

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**  
**ELCL NO. E068 OF 2025**

**JOSEPHINE WAHU NDAGI ..... 1<sup>ST</sup>**  
**PLAINTIFF/APPLICANT**  
**JOSEPH MUNYIRI GACHANGA ..... 2<sup>ND</sup>**  
**PLAINTIFF/APPLICANT**

**VERSUS**

**TIMOTHY KAMAU MAINA .....**  
**DEFENDANT/RESPONDENT**

**RULING:**

1. The Plaintiffs/ Applicants herein filed a Notice of Motion Application dated 17<sup>th</sup> July, 2025, against the defendant/respondent seeking the following orders: -
  - i. Spent.
  - ii. THAT pending the hearing and determination of this suit, this honourable court be pleased to issue an injunction restraining the defendant either by himself, his agents, servants, employees or otherwise, howsoever from continuing to occupy or dealing with all that parcel of land known as Eldoret Municipality Block 21 (King'ong'o)/3710 in a manner prejudicial to the plaintiffs' interest pending the hearing and final determination of this suit.
  - iii. THAT pending the hearing and determination of this suit, this honourable court be pleased to issue an injunction restraining the defendant either by himself, his agents, servants, employees or otherwise, howsoever from trespassing, continuing to occupy or dealing with all that parcel of land known as Eldoret Municipality Block 21 (King'ong'o)/3710 in a manner prejudicial to the plaintiffs'

interest pending the hearing and final determination of this suit.

iv. THAT costs of this application be provided for.

2. The application is premised on the 15 grounds on the face thereof and supported by the 1<sup>st</sup> applicant's Affidavit sworn on even date, on her own behalf and on behalf of her co-applicant.
3. The applicants deponed that they are the registered proprietors of the parcel of land known as Eldoret Municipality Block 21/3710 measuring approx. 0.52Ha (hereinafter referred to as the '**suit property**') together with all the developments and improvements thereon, including; a 3-storey building with a restaurant known as 5DEE hotel containing 23 self-contained rooms and other movable and immovable properties.
4. The defendant on the other hand is the registered proprietor of all that parcel of land known as Eldoret Municipality Block 21/359 measuring approx. 0.0465Ha, which is vacant.
5. It is their claim that on or about 27.07.2023, they entered into an exchange of land agreement with the defendant/respondent. That the suit property was valued at Kshs. 30,000,000/= while the respondent's parcel was valued at Kshs. 15,000,000/=. In essence therefore, the respondent was required to pay them Kshs. 15,000,000/= as part of the terms of the agreement.

6. Further, that it was an express term of the Agreement that the said Kshs. 15,000,000/= would be paid in 4 installments as follows: -
  - i. 1<sup>st</sup> Installment - Kshs. 2,500,000/= to be paid in cash upon execution of the agreement.
  - ii. 2<sup>nd</sup> Installment - Kshs. 2,500,000/= to be paid on or before 21.09.2023
  - iii. 3<sup>rd</sup> Installment - Kshs. 5,000,000/= to be paid on or before 20.12.2023
  - iv. 4<sup>th</sup> Installment - Kshs. 5,000,000/= to be paid on or before 20.03.2024
7. In addition, it was also expressly agreed that the completion date was to be 90 days from the date of receipt of the last installment, that is, 20.03.2024, in full and final settlement of the purchase price and thus making time to be of essence.
8. She outlined other terms of the agreement particularly in the event of breach of the contract and the process of indemnifying the innocent party.
9. Moreover, it was also a term of the agreement that the exchange of the 2 parcels of land would be done free from any encumbrance and placed an obligation on the applicants to ensure that the restriction placed on the suit property would be removed immediately on the execution of the agreement.
10. It was her contention that in compliance with the said terms of the agreement, she signed the necessary forms for the removal of the restriction and deposited the same with the

firm of Kibii & Company Advocates, who was acting for them in the agreement.

11. She also deposited the original title deed of the suit property together with other documents to the said firm of advocates.
12. It is further her claim that on or about 14.03.2025, through their advocate, they gave the respondent 21 days within which to pay the balance of the purchase price with a notice that upon expiry of the said period, the exchange of land agreement dated 27.07.2023 would be deemed/stand rescinded and the applicants would be at liberty to institute legal action. She annexed a copy of the said letter.
13. That the defendant/respondent responded to the said letter vide a letter dated 03.04.2025, wherein he purported to have deposited various bank cheques in compliance with his obligations under the agreement, nos. 073261, 073262, 07363, 03259, 073258 and 073260 issued in their joint names with the firm of Kibii and Company Advocates but that the said cheques have never been forwarded to them. She annexed a copy of the said letter.
14. It was her contention that on 09.04.2025, their advocate informed the defendant that the earlier notice issued dated 14.03.2025 took effect on 05.04.2025 and consequently, the defendant was considered a trespasser and that they were therefore entitled to mesne profits.
15. In addition, the defendant/respondent was also informed they had vacated parcel No. Eldoret Municipality Block 21/359 and the defendant was at liberty to take possession.

