REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. 51 OF 2025

SYMON MUITA NGATIA AND JOHN ONCHARI OMAGWA

(Suing as homeowners and representatives of the Estate Committee, in a representative capacity pursuant to Order 1 Rule 8 of the Civil Procedure Rules, on behalf of the REGISTERED HOMEOWNERS OF EASY PRESTIGE ESTATE,

SYOKIMAU)::**PLAINTIFFS/APPLICANTS**

VERSUS

EASY PROPERTIES LIMITED::**1 ST DEFENDANT/RESPONDENT**

EASY PRESTIGE MANAGEMENT COMPANY LTD::::::::::::::::::::::::::::::::::::**2 ND DEFENDANT/RESPONDENT**

EASY PRESTIGE (BLOCK G & H) MANAGEMENT COMPANY LTD::::::::::::::::::::::::::::::::::::**3 RD DEFENDANT/RESPONDENT**

EASY PRESTIGE (BLOCK A & B) MANAGEMENT COMPANY LTD::::::::::::::::::::::::::::::::::::**4TH DEFENDANT/RESPONDENT**

EASY PRESTIGE (BLOCK D & E) MANAGEMENT COMPANY LTD::::::::::::::::::::::::::::::::::::**5TH DEFENDANT/RESPONDENT**

RULING

The application is dated 19th April 2025 and is brought under Order 40 Rules 1, 2, 3 & 4 of the Civil Procedure Rules. 2010; Sections IA, 1B & 314 of the Civil Procedure Act, Articles 42 43 60 and 70 the Constitution of Kenya 2010 seeking the following orders;

1. Pending the hearing and determination of this suit, a temporary injunction be issued restraining the Defendant/Respondent, whether by itself or through its agents, servants or contractors, from undertaking or continuing any construction, development, or excavation works on the designated open space/playground on L.R. No 12715/552 (Easy Prestige Estate), or in any manner altering or dealing with the said open space contrary to the approved plan.

2. Pending the hearing and determination of this suit, the Defendant be compelled, by an interim mandatory injunction, to remove forthwith all new structures, fences, foundations, or installations erected in 2025 on the aforesaid open space and to restore the area to its original condition as an open communal green space.

3. Pending the hearing and determination of this suit, a temporary injunction be issued restraining the Defendant/Respondent from using, operating or permitting the use of the building within Easy Prestige Estate that was initially designated and approved as a Shopping Centre for any purpose other than the originally approved use — and in particular from operating or letting it out as a hotel or lodging facility — unless and until a lawful change-of-user approval is obtained following due process.

4. Pending the hearing and determination of this suit, the Honourable Court be pleased to issue an interim mandatory order directing the Defendant to hand over possession and control of the Estate's management office building to the

homeowners, through the Estate Committee or a representative management body, so that the said facility is reverted to its intended use for the benefit of residents and managed by them as originally contemplated.

5. The Officer Commanding Station (OCS), Syokimau Police Station, be directed to assist in the enforcement of the above orders, to ensure compliance and maintain public order within the Estate pending further orders of this Court.

6. That pending full disclosure, and . in the interest of ensuring the effectiveness of interim relief, this Honourable Court be pleased to issue injunctive and preservatory orders binding all the named Defendants jointly and severally, with liberty to the Plaintiffs to apply for leave to amend the pleadings to join any other management company or entity under the 1st Defendant's control that may be found to be facilitating or benefiting from the impugned construction

7. That the costs of this application be provided for in any event.
8. That the Court be pleased to grant such further or alternative orders as may be just and appropriate in the circumstances to prevent the violation of the Plaintiffs' rights and to preserve the character of the Estate pending the final determination of the suit.

This Application is based on the grounds that the Plaintiffs have a clear and arguable case. The Defendant has breached express covenants in the Plaintiffs' lease agreements and

contravened representations made during the sale of the houses by attempting to appropriate and build upon land that was specifically set aside as a communal playground/open area for residents. The Plaintiffs' proprietary rights in the common areas, as well as their constitutional and environmental rights, are under direct threat by the Defendant's actions. The harm faced by the Plaintiffs is immediate and cannot be compensated by damages. The suit property is the only remaining recreational green space within Easy Prestige Estate, used daily by over 100 families. Its destruction or alteration (and the continued operation of an unauthorized hotel within the estate) would permanently erase crucial community amenities and fundamentally change the living environment. Once the open space is built over or the estate's character altered, the loss will be irreparable — no amount of monetary compensation can recreate a safe playground for children or restore the original estate layout and ambience. The balance of convenience heavily favours the Plaintiffs. Granting the injunctions will simply preserve the status quo (maintaining the open space and current designated uses) and prevent an irreversible transformation of the estate before the Court can decide the dispute. On the other hand, denying the injunctions would allow an illegal and unilateral development to proceed to completion and an improperly converted hotel to continue operating, thus complicating or nullifying any relief that this Honorable Court might later grant. The Defendant stands to suffer no legitimate prejudice by a temporary halt, as it is being asked only to refrain from unlawful acts and to wait for proper adjudication.

