



**Philemon Aloo Oniala, Mike Kipkorir Kipkwet Binot Daniel Onginga Ogweno
t/a Wilmade Investments v Njiru Housing Development Limited; Bondeni
Maili Saba Jua Kali Association (Interested Party) (Environment and Land
Case E648 of 2025) [2026] KEELC 593 (KLR) (10 February 2026) (Ruling)**

Neutral citation: [2026] KEELC 593 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE E648 OF 2025**

**MN KULLOW, J
FEBRUARY 10, 2026**

BETWEEN

**PHILEMON ALOO ONIALA, MIKE KIPKORIR KIPKWET BINOT DANIEL
ONGINGA OGWENO T/A WILMADE INVESTMENTS APPLICANT**

AND

NJIRU HOUSING DEVELOPMENT LIMITED RESPONDENT

AND

BONDENI MAILI SABA JUA KALI ASSOCIATION INTERESTED PARTY

RULING

Introduction

1. The matter is in relation to suit property Land Reference Number 10905 Ruai Nairobi LR. No. 43/3 delineated by land Survey Plot Number 130014 (Grant No. LR. 4348), LR. No.43/37- 69 and converted now to NAIROBI BLOCK 210/2 - 34;
2. The plaintiffs herein obtained conservatory injunctive orders on the 22nd December 2025 and on the 20th January 2026. The defendant has then filed a notice of motion application dated 26th January 2026 seeking to review, vary and set aside the said orders.
3. The application was supported by an affidavit sworn by RISHIKUMAR PANACHAND HARIA where he deponed that the plaintiffs had obtained the said conservatory orders through concealment of material facts therefore misleading the court.
4. Grounds set forth in the application was that there was NRB ELCLC No. E549 of 2025 Philemon Aloo Oniala, Kipkorir Kipkwet & Daniel Onginga Ogweno/ t/a Wilmade Investments -vs- Njiru



Housing Development Limited which matter was before Hon Justice Mbogo and the plaintiff had asked for the same injunctive orders on the matter but the court declined to issue the same and the matter is to proceed for hearing. That the plaintiffs were able to obtain the ex parte orders in this matter on non-disclosure of the pending matter in the sister court hence the need to set aside the orders.

5. Prayers in the application

- i. Spent
- ii. That pending the hearing and determination of this application, this honourable Court be pleased to grant stay of the ex-parte Orders issued on the 22nd December 2025 and 20th January 2026 in this matter.
- iii. That the Honourable Court be pleased to review, vary and/or set aside the proceedings taken and Orders issued on the 22nd December 2025 and 20th January 2026.
- iv. That in the alternative to prayer 3, this Honourable Court be pleased to review and vary the orders of 22nd December 2025 and 20th January 2026 by directing that pending the hearing and determination of this suit there should be no construction works and/or new developments on Land Reference Number 10905 Ruai Nairobi LR. No. 43/3 delineated by land Survey Plan Number 130014 (Grant No. LR. 4348), LR. No.43/37- 69 and converted now to NAIROBI BLOCK 210/2 - 34;
- v. That the OCPD, OCS and DCIO of Ruai Police Station to ensure the implementation of the orders of this Honourable Court.
- vi. That the costs of this application be borne by the Plaintiffs.

Respondent's reply

6. The plaintiffs/ respondents in response filed their replying affidavit sworn on the 3rd January 2026 by the 1st plaintiff.
7. His argument was based on the fact that the defendants and the interested parties did not have any legitimate legal claims on the suit property having been determined by judgement in ELC 1235 OF 2015. He deponed that lack of proprietary rights then barred them from asking for any orders in this instant suit.
8. He further deponed that the defendant had filed another matter being ELC 115 OF 2023 where he failed to disclose that issue of ownership had already been decided by a competent court in ELC 1235 OF 2015 and that he was using the judgement obtained unlawfully in ELC 115 OF 2013 to want to evict the plaintiffs from the suit property.

