

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

LAND CASE NO E003 OF 2025

ABDULSWAMAD MWANGI MICHERU.....

PLAINTIFF

- VERSUS -

JAMAL ALI ABDI.....1ST DEFENDANT

SULEIMAN ALI.....2ND DEFENDANT

KENYA POWER & LIGHTING

COMPANY LIMITED.....3RD

DEFENDANT

RULING

I. Introduction

1. The Honourable Court was tasked with the determination of the Notice of Motion application dated 15th January 2025. It was brought by the Plaintiff/Applicant, *ABDULSWAMAD MWANGI GICHERU* under the provision of Sections 1A,1B and 3A of the Civil Procedure Act, Cap. 21,

Order 40 Rules 1 and 2 of the Civil Procedure Rules 2010 and all other enabling provisions of the law.

2. Upon service, The 1st Defendant responded to the application through a Replying Affidavit dated 28th February 2025. While the 2nd Respondent by filing replies through a Replying Affidavit dated 29th January, 2025.
3. It is instructive to note that in the pendency of determining the application, the 3rd Defendant raised an objection by filing a Notice of Preliminary objection dated 13th March, 2025 to the application and the entire suit.
4. The court will in the interest of justice and saving of judicial time deal with both the application and the preliminary objection simultaneously but separately for clarity.
5. In opposing the application, the 1st and 2nd Defendants filed a Replying Affidavits sworn on diverse days. The Honourable Court will be highlighting their contents at a later stage.

II. The Plaintiff/Applicant's Case

6. The Plaintiff/Applicant sought for the following orders:-

a) Spent.

b) Spent.

- c) That pending the hearing of this suit, the 1st and 2nd Defendants be restrained whether by themselves, servants of agents or persons claiming title under them or otherwise from further demarcating and being in occupation, fencing and erecting and/or carrying out acts of construction of illegal structures with the sole aim of further alienating and further disposition of Kwale/Pungu Fuel/63 situated in Kwale County containing by measurement one decimal one[1.1] hectares or thereabouts to third parties.**
- d) That the 3rd Defendant be restrained from connecting power and accepting installation to the people claiming ownership under title Kwale/Pungu Fuel/63 without the legal consent of the registered owner**
- e) That costs of the application be provided for.**

7. The application was premised on the grounds, testimonial facts and the averments of 11 Paragraphed Supporting Affidavit of ABDULSWAMAD MWANGI MUCHERU sworn and dated 15th January 2025 together with five (5) annexures marked as “AMM - 1 to 5” annexed thereof. He deposed that:-

- a) He was the Plaintiff/Applicant herein and hence duly authorised and competent to swear this affidavit herein.

- b) He was the duly registered owner of the suit property as per a copy of the certificate of title deed annexed.
- c) The 1st and 2nd Defendants had encroached on the suit property, occupying, fencing, and erecting illegal structures on it. They had continued to be in illegal possession of it with the sole aim of further alienating the suit property and efforts to have them vacate the suit property have borne no fruits.
- d) As a result of the alleged invasion and ongoing constructions on the suit property, he had been precluded from making any developments on the property.
- e) He had engaged a duly licensed surveyor to undertake a topographical survey to ascertain the extent of encroachment.
- f) There was a likelihood that unless stopped by the court, he was bound to suffer irreparable harm and that no prejudiced would be suffered if the application was allowed.
- g) The danger of further encroachment is glaring and there is likelihood of sub - division and sale to innocent purchasers

thus complicating the matter further by way of having multiplicity of suits.

- h) It was interest of justice that the orders sought were granted as not doing so there will be irreparable harm to be suffered to the Applicant as result of agony, by further encroachment.
- i) The Respondents were not going to be prejudice in any way if the orders were granted.

III. 1st Defendant/Respondents Case

8. The 1st Defendant responded to the application through a 19 Paragraphed Replying Affidavit dated 28th February 2025. It was sworn by JAMAL ALI ABDIUKO, the 1st Defendant/Respondent herein together with annexures marked as "JAAI - 1" annexed thereto. He averred as follows that:-

- a) He was a male adult of sound mind and disposition and hence competent and familiar with the facts of the matter to swear this Affidavit.

