminated and that her claim is limited to a refund of the purchase price and damages for breach of contract. She does not seek any proprietary relief regarding the suit property, such as specific performance, transfer, or possession.
49. Having pleaded termination of the contract, the Plaintiff has expressly disclaimed any subsisting contractual or equitable interest in the suit property. The dispute, as framed by the pleadings, is therefore no longer a rights-in-land dispute but a purely monetary claim arising from an alleged breach of contract.
50. In light of the foregoing, I find that the Plaintiff has not established a prima facie case with a probability of success
51. In an application for interlocutory injunction, the Applicant must satisfy the three conditions before an injunction is granted.
52. In the case of *Nguruman Limited Vs Jan Bonde Nielsen & 2 Others* [2014] eKLR, the Court of Appeal stated as follows: -

“...these are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... if the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If a prima facie case is not established, then irreparable injury and the balance of convenience need no consideration.

53. Having found that the Applicant has failed to establish a prima facie case with a probability of success, it will be immaterial to consider the other limbs that are to be considered in granting a temporary injunction. In so finding, I am persuaded by the holding in the case of *Commercial Finance Co. Ltd vs Afraha Education Society & Others*, C A Civil Appeal No. 142 of 1999, where the court held that:

“.....the judge should address himself sequentially on the conditions for granting an injunction instead of proceeding straight away to address himself on the third condition because where the Applicant has no registered interest in the land comprised in the title dispute and thereof has not demonstrated that it has a prima facie case with a probability of success, no interlocutory injunction would be available.”

54. Ultimately, the application dated 1st August 2025 partially succeeds in the following terms:
 - i. The prayer seeking a temporary injunction restraining the Defendants, whether by themselves, their agents or servants, from selling, transferring, charging, or otherwise dealing with the suit property is hereby dismissed.
 - ii. A mandatory order is hereby issued compelling I&M Bank Kenya Limited to transfer the sum of Kenya Shillings Sixty-Five Million (Kshs. 65,000,000/=) into an interest-earning joint account in the names of the advocates for the Plaintiff and the Defendants, to be held pending the hearing and determination of the suit.



- iii. The transfer of the said sum shall be effected within fourteen days from the date hereof, failing which the Plaintiff shall be at liberty to apply.
- iv. The Applicant is awarded costs of the application.

RULING DELIVERED DATED AND SIGNED THIS 6TH DAY OF FEBRUARY 2026

.....

T. MURIGI

JUDGE

In The Presence Of:

Chemutai for the Plaintiff/Applicant

Nyakundi holding brief for Ogeto for the Respondent.