Interested party's Reply

9. The proposed interested party equally filed their replying affidavit sworn by one Nicholas Wahome Kimondo where he reiterated the arguments as raised by the applicant/defendant in supporting the application to set aside the orders issued on the 22nd December 2025 and 20th January 2026. It was his assertion that the orders had been obtained on concealment of facts and the application should be dismissed as it was an abuse of the court process being that there was another active matter in court.
10. The application was canvassed by way of written submissions and the following issues came up in the Applicant's submissions



- i. Whether the suit offends the provision of section 6 of the *civil procedure Act*
- ii. Whether there was non-material disclosure of material facts
- iii. Whether the application was merited.

Analysis and Determination

11. Having looked at the application, the responses and submissions by parties the sole issue for determination is whether the applicant has established valid grounds to set aside the orders of injunction issued on 22nd December 2025 and 20th January 2026

12. 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:

“7. 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.”

13. 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: -

“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”

14. 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;

“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”.



15. 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.”
16. 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.”
17. In the present case the applicant avers that the orders were issued on concealment of facts, which if were in the knowledge of the court, would not have granted the orders.
18. I have perused the application dated 3rd November 2025 in ELCLC No 549 of 2025 Philemon Aloo Oniala, Kipkorir Kipkwet & Daniel Oginga Ogweno t/a Wilmade Investments -vs- Njiru Housing Development which sought for orders of temporary injunctions as against the defendant and his agents herein to prevent any dealings with the suit property and further asked for status quo orders .A determination was made on the by Hon Justice Mbogo and court orders were issued on the 4th November 2025.Order 3 was specific in that the court declined to grant interim injunctive orders and ordered the matter to proceed for inter parte hearing. The applicant avers that on the 17th December 2025 the parties were heard and the honourable judge declined to grant the order.
19. There is no attachment of the order issued on the 17th December 2025 but the filing of this suit clearly points out that the plaintiffs were not granted the injunctive orders in ELCLC/E549 of 2025.
20. The plaintiff/respondents in their replying affidavit have not controverted the facts as raised but rather sought to bring up the lack of proprietary interest on part of the applicant hence not warranted to obtain any orders as prayed for.
21. I find that this information was not available to the court as at the time it issued the orders of 22nd December 2025 and 20th January 2026. The issue of injunctions were dealt with a competent court and the matter is still very much active and as such making the application sub judice. This non-disclosure can be said to be misleading as court in granting the orders was not privy to the existence of ELCLC/E549 of 2025.Having established that there is ELCLC 549 OF 2025 which seeks determination of



proprietary rights over the suit property and which is the same cause of action as in this matter then the doctrine of sub judice comes into play as the court cannot adjudicate on an issue that is before another competent court. The legal provisions governing the same are contained in Section 6 of the Civil Procedure Act, which provides as follows:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

22. The Supreme Court in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 Others (Interested Parties)* [2020] eKLR stated that:

“The term sub judice is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub judice rule is to stop the filing of multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing on decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of sub judice must therefore establish that; there is more than one suit over the same subject matter, that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

23. 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 which facts point out to sub judice thus the application dated 26th January 2026 is merited and therefore allowed as prayed.

24. For the reasons as above, make the following orders

1. The Conservatory orders issued on the 22nd December 2025 and 20th January 2026 be and are hereby set aside and/or discharged forthwith
2. Pending the hearing and determination of this suit there should be no construction works and/or new developments on Land Reference Number 10905 Ruai Nairobi LR. No. 43/3 delineated by land Survey Plan Number 130014 (Grant No. LR. 4348), LR. No.43/37- 69 and converted now to Nairobi Block 210/2 - 34;
3. The Officer commanding station (OCS) of Ruai Police Station to ensure compliance.
4. Costs of the application to be borne by the plaintiff/respondent

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 10TH DAY OF FEBRUARY 2026.

MOHAMMED N. KULLOW



JUDGE

Ruling delivered in the presence of: -

Ms. Makaba holding brief for Wanyaga for the Plaintiff

Ms. Kavata holding brief for Shah for the Defendant/Applicant

Ms. Andata for the Interested Party

Philomena W. Court Assistant