- b) The application and the suit ought to be dismissed as the Plaintiff/Applicant herein had no legal capacity to sue him whatsoever.
- c) He did not possess the suit property by himself and thus could not actualize the allegations by the Plaintiff/Applicant.
- d) He was merely a caretaker of the newly built but incomplete mosque on the property which stood on a portion of land falling outside the suit property thus not able to actualise the allegations against him.
- e) The portion on which the mosque stood was purchased by a well-wisher known as Kassim Hussein Mganga a resident of the United States of America (USA) vide a land sale agreement dated 13th March 2018 purely for purposes of building the said mosque.
- f) The said mosque was built courtesy of financial support from neighbouring members of the community. It was after seven years later after the commencement of the construction and when it was near completion that the Plaintiff/Applicant appeared from the blues and decided to lay claim on the property.

- g) From the averments made out under Paragraphs 4 and 5 of the Plaintiff/Applicant's supporting Affidavit were clear that the Applicant was a man of means and used his position to bulldoze members of the community around his alleged property and/or forcefully grabbed their land through dubious means.
- h) Even after engaging the topographical surveyor, the Plaintiff/Applicant had not placed before this Court any material attributable to the 1st Defendant/Respondent as owning any or all the developed/erected purported illegal structures on the suit property.
- i) The Applicant had failed to place any evidence before court on how the 1st Defendant had encroached on the suit property. Further that the Applicant had not demonstrated any solid case to warrant grant of the order sought.
- j) The Plaintiff/Applicant never made any claim of ownership to the suit land nor the land where the mosque stood nor was he a sponsor of the mosque.
- k) The Plaintiff/Applicant failed to exercise due diligence and fell into the trap of wanting to grab more land.

- l) Thus, the Court should not allow the application as it had not been proved. He stood to suffer more if the orders sought were granted.
- m) Lastly, the Plaintiff/Applicant had made demands of a sum of Kenya Shillings Two Million Five Hundred (Kshs. 2,500,000/-) in order to relinquish the rights to the property and had been blowing hot and cold on the same.
- n) For the Plaintiff/Applicant approaching the court was an afterthought and had been done with unclean hands.

IV. The 2nd Defendant/ Respondents Case

- 9. The 2nd Respondent opposed the application through a 10 Paragraphed Replying Affidavit sworn by the 2nd Respondent SULEIMAN ALI. He averred that:-
 - a) He was an occupant of a portion of land known as Kwale/Pungu Fuel Area/63 measuring about 1.1 hectares.
 - b) He had been the rightful owner of the portion since time immemorial and way before the applicant acquired it.

- c) Through his occupation and possession he has extensively developed the portion by putting several structures thereon and is surprised on how the applicant got title of the same.
- d) He averred that he has never contacted the 3rd Defendant in a bid to connect power to the suit parcel and the allegations ought to be proved by the Applicant.
- e) In the event the application was allowed as prayed, it would be prejudicial to the 2nd Defendant as the suit property belonged to him.
- f) He stated that a similar application had been filed before court on 16th January 2025 and which covered the said subject matter between the parties herein.
- g) The court was urged to dismiss the application with costs as it was a duplicate suit.

V. 3rd Defendant/Respondent's Case

- 10. The 3rd Defendant raised a preliminary objection dated 13th March, 2025 to the application by the Plaintiff. It was to the effect that:-
 - a) this Honourable Court lacks jurisdiction to hear and determine this dispute and suit against the 3rd

Defendant together with all consequential orders and should be struck out with costs.

b) It offended the provisions of Sections 3 (1),10, 11 (e), (f) (i), (k) & (l) 23, 24, 36, 40, 42,167 and 224 (2) (e) of the Energy Act 2019 together with regulations 2, 4, 7 and 9 of the Energy (Complaints And Disputes Resolutions] Regulations 2012 as read together with Article 159 (2) (c)) and 169 (1) (d) and (2) of the Constitution of Kenya 2010 and Sections 9 (2) and (3) of the Fair Administrative Action Act 2015.