The Defendant has failed to comply with mandatory planning and environmental laws in undertaking the new construction and change-of-use. No development permissions or

statutory approvals have been obtained or evidenced: there is no NEMA Environmental Impact Assessment license posted for the project, no County Government development/building permit, and no registration by the National Construction Authority (NCA) displayed at the site, as required by the Environmental Management and Coordination Act (EMCA) and the Physical and Land Use Planning Act, 2019, In addition, the conversion of the purported shopping centre into a hotel was done without obtaining a change-of-user approval from the Machakos County Government. These omissions render the Defendant's actions prima facie illegal .The ongoing construction and unapproved user change are therefore not only in breach of the law but are being carried out clandestinely, without the knowledge or input of those most affected.

That the 1st Defendant's actions amount to a blatant breach of the lease covenants and contractual obligations governing the estate. Clause 4 of the standard lease agreements (executed by each Plaintiff) explicitly required the Defendant to incorporate a management entity and transfer the reversionary interest in all common areas (including the open spaces and communal facilities) to that entity or to the homeowners once the units were sold. Instead of honoring this covenant, the 1st Defendant has retained control of the common property and is now repurposing it for its own gain. Building on the open space — which the Defendant covenanted to preserve and ultimately hand over to the homeowners — constitutes a fundamental breach and a derogation from grant. Likewise, the Defendant's continued exclusive control over the estate's management office (which should be under homeowners' management) violates the lease terms.

The Defendant induced the Plaintiffs to purchase their homes through clear representations that amenities like the playground/green park and a community shopping centre would be part of the estate. The homeowners bought their properties with the legitimate expectation that these common amenities would be preserved and used as promised. The attempt to eliminate the only playground and the conversion of the intended shopping area into a private hotel amount to an actionable misrepresentation of the original development plan and a betrayal of the Plaintiffs' expectations. The Plaintiffs reasonably expected that any such major change (if ever contemplated) would follow due process, including consultation and requisite approvals — which has not happened.

That the 1st Defendant's conduct offends several constitutional provisions. By destroying green open space and undermining communal amenities, the Defendant is infringing on the Plaintiffs' right to a clean and healthy environment as guaranteed under Article 42 of the Constitution. The right to adequate housing under Article 43(1)(b) includes the provision of reasonable infrastructure and amenities; the estate's habitability and safety (especially for children) is part of that right and is being compromised. The principles of land policy in Article 60, including sustainable use and sound conservation of land, as well as equitable sharing of amenities, are being subverted by the Defendant's actions. Furthermore, Article 70 of the Constitution entitles any person to apply to court for relief when the right to a clean and healthy environment is threatened or violated.

That the manner in which the 1st Defendant has acted utterly lacks transparency or public participation, contrary to the national values in Article 10 of the Constitution (which

include participation of the people, good governance, sustainability, and rule of law) and contrary to statutory requirements (e.g. community participation in environmental impact assessments and in change-of-use applications). The homeowners — the persons most affected by these changes — were given no notice or say in the decision to erect a new building on their shared playground or to introduce a hotel into their residential estate. This exclusion violates their community rights to be consulted on matters affecting their environment and welfare. The resulting anger and agitation among residents also pose a potential security and public order issue; if the project continues, there is a real risk of protest or confrontation that could disturb the peace. It is therefore in the public interest to grant these conservatory orders. Upholding planning laws and environmental safeguards for communal spaces will send a message that such laws exist to protect communities and cannot be disregarded for private profit.

In the absence of disclosure and to prevent circumvention of liability through corporate fragmentation or concealment, the joinder of the 2nd to 5 th Defendants is justifiable and necessary at this stage. The Plaintiffs further reserve the right to seek leave to amend the pleadings to include any additional management companies that may emerge as having been used by the 1st Defendant in connection with the impugned activities. The Court is accordingly urged to issue injunctive relief binding all named Defendants jointly and severally, to ensure effective preservation of the suit property and enforcement of any eventual orders.

That if the Court does not intervene on an urgent basis, the 1st Defendant may rush to complete the construction or entrench the changes before the case is heard, thereby presenting the homeowners and the Court with a fait accompli. The new structure could be completed or even sold/occupied, and the hotel could further establish its operations, making it exceedingly difficult to reverse the situation. Such an outcome would render any final judgment nugatory, effectively denying the Plaintiffs a meaningful remedy.