16. It is therefore the applicants' claim that having rescinded the exchange of land agreement and vacated the defendant's parcel of land it is only fair that he be restrained from the continued trespass into the suit parcel.
17. In conclusion, they urged the court to allow the application and grant the restraining orders of injunction sought.
18. The application was opposed. The Defendant/Respondent filed a replying affidavit dated 11<sup>th</sup> September 2025. He dismissed the application as being fatally defective, incurable, raises no reasonable cause of action, vexatious, frivolous, scandalous, an abuse of the court process and that it does not meet the required standard for the grant of orders of injunction.
19. He further dismissed the application as being fatally defective for want of compliance with the provisions of Order 1 Rule 13 (1) and (2) of the Civil Procedure Rules, the 2<sup>nd</sup> applicant not having given the 1<sup>st</sup> applicant authority to institute the suit on his behalf.
20. He acknowledged that he entered into an exchange of land agreement dated 27.07.2023 with the plaintiffs wherein he was exchanging his parcel of land known as Eldoret Municipality Block 12/359 mutually valued at Kshs. 15,000,000/= with the plaintiffs' parcel of land known as Eldoret Municipality Block 21 (King'ong'o)/3710, which was mutually valued at Kshs. 30,000,000/=. He annexed a copy of the said Exchange Agreement.

21. He also admitted that as part of the term of the exchange agreement, he was to pay the difference in value of the properties as per clause 3 of exchange agreement of about Kshs. 15,000,000/=
22. He further deponed that under clause 9 of the exchange agreement, it was a term of the agreement that the applicants were to have the restriction removed immediately upon the execution thereof and which has not been removed to date. He annexed a copy of the official search in support of the said averments.
23. He also deponed that further to the exchange agreement, the applicants entered into a Memorandum of Understanding dated 28.07.2023 on how they were going to share the difference in value of Kshs. 15,000,000/= among themselves.
24. On the averments on payment of the difference in value of Kshs. 15,000,000/=; he stated that the applicants had agreed that they would provide him with their joint account details, where the difference would be deposited. That pursuant to the express authority of the applicants, he has since paid a sum of Kshs. 10,200,000/= which was duly received by both applicants.
25. It is his claim that the applicants failed to give him directions where to deposit the balance of the difference in value amounting to Kshs. 4,800,000/= in full compliance with his obligation. He therefore deposited bankers cheques Nos. 073258, 073259, 073260, 073261, 073262 and 073263 in

- full and final payment of the balance, to the advocate who prepared both the exchange agreement and the memorandum of understanding between the applicants.
26. In conclusion, he deponed that he is in occupation of the suit property and if the restraining orders of injunction is issued at this stage, then the same would amount to an eviction order without being accorded a hearing.
  27. The replying affidavit was served upon the applicants, who filed a Further Affidavit dated 17.11.2025 and sworn by the 1<sup>st</sup> applicant, in response to the allegations raised in the replying affidavit. She denied the allegations raised by the respondent and maintained that the application meets the threshold for the grant of the orders of injunction sought.
  28. In response to the issue of removal of the restriction lodged against the title of the suit property, she reiterated that she signed the relevant forms for the removal of the restriction and deposited the same with the firm of Kibii & Company Advocates, who was acting for both parties in the exchange agreement.
  29. It was her contention that it was a term of the agreement that the restriction be removed immediately upon the execution of the agreement. Thus, she argued that the respondent could not pay any money without the restriction being first removed. That the fact that the respondent continued making payments meant that the crucial step of removing the restriction had been complied with.

30. It was her claim that it was not a term of the agreement that the balance of the purchase price was to be deposited with the firm of Kibii & Company Advocates. Moreover, that there was no communication to either herself or their advocate that the said cheques had been deposited.
31. On the issue of Authority to Plead by the 2<sup>nd</sup> applicant, she deponed that the 2<sup>nd</sup> applicant duly signed an Authority to Plead in the presence of their daughter, Ann Nyambura Munyiri, Mr. Konosi Advocate and herself. She annexed a copy of the said Authority to Plead duly signed.
32. She further dismissed the contents of the Affidavit allegedly signed by the 2<sup>nd</sup> applicant. It was her contention that they (1<sup>st</sup> and 2<sup>nd</sup> applicant) never agreed that the balance was to be paid to each of them in equal share of Kshs. 2,400,000/= as averred in the said affidavit.
33. In conclusion, she urged the court to disregard the said affidavit and allow the application as sought.
34. This court issued directions on the disposal of the application by way of written submissions. The applicants filed their submissions dated 05.12.2025 and authorities while the respondent filed his submissions dated 01.12.2025 together with authorities which I have read and considered.