VI. Submissions

11. On 17th March, 2025, while in the presence of all the parties herein, the Honorable Court directed that the Preliminary Objection and the application be canvassed by way of written submissions. Pursuant to that, all the parties fully complied. The Honourable Court reserved the 17th June, 2025 as the date to deliver its Ruling. Nonetheless, due to unavoidable circumstances, it was eventually delivered on 8th October, 2025 thereof.

A. The Written Submissions by the Plaintiff/Applicant

12. The Plaintiff through the law firm of Messrs Muturi Gakuo & Kibara Advocates filed their written submissions dated 26th June, 2023. Mr. Gakuo Advocate commenced by stating that the instant application had been brought before court pursuant to the provisions of Order 40 of the Civil Procedure Rules, 2010. That the preliminary objection disputing the jurisdiction of this court was misplaced as the 3rd Defendant had not produced any contract or documentary evidence to show any contractual relationship between the parties to warrant the matter being referred to the alternative dispute resolution mechanisms referred to by the 3rd Defendant.

13. It was submitted that the preliminary objection never raise any pure point of law. Thus, the objection ought to be dismissed. Reference was made to the provisions of Section 46 of the Energy Act which provides that a survey ought to be done with the permission of the owner of land before any invasion. That in the instant case the 3rd Defendant trespassed on the land without the permission of its owner. To buttress on this legal position, reference was made to the case of: ***Waitiki - Versus - Kenya Power &***

Lighting Company [2022] eKLR” which re - affirmed this position.

14. On the acts of trespass necessitating the injunction, the Plaintiff/Applicant placed reliance on the case of:- “***Giella - Versus - Cassman Brown***” which outlines the guiding principles of an injunction. On a prima facie case, it was submitted that the Plaintiff/Applicant had produced a title deed to show ownership together with a certified copy of the green card. The court was referred to the provisions of Section 26 of the Land Registration Act, No. 3 of 2012 on the indefeasibility of a title. That the Plaintiff had established there was a right that was being infringed upon with regards to his ownership of the suit property. Based on this the court was urged to find that a prima facie case had been established.

15. On irreparable harm, it was submitted that the 1st and 2nd Defendants had invaded the suit property and constructed thereon. That this actions were enough to demonstrate irreparable loss and damage to the Applicant. The Applicant was apprehensive that the continued actions by

the 1st and 2nd Defendants posed the risk of them subdividing the land and selling it to third parties.

16. Lastly, the Learned Counsel for the Applicant averted that on the balance of convenience and stated that the same leaned towards the applicant who had demonstrated ownership of the suit property. In conclusion the court was urged to use its powers under the provision of Article 40 of the Constitution of Kenya, 2010 to protect the proprietary rights of the Plaintiff/Applicant.

B. The Written Submissions by the 1st Defendant/Respondent

17. The submissions were made in respect of the Plaintiff's Application dated 15th January, 2025. The 1st Defendant reiterated that he was total stranger to the Application and the suit before this Honourable Court as he never owned any portion of or any purported illegal structures on the suit property.

18. That the Plaintiff/Applicant had merely selected him as guinea pig to instil fear, intimidate and or threaten the real trespassers/occupants of his alleged land he purported to have been invaded upon.

19. It was the 1st Defendant's submission that the Plaintiff had not laid any specific or any particular direct claim against him either in terms of any structure specifically attributable to him or any other identifiable form of trespass if any.

20. That from the Plaintiff's elaborate aerial survey map and pictures, the Plaintiff had not been able to point out exactly which structure(s) belonged to the 1st Defendant apart from the generalized allegations of trespass and construction of illegal structures.

21. The Learned Counsel opined that the 1st Defendant was a caretaker of a mosque standing on a piece of land bordering the Plaintiff/Applicant's suit land. It could not be left to the court to assume, infer or draw conclusions on such issues without falling into error of law and facts. The court was urged to decline such invitation.

