

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ELCLC No. E017 OF 2025

ANTHONY OSORO NYABWENDO 1ST
PLAINTIFF
ALFRED MOFFARD OMUNDI MICHIRA ALIAS
ALFRED M. MICHIRA 2ND
PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF KISII 1ST
DEFENDANT
HON. ATTORNEY GENERAL (SUED ON BEHALF OF
THE PRINCIPAL SECRETARY
DEPARTMENT OF PUBLIC WORKS) 2ND
DEFENDANT

RULING

1. The Plaintiffs moved the Court through Plaint dated 3rd June 2025 in which they averred that the First Plaintiff was the registered proprietor of the parcel of land known as Keroka Township/39B (the suit property) which he sold to the Second Plaintiff. That on 23rd May 2025, the First Defendant instructed her employees to demolish part of the suit property without any just cause.
2. The Plaintiffs therefore prayed for judgment against the Defendants jointly and severally for:

- a. *The Defendants be declared the trespassers/trespassed into plaintiff's property known as KEROKA TOWNSHIP/39B, without any right of colour or just cause.*
 - b. *That the demolition of part of the KEROKA TOWNSHIP/39B was illegal and irregular.*
 - c. *The plaintiffs are entitled to special, general and exemplary damages due to the defendants illegal and or unconstitutional acts tendered on 26th day of May, 2025.*
 - d. *That the costs of the suit/plaint be borne by the defendants.*
 - e. *Any other relief the court may deem fit to grant.*
3. Contemporaneously with the Plaint, the Plaintiffs filed Notice of Motion dated 3rd June 2025, which is the subject of this ruling. The following orders are sought in the application:
1. *[Spent]*
 2. *[Spent]*
 3. *THAT the Honourable court be pleased to grant temporary/interim injunction orders restraining the Respondents their Agents, servants and or employees from further trespassing and demolition of the applicants' property known as KEROKA TOWNSHIP/39B, pending hearing and determination of the substantive suit herein.*

4. THAT the costs of this application be provided for by the Respondents.

4. The application is based on the grounds listed on its face and is supported by an affidavit sworn by the Second Plaintiff. He deposed that the First Plaintiff was the registered proprietor of the suit property and that he purchased the suit property from the said First Plaintiff. That on 23rd May 2025, the Defendants, their employees and agents trespassed into the suit property without any notice and demolished part of a building which was under construction.
5. The Second Plaintiff added that he reported the issue to the police on 26th May 2025 and that on 27th May 2025, he received a notice dated 26th May 2025 from the First Defendant requiring him to demolish part of the property within 14 days, yet the suit property was not situated within the First Defendant's jurisdiction. He therefore urged the Court to intervene by granting the orders sought.
6. The First Defendant reacted to the application and the suit by filing Notice of Preliminary Objection dated 10th September 2025 and a replying affidavit sworn by Vincent Nyangwara, her Chief Officer, Department of Roads, Public Works and Transport.
7. The issues raised in the Notice of Preliminary Objection are that this Court lacks jurisdiction to determine Constitutional violations and that the mandate on those matters is with the

High Court pursuant to **Article 165 (3) (b)** of the **Constitution**, that the Plaintiff has not produced any title deed to prove ownership, that the Plaintiff encroached onto a public road reserve and that the suit offends **Section 13A** of the **Government Proceedings Act**.

8. This ruling is also on the Notice of Preliminary Objection.
9. Mr Nyangwara deposed in the replying affidavit that the structures which the Plaintiff erected encroached on a road reserve and were lawfully demolished, that the Plaintiffs had neither annexed any document proving ownership nor payment to concerned authorities. He added that the Plaintiffs had also not annexed any minutes from the First Defendant as proof of allotment.
10. Counsel appearing for the Second Defendant informed the Court that the said Defendant would not participate in the hearing of the application but would instead wait for the hearing of the main suit.
11. The Preliminary Objection and the application were canvassed together through written submissions. The Plaintiffs filed two sets of submissions: one dated 29th October 2025 and another dated 11th November 2025. Similarly, the First Defendant two sets of submissions: one dated 29th October 2025 and another also dated 29th October 2025.

12.I have carefully considered the Preliminary Objection, application, the affidavits and the submissions. The issues that arise for determination are whether the Preliminary Objection is merited and whether an interlocutory injunction should issue.

13.I will deal with the Preliminary Objection first. By its very nature, a valid preliminary objection should raise a jurisdictional issue. Jurisdiction is everything. Without it, the proceedings come to a certain end and the court cannot take any further step. See **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR** and **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR**.

14.The law on preliminary objections is clear enough. A preliminary objection must be on a pure point of law. The objection must be argued purely on the facts pleaded by the party against who it is raised. See **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**.

