

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELCLC NO.E077 OF 2025

GEORGE MUGA ODENYOPLAINTIFF/APPLICANT

VERSUS

H. YOUNG & CO. (E.A) LTDDEFENDANT/RESPONDENT

R U L I N G

The application before court for determination is the Notice of Motion dated 2nd December, 2025 expressed to be brought pursuant to the provisions of sections 1A, 1B, 3, 3A of the Civil Procedure Act, sections 3, 4, & 9 of the Environment and Land Court Act and Order 40 Rules 1, 2 & 3 and Order 51 Rule 1 Civil Procedure Rules, Article 42, 69 and 70 of the Constitution of Kenya 2010.

The application seeks for an order of temporary injunction restraining the Defendant whether by itself, its agents, servants and or employees or otherwise howsoever from entering upon or carrying out any excavation of any nature on the suit land known as LR. NO.KISUMU/SONGHOR/1044 or dealing with the suit property in any manner whatsoever, remaining on the suit property and/or threatening, harassing or intimidating the Plaintiff or persons or in

any whatsoever way interfering with the Plaintiff's/Applicant's interest in the said property. The application also sought costs.

The application was supported by the Supporting Affidavit sworn by the Applicant on 1st December, 2025. In addition, the Applicant also filed his Supplementary Affidavit on 26th January, 2026.

The application was opposed vide the Replying Affidavit sworn by Jude Lyotzgen on behalf of the Respondent on 14th January, 2026.

The application was heard by way of written submissions.

The substantive prayer sought is an order of temporary injunction.

The law guiding grant of temporary injunction is found in Order 40 Rules 1, 2 and 3.

Rule 1 provide that;

“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 fold in execution of a decree; or

(b) that the defendant threatens 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 orders for purposes 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”.

In order for the relief of temporary injunction to be available the appellant must therefore demonstrate the grounds provided in the law.

In Giella vs Cassman Brown Co. Ltd (1973) 358 that the Applicant must establish a *prima facie* case with a probability of success, an interlocutory injunction will not normally be granted unless the Applicant would suffer irreparable injury which would not adequately be compensated in damages and that when the court is in doubt, it will decide the application on a balance of convenience. Has the applicant demonstrated these grounds herein? *Prima facie* case was defined in Mrao Ltd vs First American Bank Kenya Ltd & 2 Others [2003] eKLR 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.”

In the present case, the Applicant pleaded that he is the lawfully registered proprietor of the parcel of land known as KISUMU/SONGHOR/1084, measuring 6.8 Ha (the suit land herein). That the Defendant illegally entered into the Plaintiff’s land without his consent or any colour of right and is wrongfully excavating, harvesting and ferrying murram and using it in a road construction adjacent to the suit property.

That the Defendant’s actions amount to trespass and conversion. That the actions are causing irreversible environmental degradation, destruction of the Applicant’s land profile and ecosystem, destabilisation of the soil structure and long-term impairment of beneficial use of the suit property which cannot be compensated adequately by damages.

That unless the court intervenes, the Defendant will continue with the unlawful activities thus making the eventual judgement herein hollow.

To the Supporting Affidavit, the Applicant annexed a copy of title deed to prove ownership of the suit land. The Applicant also annexed to the Supporting Affidavit was a copy of Report by County Surveyor dated 10th September, 2025, demand letter, valuation report and photographs of the site complained of.

It was submitted on behalf of the Applicant vide the written submissions dated 27th January, 2026 that under the provisions of section 24 of the Land Registration Act, the Applicant is vested with exclusive ownership of the suit land together with all rights and privileges belonging or appurtenant thereto. That the question of whether the excavation took place on the suit land was considered by the survey report dated 10th September, 2025. That trespass has been demonstrated.

That the applicant has demonstrated a *prima facie* case and that unless the orders of interlocutory injunction is granted, the Applicant will suffer irreparable injury. The Applicant prayed that the application be allowed.