22. According to the 1st Defendant, the Plaintiff/Applicant had a duty to prove his case satisfactorily and to the required standards. Throughout the pleadings and the evidence tendered by the Plaintiff/Applicant, there was no specific allegation levelled and/or pointing at him. The supporting

evidence had not picked, pointed or placed upon him was capable of granting him the chance to traverse in his defence. This was because he was wrongly sued in this suit. Being a caretaker of a community mosque that was built by a sponsor who bought a portion of land bordering the Plaintiff/Applicant's suit land, he was neither an agent nor servant of the sponsor.

23. The 1st Defendant further submitted that the Plaintiff/Applicant ought to have pursued those who sold the portion of land to the sponsor if any dispute has arisen against the mosque which falls outside the suit land. And were the Plaintiff to pursue that line, then a totally different suit would have arisen being a boundary dispute which would automatically oust the jurisdiction of this honourable court.

24. The Court would note that the Plaintiff/Applicant deliberately withheld this material fact. Therefore, it should treat the Plaintiff as having filed the case in bad faith and with unclean hands. Reference was made in the case of:- ***“Sheikh - Versus - Sheikh & Others [1991] LLR 2219 (CAK)”***, where the court asked that pleadings be

precise and with clarity. Further reference was made to the case of "**David Sironga Ole Tukai - Versus - Francis Arap Muge & 2 Others (Civil Appeal No. 76 of 2014) [2014] eKLR**" and in the case of:- "**D.T. Dobie Company (K) Limited - Versus - Wanyonyi Wafula Chebukati [2014] eKLR**" where the court held: -

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not thus proof on a balance of probabilities means a win however narrow."

25. The 1st Defendant made reference to the provisions of Sections 107 (1), 109 and 110 of the Evidence Act Cap. 80 all on the standard and the burden of proof. That it is trite law that the standard of proof in civil matters is on a balance of probabilities as was held in in the case of: "**Hon. Daniel Torotich Arap Moi - Versus - Mwangi Stephen Muriithi [2014] eKLR**".

26. With regards to what constitutes "**a Prima facie Case**" as the first ingredient for considering granting of injunctive orders, the Learned Counsel relied on the definition of the term "**prima facie case**" in the matter of "**Mrao Limited -**

Versus - First American Bank of Kenya (2003) KLR 125 in the following terms: -

"A prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later."

27. On the burden of proving a prima facie case would perpetually lie on the Applicant. In that regard, the Court of Appeal in the case of ***"Nguruman Limited - Versus - Jan Bonde Nielsen and 2 others (2014) eKLR"***, proclaimed that:

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"the party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion."

28. ***It was submitted that the Plaintiff has failed to meet the threshold as set out in the several cases cited above. Instead, the Plaintiff has at Paragraph 6 of his submissions contradicted his claim by admitting that there were no***

contracts between the 3rd Defendant and the 1st and 2nd Defendants to install electricity. This being the case then the Plaintiff has no basis to allege that the 1st Defendant trespassed on his property then contracted the 3rd Defendant to install electricity at the same time. In alleging that a right has been infringed on, the Plaintiff must be in a position to prove that the said right has been infringed by the Defendant. He does not enjoy the latitude to apply for a sweeping blanket order of the court to cover the targeted if any and those that fall outside his suit property like the 1st Defendant herein”.

29. On non-disclosure of material facts, it was submitted that failure to disclose occurs when a party fails to reveal information that would have affected the other party's decision to enter into the transaction. This can be intentional or unintentional. In either case, failure to disclose can be grounds for legal action. Material information is information that is important to the decision-making process of the other party. This can include financial information, legal liabilities, and other information that may affect the course of a transaction.

30. To support this legal position, reference was made in the case of ***“Ruaha Concrete Co. Ltd et al - Versus - Paramount***

universal Bank Limited et al, HCCC No. 430 of 2002”, the Court outlined in that case the principles of non-disclosure and the consequences which will follow as a result of such non-disclosure. The 1st Defendant submitted that it was now settled that any party seeking an equitable relief must disclose all the necessary facts that may aid the court in rendering justice to the parties.

31. The Learned Counsel averred that the Plaintiff/Applicant failed to disclose that his suit land borders that on which stood the mosque to which the 1st Defendant was a caretaker. That the mosque land was purchased from other sellers known to him by a sponsor for purposes of the Muslim community around it. Accordingly, he urged this Honourable Court to dismiss the Plaintiff/Applicant's application.