**Analysis and Determination:**

35. I have carefully considered the grounds in the application, the Supporting and Further affidavit and the annexures

therein, the replying affidavit by the respondent and the annexures thereto as well as the rival submissions in totality.

36. Consequently, it is my considered view that the following issues arise for determination: -
- i. Whether the applicants have met the requirements for the grant of an order of temporary injunction.*
  - ii. Who shall bear the costs of the application*

**Whether the applicants have met the requirements for the grant of an order of temporary injunction;**

37. The applicants in prayers no. (ii) and (iii) have sought the grant of an order of injunction restraining the defendant, his agents, servants, employees or otherwise, howsoever from continuing to occupy, trespassing, occupying or dealing with the suit property in a manner prejudicial to their interest pending the hearing and final determination of the suit.
38. Order 40 (1) (2) of the Civil Procedure Rules governs the grant of temporary injunction. Further, section 13 (7) (a) of the Environment and Land Court Act, 2015 also empowers this court to grant interim preservation orders, including an interim order of injunction in the nature sought herein.
39. The principles governing the grant of temporary injunctions are now well settled and have been established by a long line of authorities. The Court of Appeal in the case of **Nguruman Limited vs. Jan Bonde Nielsen & 2 others [2014] eKLR** restated this position and held 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 prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”**

40. It is important to note that these 3 principles are to be applied as separate, distinct and logical hurdles which an applicant is expected to prove sequentially. The existence of one element alone does not automatically entitle an applicant to an order of injunction without considering the other elements. **See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001]** Vol. 1 EA 86.

**Prima Facie Case;**

41. The applicants herein bear the legal burden of demonstrating the existence of a prima facie case which

raises arguable and triable issues with a probability of success.

42. The Court of Appeal in **Mrao Ltd vs. First American Bank of Kenya and 2 Others (2003) KLR 125** explained what amounts to a prima facie case and stated 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.”***

43. The applicants contend that the respondent breached the exchange agreement, for having failed to comply with the 90 days completion period and paying the last installment of the purchase price within the agreed period. It is further their contention that there was no clause in the exchange agreement that the balance of the purchase price would be paid to the advocate.
44. The respondent on the other hand contends that he has fully complied with his obligation under the exchange agreement and accused the applicants for being in breach of the agreement.
45. It is his claim that he paid the applicants a total of Kshs. 10,200,000/= out of the mutually agreed amount of Kshs. 15,000,000/=. That the balance of Kshs. 4,800,000/= has been paid via 4 banker's cheques which were deposited with

the firm of Kibii & Co. Advocates and which have never been collected from the said firm by the applicants to date.

46. It is also his claim that the applicants have failed to remove the restriction lodged against the title of the suit property as agreed in the exchange agreement and thus avers that they are the ones in breach of the agreement. He therefore maintained that the applicants have not established a prima facie case.
47. In determining whether a prima facie case has been established, this court is called upon to make an assessment of the facts laid out in the supporting affidavit in light of the averments made in the replying affidavit to determine whether the applicants' right have been infringed to warrant the grant of the injunctive orders.
48. It is common ground that there exists an Exchange of Land Agreement between the parties herein and the terms therein are not contested. It is also not in contest that the respondent is in possession, occupation and use of the suit property herein.
49. What however appears to be in dispute is whether there was a breach of the agreement and who was in breach in terms of the full and final payment of the purchase price as well as the removal of the restriction lodged against the title of the suit property.
50. I have carefully looked at the grounds contained in both the supporting, further and replying affidavits and the annexures therein. The applicants' basis for the injunctive reliefs is that

the exchange agreement has since been rescinded and they subsequently vacated the respondent's parcel of land whereas the respondent continues to use and benefit from their parcel of land.

51. It is crucial to point out that one of the annexures relied on by the respondent herein is the affidavit sworn by the 2<sup>nd</sup> applicant on 08.08.2025, wherein he is distancing himself from the suit. At paragraph 6 of the said affidavit, the 2<sup>nd</sup> applicant confirms that the restriction has not been removed.
52. The 2<sup>nd</sup> applicant goes further to confirm that the total amount they have received amounts to Kshs. 10,200,000/= and at paragraph 9 conveys his intention to complete the transfer of the suit property and that he is ready to collect the bankers cheques from Kibii & Co. Advocates.
53. At paragraph 8 of the said affidavit, the 2<sup>nd</sup> applicant states that he did not give authority to the 1<sup>st</sup> applicant to institute the suit on his behalf.
54. It is important to note that despite the strong, weighty and substantial allegations made in the said affidavit allegedly sworn by the 2<sup>nd</sup> applicant herein, the applicants filed a further affidavit marred with blanket denials and asked the court to disregard the said affidavit for claims of forgery. The 2<sup>nd</sup> applicant did not swear any affidavit to dissociate himself and/or refute the allegations made in the said affidavit even though he is a party in the present suit.