The case of the Respondent as contained in the Replying Affidavit is that its presence and activities on the ground were lawful, bona fide and lawfully sanctioned having been strictly carried out pursuant to a valid, binding and subsisting Lease Agreement dated 30th September, 2024 duly executed with the registered proprietor of KISUMU/SONGHOR/1045 thus vesting the Defendant with lawful authority and colour of right to enter and occupy and utilize the demised portion of the land being 2 acres of the property. That the Defendant paid to the owner of the land a total of Kshs.5,600,000 being consideration under the lease. That it was the registered proprietor of parcel No.1045 who physically identified and pointed out the fenced land to the Defendant.

That the Defendant is not and has not been in occupation of the Applicant's property.

That the question of whether any encroachment occurred if at all is a purely technical issue of boundary identification and delineation incapable of accurate conclusive determination unless through properly conducted joint survey involving the Plaintiff and the registered proprietor of plot No.KISUMU/SONGHOR/1045 and duly licensed surveyors in accordance with the applicable law and professional survey standards.

That the Application is misconceived, disproportionate, speculative and wholly inconsistent with the overriding objective of the court.

To the Replying Affidavit, the Respondent annexed a copy of lease agreement with the owner of plot No. KISUMU/SONGHOR/1045, copy of deed of variation, copies of payment advices evidencing payment of consideration under the lease and photographs.

It was submitted on behalf of the Respondent vide the written submissions dated 29th January, 2026 that the Applicant has failed to demonstrate a clear and uncontested violation attributable to the Respondent.

That a boundary dispute cannot be determined at the interlocutory stage.

Relying on the case of M'Mukanyi -vs- M'Mbijiwe (1984)KLR 761 and Kahindi Ngala Mwangondi -vs- Mtana Lewa [2014]eKLR, Counsel submitted that a boundary dispute cannot be converted into a trespass claim to attract injunctive relief.

Counsel submitted that under the provisions of sections 18 and 19 of the Land Registration Act, the jurisdictional sequence is that the first port of call is the Land Registrar who is supposed to handle the dispute in accordance with the provisions of section 19 of the Act.

That a County Surveyor's report prepared at the instance of the one party without the Land Registrar's inquiry and notice or participation of owners of all adjoining land is preliminary material capable of being used to trigger or support a boundary dispute.

On whether damages are an adequate remedy, relying on the case of Kenled Cons Ltd -vs- Gatitu Service Station Ltd & Another [1990]KLR 557 where it was held that an injunction will not normally be granted where the dispute involves contested issues requiring full trial, or where the alleged injury is capable of being compensated by damages, Counsel submitted that the Applicant had not demonstrated any unique or irreparable harm incapable of compensation by damages.

Counsel submitted further that the balance of convenience tilts decisively in favour of the Respondent because the Respondent has already ceased operation and there is no imminent or irreversible threat.

I have considered the application and all material placed before court in support and in opposition.

I find that the Applicant has established *prima facie* case, that he is the registered owner of the suit land and secondly, through the County Surveyor's report that the activities of the Respondent were

being carried out on the suit land. No surveyor's report was placed before court by the Respondent to discount the County Surveyor's report and demonstrate that the activities complained of are being carried out within the confines of parcel No. KISUMU/SONGHOR/1045 as claimed by the Respondent.

It has not been denied by the Respondent that its activities included excavating, harvesting and ferrying of murram and that the actions have the effect of causing irreversible environmental degradation, destruction of the subject land profile and ecosystem and destabilization of the soil structure and long term impairment of the beneficial use of the suit property.

I further find that the balance of convenience is in favour of preserving the suit land pending hearing of the case.

I find that the Applicant has prima facie demonstrated that the suit property is in danger of being wasted and/or damaged and ought to be protected pending hearing of the case. I allow the application.

Costs to the Applicant.

Orders accordingly.

Ruling dated and signed at Kisumu, read virtually this 5th day of March, 2026 through Microsoft Teams Online Application.

E. ASATI

JUDGE

In the presence of:

Maureen: Court Assistant.

Hiram h/b for Kariuki for the Applicant.

Kariuki h/b for Murende for the Respondent.