C. The Written Submissions by the 2nd Defendant/Respondent

32. The 2nd Defendant is acting in person. Thus, his submissions were prepared and filed by him. He commenced the submissions by outlining the prayers sought by the Applicant in the application. He stated that

he had been in occupation of the suit property since time immemorial. He stated having been in utilisation of the land. The Plaintiff/Applicant could not lay claim on the suit land at this point as he had done.

33. According to the 2nd Defendant, the Applicant had not demonstrated by way of evidence on how the 2nd Defendant had trespassed on his land. That the Plaintiff/Applicant had failed to discharge his duties of proving the alleged encroachment. It was submitted that the suit herein was res judicata as there was a similar suit being land case no E003 of 2025 in the ELC court and which was between the same parties and the same issues. Reliance was placed in the case of:- ***“Julia Muthoni Githinji - Versus - African Bank Corporation Limited [ELC Appeal Case No 18 of 2019]”***.

34. In conclusion the court was urged to dismiss the Plaintiff/Applicant’s application for being res judicata and also for having not been proved to the required standard.

VII. Analysis and Determination

35. I have keenly considered the application as filed by the Applicant herein, the disputed objection raised dated 13th March 2025 by the 3rd Defendant herein, the rival and

detailed written submissions, the myriad authorities cited, the relevant provisions of the Constitution of Kenya, 2010 and statutes.

36. In order to reach at an informed, reasonable and fair decision on the matter, the Honorable Court wishes to be guided by the following four (4) issues for its determination. These are: -

a) Whether the Preliminary Objection dated 13th March, 2025 by the 3rd Defendant meets the threshold and is sustainable in accordance with the Law and Precedents?

b) Whether the Preliminary Objection dated 13th March, 2025 has any merit whatsoever to this case.

c) Whether the Applicant has made a case for grant of the injunction orders sought pursuant to the provisions of Order 40 of the Civil Procedure Rules.

d) Who bears the costs of the application?

ISSUE No. a). Whether the Preliminary Objection dated 13th March, 2025 is sustainable in accordance with the Law and Precedents?

37. Under this Sub - heading, the Honourable Court will endeavour to define what a preliminary Objection is in Law. According to the Black Law Dictionary a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

38. The above legal proposition has been made graphically clear in the now famous case of ***“Mukisa Biscuits Manufacturing Limited - Versus - West End Distributors (1969) EA 696”*** Where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure point of law. The Learned Judge then held that: -

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does

nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

39. Similarly the Supreme Court in the case of ***“Hassan Ali Joho & another - Versus - Suleiman Said Shabal & 2 others SCK Petition No. 10 of 2013 [2014] eKLR”*** held that:-

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.

40. Further in the case of: ***“Hassan Nyanje Charo - Versus - Khatib Mwashetani & 3 others, [2014] eKLR’*** the court held that:-

“Thus a preliminary objection may only be raised on a ‘pure question of law.’

To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

41. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at

the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter.

42. Likewise, the Court in the case of:- **“Oraro - Versus - Mbaja [2005] eKLR 141”**, on the nature of preliminary objections observed that:-

“A preliminary objection is now well identified as and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary objection anything that purports to be a preliminary objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

43. From a face value, the objections raised by 3rd Defendant are anchored on matters that are substantial law. The

Preliminary objection is founded on the notion that the Plaintiff has offended the provisions of the Energy and Petroleum Regulatory Authority and the Energy and Petroleum Tribunal in relation to the jurisdiction of the court to hear and determine the matter before it for reasons that it was within the preserve of the tribunal as was held in the Mukisa Biscuit case supra, an example of a Preliminary Objection is an objection as to the jurisdiction of a court. the 3rd Defendant maintains that the Fair Administrative Actions Act provides for alternative dispute resolution mechanisms above as per the principles outlined in the doctrine of exhaustion. Hence, I discern that the Preliminary Objection is relevant purely on that basis and in tandem with the legal ratio of ***“Mukisa Biscuit Case”*** whatsoever.