This court has considered the application and the submissions therein. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of Giella vs Cassman Brown (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of Nguruman Limited vs Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that;

> *"in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.*
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> *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 states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially".*

Consequently, the Plaintiff ought to, first, establish a prima facie case. In Mrao Ltd vs First American Bank of Kenya Ltd (2003) EKLR the Court of Appeal gave a determination on a prima facie case. The court stated that;

> *"... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."*

In support of his application, the Plaintiff/Applicant stated the Defendant has breached express covenants in the Plaintiffs' lease agreements and contravened representations made during the sale of the houses by attempting to appropriate and build upon land that was specifically set aside as a communal playground/open area for residents. The Plaintiffs' proprietary rights in the common areas, as well as their constitutional and environmental rights, are under direct threat by the Defendant's actions.

Secondly, The Plaintiffs have to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of Pius Kipchirchir Kogo vs 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.

The Applicants stated that they the harm faced by the Plaintiffs is immediate and cannot be compensated by damages. The suit property is the only remaining recreational green space within Easy Prestige Estate, used daily by over 100 families. Its destruction or alteration (and the continued operation of an unauthorized hotel within the estate) would permanently erase crucial community amenities and fundamentally change the living environment.

Thirdly, the Plaintiffs have to demonstrate that the balance of convenience tilts in their favour. In the case of Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) EKLR which defined the concept of balance of convenience as:

'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".

In the case of Paul Gitonga Wanjau vs Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR, the court dealing with the issue of balance of convenience expressed itself thus;

> *" Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies."*

The Applicants contend that the balance of convenience tilts in their favour because if the orders sought herein are not granted the 1st Defendant may rush to complete the construction or entrench the changes before the case is heard, thereby presenting the homeowners and the Court with a fait accompli. The new structure could be completed or even sold/occupied, and the hotel could further establish its operations, making it exceedingly difficult to reverse the situation. Such an outcome would render any final judgment nugatory, effectively denying the Plaintiffs a meaningful remedy.

The decision of Amir Suleiman vs Amboseli Resort Limited (2004) eKLR where the learned judge offered further elaboration on what is meant by "*balance of convenience*" and stated;

> "*The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.*"

The Respondents submitted that the Applicants have no recognisable rights in the un built open spaces of the suit property that is capable of infringement. That their claim to every available space or building is illegal and the open space play ground is not registered as communal property in the title documents. That the Applicants reliance on the lease covenant to claim rights over alleged open space is misplaced as no such evidence has been tendered to show that the covenants expressly prohibit development or confer proprietary rights to the Applicants in the alleged open space. They submit that the necessary NEMA approvals have been obtained. That the Applicants have failed to establish a prima facie case, irreparable harm, or balance of convenience. Their claims are speculative, based on hearsay, illegally obtained documents, and overreach beyond their contractual rights.

Bearing this in mind, I am convinced that there is a risk in not granting orders of temporary injunction than granting them, as I wait to hear the suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the current situation on the ground. I have also not had the opportunity to interrogate the annexures therein.

In Robert Mugo wa Karanja vs Ecobank (Kenya) Limited & Another (2019) eKLR where 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..."*

The Applicant sought for "interim mandatory" to take control of the possession and control of the management office and to remove all structures erected in 2025 on the open space. A mandatory/permanent injunction is ordinarily granted after a full hearing and when all the evidence has been adduced and all facts have been established. In the case of Kenya Power & Lighting Co. Limited vs Sheriff Molana Habib (2018) eKLR it was held inter alia as follows;

> *"…A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only*

meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties…"

When it comes to mandatory injunctions, courts have been hesitant to grant the same particularly at the interlocutory stage, save in clear-cut cases. Such was the reasoning taken by the court in Lucy Wangui Gachara vs Minudi Okemba Lore (2015) eKLR when it rendered itself thus;

"…the court will not grant a mandatory injunction if the damage feared by the plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. We would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a summary hearing.

Persuasive judicial pronouncements by Indian courts have also affirmed that great circumspection is called for before awarding a mandatory injunction at interlocutory stage. In BHARAT PETROLEUM CORP LTD V. HARO CHAND SACHDEVA, AIR 2003, Gupta, J. of the Delhi High Court observed as follows:

"While Courts power to grant temporary mandatory injunction on interlocutory application cannot be disputed, but such temporary mandatory injunctions have to be issued only in rare cases where there are compelling circumstances and where the injury complained of is immediate and pressing and is likely to cause extreme hardship. If a

mandatory injunction has to be granted at all on interlocutory application, it is granted only to restore status quo and not to establish a new state of things."

I find that it would be premature for me to grant final orders at this interim stage in favour of the Applicants.

In view of the foregoing, I find that the application is merited in part and I order that the status quo be maintained pending the hearing and determination on the suit. Costs of the application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF FEBRUARY 2026.

N.A. MATHEKA

JUDGE