15.Not every objection amounts to a valid preliminary objection. As Sir Charles Newbold (P) lamented in **Mukisa Biscuit Manufacturing Co. Ltd** (supra), the widespread practice of raising what really does not amount to a valid preliminary objection must stop.

16. The objections that the First Defendant has raised are that this Court lacks jurisdiction to determine Constitutional violations and that the mandate on those matters is with the High Court pursuant to **Article 165 (3) (b)** of the **Constitution**, that the Plaintiff has not produced any title deed to prove ownership, that the Plaintiff encroached onto a public road reserve and that the suit offends Section **13A** of the **Government Proceedings Act**.

17. Determination of the issues of whether the Plaintiffs have proven ownership, whether that the Plaintiffs encroached onto a public road reserve and whether a notice was issued under **Section 13A** of the **Government Proceedings Act** all require the Court to receive and consider evidence. Thus, the objections raised on those points are not valid preliminary objections and are therefore dismissed.

18. On the other hand, the First Defendant's contention that this Court lacks jurisdiction to determine Constitutional violations and that the mandate on those matters is with the High Court pursuant to **Article 165 (3) (b)** of the **Constitution** is a pure point of law which can be considered as a preliminary objection.

19. It must be noted that this is not a constitutional petition. The Plaintiffs moved the Court by way of a plaint. That aside, the jurisdiction of this Court to interpret and apply the Constitution has never been in doubt. Suffice it to quote the Court of

Appeal in **Attorney General & 2 others v Okiya Omtata Okiiti & 14 others [2020] KECA 30 (KLR)** where it held thus:

We have no doubt that the ELRC and the ELC have jurisdiction to interpret and apply the Constitution as held by the High Court in United States International University (USIU) v. The Attorney General & Others [2012] eKLR and this Court in Daniel N. Mugendi v. Kenyatta University & 3 Others [2013] eKLR. However, the jurisdiction of those specialized courts to interpret and apply the Constitution is not original or unlimited like that of the High Court. It is limited to constitutional issues that arise in the context of disputes on employment and labour relations or environment and land matters. In Daniel Maingi Muchiri Jubilee Insurance Co Ltd, CA No 138 of 2016, this Court expressed the position as follows:

“The Environment and Land Court and the Employment and Labour Relations Court too have jurisdiction to redress violations of constitutional rights in matters falling under their jurisdiction.”

20. Flowing from the foregoing, the short answer is that this Court has jurisdiction to redress violations of constitutional rights in

matters falling within its jurisdiction. The Plaintiffs' case is built around claims of trespass and demolition of part of a building under construction on a parcel of land. Those are matters squarely within the jurisdiction of this Court. I find no merit in the preliminary objection and I therefore dismiss it.

21. I now turn to the question of whether an interlocutory injunction should issue.

22. The principles applicable while considering an application for interlocutory injunction are firstly, that the applicant must establish a *prima facie* case with a probability of success. Secondly, even if he succeeds on that first limb, an injunction will not issue if damages can be an adequate compensation. Lastly, if the court is in doubt as to whether damages will be an adequate compensation then the court will determine the matter on a balance of convenience. See **Giella -vs- Cassman Brown & Co Ltd [1973] EA 358**.

23. The Court of Appeal revisited the principles in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR** where it stated:

These are the three pillars on which rests 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. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. 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 is 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 prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between.

24. The Court of Appeal defined "*prima facie* case" in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others** [2003] eKLR as follows:

... a case in 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... [it] is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.

25. The First Plaintiff contends that he is the registered proprietor of the parcel of land known as Keroka Township/39B (the suit property) and that he sold it to the Second Plaintiff. As correctly submitted by the First Defendant, the Plaintiffs have not annexed title deed or even a letter of allotment. The document titled "Kadi Ya Ploti" is not supported by any minutes from the First Defendant to show an allotment. Even if the document was to be considered an allotment, no evidence of payment of such charges as rates and rent as well as compliance with terms of allotment has been availed. Further, an allotment is not title to land.

26. In view of the foregoing, I find that the Plaintiffs have not established a *prima facie* case with a probability of success. In those circumstances, I need not enquire into whether damages can be an adequate compensation and the test of a balance of convenience.

27. I find no merit in both Notice of Motion dated 3rd June 2025 and Notice of Preliminary Objection dated 10th September 2025. I dismiss both. In view of the outcome, each party shall bear own costs.

Dated, signed, and delivered at Nyamira, this 18th day of February 2026.

**D. O. OHUNGO
JUDGE**

Delivered in the presence of:

Mr Okemwa for the Plaintiffs

No appearance for the First Defendant

Mr Ndiritu for the Second Defendant

Court Assistant: B Kerubo