ISSUE No. b). Whether the Preliminary Objection dated 13th March, 2025 has any merit whatsoever to this case.

44. Under this sub - heading, the Honourable Court will examine whether the objection is meritorious to the subject matter. The provision of Regulation 4(a) of the

Energy (Complaints and Disputes Resolution) Regulations 2012 (Regulations) provides as follows:-

“These regulations shall apply to complaints and disputes in the following areas: billing, damages, disconnection, health and safety, electrical installations, interruptions, licensee practices and procedures, metering, new connections and extensions, reconnections, quality of service, quality of supply, tariffs, way leaves, easements or rights-of-way in relation to the generation, transmission, distribution, supply and use of electrical energy.”

45. Regulation 7 of the Energy (Complaints and Disputes Resolution) Regulations 2012 (Regulations) provides as follows:‘

‘(1)In the event that any complaint is not resolved to the dispute and satisfaction of the complainant, after exhausting the complaints handling procedures established pursuant to regulation, the parties may declare a dispute, and both or any one of them may refer it to the Commission for recourse.2.A party to a dispute may refer the dispute to the Commission in form Section S-2 as set out in the Second Schedule.3. Where a dispute has been referred to the Commission, the Commission shall appoint a mediator who shall assist the parties to reach a settlement within thirty days from the date of such appointment.4.Where the

dispute(a)is resolved through mediation in accordance with paragraph 3, the parties shall file their settlement agreement with the Commission within five days, and the agreement shall be final and binding on both parties.(b)is not resolved through mediation in accordance with paragraph 3, the procedures set out in regulations 8 to 16 shall apply.”

46. The provision of Section 24 of the Energy Act provides as follows:-

’(1)A person aggrieved by a decision of the Authority may appeal to the Tribunal within thirty days of receipt of the decision.(2)Notwithstanding subsection (1), the Tribunal may entertain an appeal after the expiry of the thirty-day period if it is satisfied that there was sufficient cause for not filing it within that period.”

47. While the provision of Section 37 of the Energy Act states as follows:-

“(1)The Tribunal may, on its own motion or upon application by an aggrieved party, review its judgments and orders.(2)Judgments and orders of the Tribunal shall be executed and enforced in the same manner as judgments and orders of a court of law.(3)Any person aggrieved by a decision of the Tribunal may, within thirty days from the date of the decision or order, appeal to the High Court.

(4)The law applicable to applications for review to the High Court in civil matters shall, with the necessary modifications or other adjustments as the Chief Justice may direct, apply to applications for review from the Tribunal to the High Court.”

48. Thus, it is upon this court to make a determination on whether the orders in the instant application relates to matters regulated under the Energy Act, 2019. From the records and specifically the prayers sought, the court notes that the Plaintiff seeks to have an injunction against the 1st and 2nd Defendants who are in occupation of the suit property, from further developing the suit property as they already have constructed structures thereon that are permanent. Further that they should be barred from undertaking any fencing and engaging third parties in any transactions with regards to the suit property.

49. On critical assessment of the facts of this case, I deduce that the Applicant has further sought that the 3rd Defendant be restrained from connecting power and accepting installation to the people claiming to be owners of the suit property. Hence, in my view, the gist of this

matter is the use and occupation of the suit land by the 1st and 2nd Defendants. Clearly, there is no direct implication to the 3rd Defendant whatsoever. The prayer against the 3rd Defendant is more of a cautionary measure to not engage other parties other than the Applicant in power installation on the suit property.

50. Therefore, it is safe to conclude that the dispute is not between the 3rd Defendant's known mandate as is being instigated by the 3rd Defendant. There is absolutely no dispute between the Applicant and the 3rd Defendant as there is no evidence of any transaction having been undertaken between the said parties. The alleged action of trespass over the suit property is by the 1st and 2nd Defendants and recourse to the same lays before this court.

51. Having looked at the definition and what constitutes a preliminary objection considering the issue for determination before this court, I am not satisfied that the Preliminary Objection dated 13th March 2025 raises a pure point of law which merits consideration by this court. The issues raised by the Applicant/Plaintiff are

issues which can only be resolved on an intensive and thorough hearing on its own merit before the Environment & land Court.