55. This court is careful not to delve into issues of breach of the exchange agreement on account of payment of the purchase price and removal of the restriction which in my considered view goes to the substantive issues of the main suit. However, from the material presented before this court, both parties have demonstrated a right which has apparently been infringed by the other party.
56. Consequently, it is the finding of this court that the applicants have failed to sufficiently demonstrate the existence of a prima facie case to the required standard to warrant the grant of the injunctive orders sought.

**Irreparable Loss and Injury:**

57. The second element is that the applicants must demonstrate the irreparable loss and injury that they are likely to suffer which cannot be adequately compensated by an award of damages unless an order of injunction is granted.
58. The applicants are under a duty to demonstrate the nature and extent of the irreparable loss and harm that they are likely to suffer unless the orders sought are granted. This injury must be actual, substantial and demonstrable and not mere unfounded fears or apprehension.
59. In the Court of Appeal case of **Nguruman Limited v Jan Bonde Nielsen & 2 Others supra**; while defining what amounts to an irreparable injury, the court held as follows;

***“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately***

***remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”***

60. On this ground, the applicants contend that by reason of the respondent's default in finalizing the payment of the purchase price, their children have not benefited from the sale of the suit property as intended. That their children's education cannot be quantified into monetary compensation.
61. The respondent on the other hand has demonstrated the payment of the purchase price, which was the difference in value of the 2 parcels of land which were exchanged. He annexed copies of bank and mpesa statement to that effect.
62. With regards to the payment of the 4<sup>th</sup> installment, in full and final settlement of the purchase price, it is the respondent's claim that he was not provided with the relevant account details in line with the MOU dated 28.07.2023 at clause D.

Clause D outlines how the payment of the fourth and final instalment should be made and to whom.

63. It is therefore his claim that since the relevant details were not provided as agreed, he was unable to make direct payments hence the use of the Bankers Cheques deposited with the firm of Kibii & Co. Advocates, who was acting for them. The respondent thus maintains that the applicants will suffer no harm/injury.
64. The applicants have not disputed that the bankers cheques were deposited with the firm of advocates and/or outlined a justifiable reason for their failure to collect the same. Instead, it is the 1<sup>st</sup> applicant's contention that there was no clause in the exchange agreement providing that payment of the purchase price to be made through the advocates.
65. I have carefully considered the rival positions taken by the parties herein and it is my considered opinion that the applicants have failed to sufficiently demonstrate the irreparable loss and injury that cannot be measured by reasonable accuracy or that which monetary compensation is not an adequate remedy as outlined in the Nguruman case above.

**Balance of Convenience;**

66. The final element is on the balance of convenience. On this element, the court is called upon to balance the hardship or inconvenience likely to be caused to the applicants by declining the injunction against the hardship or

inconvenience likely to be caused to the respondent by granting the injunction.

67. Taking the totality of the foregoing into account, it is my finding that the balance of convenience tilts in favor of the respondent in not granting the orders of temporary injunction in the nature sought.
68. The upshot of the above is that the applicants have failed to sufficiently prove all the three elements required for the grant of an order of temporary injunction to the required standard.
69. Further and without prejudice to the foregoing, this court has duly noted the nature of the injunctive orders sought herein and its effect if granted at this interlocutory stage which may result in evicting the respondent from the suit property at this interim stage. It is a fundamental principle that a court should take whichever course that appears to carry the lower risk of injustice if it should turn out to have been wrong.

**Who shall bear the costs of the application;**

70. Although costs of the suit are on the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act.
71. In this case, having held that the applicants have failed to sufficiently proved their claim, it is the finding of this court

that the respondent is entitled to costs of defending the application.

**CONCLUSION:**

72. In view of the foregoing, it is the finding of this court that the Notice of Motion Application dated 17<sup>th</sup> July, 2025 is **not merited** and is hereby **dismissed** with costs to the defendant/respondent.
73. Be that as it may, an order of status quo be and is hereby issued for purposes of preserving the obtaining state of affairs as at the time of this ruling.
74. The defendant/respondent be and is hereby ordered not to put up any additional permanent structures, alienate, charge and or alter the state of the suit parcel known as ELDORET MUNICIPALITY BLOCK 21 (KING'ONG'O)/3710 pending the hearing and determination of the suit.
75. It is so ordered.

**DATED, SIGNED and DELIVERED** in **ELDORET** this **26<sup>th</sup>** day of **FEBRUARY, 2026.**

**HON. C. K. YANO  
JUDGE**

Ruling delivered in the presence of: -

Mr. Onyango holding brief for Mr. Konosi for the Plaintiffs.

No appearance for Mr. Mathai for the Defendants.

Court Assistant - Laban