52. On arriving at this legal conclusion, I am guided by the words of Chief Justice Marshall of the “***U.S. Supreme Court in Cohens - Versus - Virginia 19 U.S. 264 (1821): -***

“It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is exercise our best judgment, and conscientiously perform our duty.”

53. Thus, the upshot of the foregoing analysis, by all means the preliminary objection cannot succeed. It is not merited.

ISSUE No. c). Whether the Applicant has made a case for grant of the injunction orders sought pursuant to the provisions of Order 40 of the Civil Procedure Rules.

54. Under this Sub - title, the Honourable Court will examine whether the Applicant has met the threshold for grant of orders of injunction. The Applicant prays to be granted a temporary injunction against the Respondents pending determination of the main suit.

55. The legal provisions that govern the granting of injunctions is founded under the provision of Order 40 Rule 1 of the Civil Procedure Rules 2010. It provides as follows: -

Order 40, Rule 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 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.

58. Fundamentally, the principles applicable in an application for an injunction were laid out in the celebrated "*Classicus locus*" case of "**Giella - Versus - Cassman Brown & Co. Limited (Supra)**" where it was stated: -

"First an 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 injury which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

56. The three conditions set out in the above case, need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. Graphically, the Court of Appeal was more spot on with regards to the said conditions to be considered while considering these issues in the case of

“Nguruman Limited - Versus - Jan Bonde Nielsen & 2 others

[2014] eKLR”: where it held as follows:-

“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. Limited - Versus - 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”.

57. In a nutshell, 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. Limited - Versus - 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".

58. In the case of "**Mbuthia - Versus - Jimba credit Corporation Ltd 988 KLR 1**", the court held that;

"In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the party's cases."

59. Similarly, in the case of ***“Edwin Kamau Muniu - Versus - Barclays Bank of Kenya Limited”*** the Court held that:-

“In an interlocutory application to determine the very issues which will be canvassed at the trial with finality. All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria.”

60. In dealing with the first condition of ***“prima facie case”***, the Honorable Court was guided by the definition melted down in the famous case ***“MRAO Limited - Versus - First American Bank of Kenya Limited (Supra)”*** *inter alia*: -,

“So, what is a prima facie case, I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself would 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”

61. On the second limb to be considered - whether the Applicant might suffer irreparable injury which cannot be adequately compensated by an award of monetary damages. The Applicants must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. The judicial decision of ***“Pius Kipchirchir Kogo - Versus - Frank Kimeli Tenai (2018) eKLR”*** provides

an explanation for what is meant by irreparable injury and it states:-

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

62. It is a conjecture that a party who holds a title deed to a property is prima-facie evidence that he is the owner of such suit property and has a good Title against the world. The title deed in respect of the suit land was allegedly issued on 14th August 2009 and is annexed to the supporting affidavit and marked as exhibit “AMM-1”.

63. The provision of Section 24 of the Land Registration Act, No. 3 of 2012 provides as follows: “

Subject to this Act—(a)the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and(b)the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and

privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

64. The provision of Section 26(1) of the Land Registration Act 2012 provides as follows:-

“The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon transfer on transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge except (a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) Where the Certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

65. In the case of ***“Willy Kipsongok Morogo - Versus - Albert K. Morogo (2017) eKLR”*** the Court held as follows:-

‘the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under the Act.’

66. It is my considered view that the Applicant, being the holder of a title deed to the suit property is protected

under the law and ought to be granted an opportunity to defend his title at the full hearing while at this stage the substratum of the case which is the suit land and the developments therein ought to be preserved.

67. It is noteworthy that the Applicant is required to demonstrate that irreparable injury will be occasioned to them if a temporary injunction is not granted. In the case of:- **“Pius Kipchirchir Kogo - Versus - Frank Kimeli Tenai (2018) eKLR”** the court discussed what is meant by irreparable injury and it stated as follows:-

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

68. The 2nd Respondent at paragraph 3 of his replying affidavit attached images of the developments erected over the suit property where he stated that he resides. From this, the court can tell that indeed as alleged by the Applicant, developments have been made on the suit

property by another party other than him despite the fact that he holds the title to the land.

69. I think it is these developments that made the Applicant apprehensive of the fact that the 3rd Respondent may be approached to connect electricity to the developed structures. For this reason, the court finds that the Applicant has shown sufficient demonstration of irreparable loss which may be visited upon him should the orders sought not be granted.

70. Thirdly, the Applicant has to demonstrate that the balance of convenience tilts in his favour. In the case of ***"Pius Kipchirchir Kogo (Supra)"*** the concept of balance of convenience was defined as follows:-

'The meaning of balance of convenience will favour of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience

be equal, it is the Plaintiff who will suffer. In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.

71. In considering this element, the courts are called upon to consider which route bears the lower risk. In the case of :-
“Robert Mugo Wa Karanja - Versus - Ecobank (Kenya) Limited & Another [2019) eKLR”, the court in deciding on an injunction application stated:-

“circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts...”

72. From the circumstances of this case, the documentary evidence tendered by both parties, the annexures thereto, the submissions and the applicable law, I find

that the applicant has met the requirements for the grant of temporary injunction orders.

ISSUE No. d). Who will bear the costs of the objection

73. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation.
74. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of ***“Harun Mutwiri - Versus - Nairobi City County Government [2018] eKLR”*** and ***“Kenya Union of Commercial, Food and Allied Workers - Versus - Bidco Africa Limited & Another [2015] eKLR”***, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of ***“Hussein Muhumed Sirat - Versus - Attorney General & Another [2017] eKLR”***, the court stated that costs follow the event as a well-established legal principle, and the

successful party is entitled to costs unless there are other exceptional circumstances.

75. In the present application, the Preliminary Objection dated 3rd March, 2025 by the 3rd Defendants herein has been dismissed and hence the Plaintiffs will be entitled to costs but to abide the conclusion of the suit.

VIII. Conclusion & Disposition

76. Consequently, upon causing an indepth analysis to the framed issues herein, the Honourable Court based on the principles of Preponderance of Probabilities and the balance of convenience, the Court proceeds to specifically make the following orders. These are:-

a) THAT the Notice of Preliminary Objection dated 13th March, 2025 raised by the 3rd Defendant herein be and is hereby dismissed for lack of merit.

b) THAT pending the hearing of this suit, there be temporary injunction orders granted restraining the 1st and 2nd Defendants whether by themselves,

servants of agents or persons from claiming title under them or otherwise undertaking any further demarcating and being in occupation, fencing and erecting and/or carrying out acts of construction of illegal structures with the sole aim of further alienating and further disposition of all that parcel of land known as Land Reference Numbers Kwale/Pungu Fuel/63 situated in the County of Kwale measuring approximately one decimal one [1.1] hectares or thereabouts to third parties pending the hearing and final determination of this suit.

c) THAT an order made herein restraining the 3rd Defendant from causing any connection of power lines or accessories and accepting installation to the people claiming ownership of all that parcel of land Known as Land Reference Numbers Kwale/Pungu Fuel/63 without the legal

consent of the registered owner as stipulated by Law.

d) THAT for expediency sake, there be a mention on 30th April, 2026 for purposes of conducting a Pre - Trial Conference on case management pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010. There be a hearing on 8th October, 2026 preferably through Physical means.

e) THAT costs of the objection and application to be awarded to the Plaintiff and be borne by the 3rd Defendant in the cause.

IT IS ORDERED ACCORDINGLY.

RULING DELIVERED THROUGH THE MICRO - SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS.....12TH DAY OFFEBRUARY.....2026

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**HON. MR. JUSTICE L.L NAIKUNI,
ENVIRONMENT & LAND COURT**

AT

KWALE.

Ruling delivered in the presence of: -

- a) Mr. Daniel Disii, the Court Assistant.
- b) M/s. Bwire Advocate holding brief for Mr. Gakuo Advocate for the Plaintiff.
- c) Mr. Mutuma Advocate for the 1st Defendant.
- d) Mr. Suleiman Advocate for the 2nd Defendant.
- e) No appearance for the 3rd Defendant.