

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NUMBER E043 OF 2025

JOHNSON MBAABU MBURUGU1ST PLAINTIFF

CATHERINE GAKII MBABU.....2ND PLAINTIFF

VERSUS

ABDI RASID AHMED1ST DEFENDANT

JAMES KIBAKI KAILEMIA2ND DEFENDANT

LAND ADJUDICATION & SETTLEMENT OFFICER

TIGANIA WEST SUB-COUNT.....3RD DEFENDANT

**THE HONOURABLE ATTORNEY GENERAL4TH
DEFENDANT**

RULING

1. Before me is the Application dated the 18.12.2025, brought pursuant to the provisions of **Sections 1 A , 1B , 3 , 3A and 63e of the Civil Procedure Act, Chapter 21 Laws of Kenya; Order 40 Rules 1, 2 , 3 and 4 of the Civil Procedure Rules, 2010;** and all enabling provisions. The reliefs sought at the foot of the application are:

- i. *That the Application be certified as urgent, owing to its urgent nature, the same be heard Ex-parte in the first instance, and the Honourable Court be pleased to issue the orders sought accordingly.*

- ii. *That pending the inter parties hearing of this application, the Honourable Court be pleased to issue a temporary order of injunction restraining the 1st defendant, his servants, agents, employees, assignees, or anybody else acting on his behalf from carrying out any further construction of permanent stone perimeter wall, constructing any building, carrying out any development and/or in whatsoever manner doing on the land parcel No. 1498 [correctly shown in the map for Mbwaa 1 Land Adjudication Section as land parcel No. 2584] situated in Mbwaa 1 Land Adjudication Section in Tigania West Sub-County.*

- iii. *That pending the hearing and determination of this suit, the Honourable Court be pleased to issue a temporary order of injunction restraining the 1st defendant, his servants, agents, employees, assignees, or anybody else acting on his behalf from carrying out any further construction of permanent stone perimeter wall, constructing any building, carrying out any development and/or in whatsoever manner doing on the land parcel No. 1498 [correctly shown in the map for Mbwaa 1 Land Adjudication Section as land parcel No. 2584] situated in Mbwaa 1 Land Adjudication Section in Tigania West Sub-County.*

- iv. *That pending the inter parties hearing of this application, the Honourable Court be pleased to issue order of injunction restraining*

the 2nd defendant, his servants, agents, employees, assignees, and/or anybody else acting on this behalf from selling, alienating, disposing of, trespassing, interfering, and/or in whatsoever manner dealing with the Plaintiffs' Parcel Nos. 1480, 1481, 1482, 183, 1484, 1485,1486,1487,1489,1490,1491,1492,1495,1496,1497,11498,1499,1590,1591,1592 and 3099 situated in Mbwaa 1 Land Adjudication Section in Tigania West Sub-County.

v. *That pending the inter parties hearing of this application, the Honourable Court be pleased to issue order of injunction restraining the 2nd defendant, his servants, agents, employees, assignees, and/or anybody else acting on this behalf from selling, alienating, disposing of, trespassing, interfering, and/or in whatsoever manner dealing with the Plaintiffs' Parcel Nos. 1480, 1481, 1482, 183, 1484, 1485,1486,1487,1489,1490,1491,1492,1495,1496,1497,11498,1499,1590,1591,1592 and 3099 situated in Mbwaa 1 Land Adjudication Section in Tigania West Sub-County.*

vi. *That pending inter parties hearing of this application, the Honuorable court be pleased to issue a temporary order of injunction restraining the defendants, their servants , agents, employees, assignees, and/or anybody else acting to their behalf from erasing from the map for Mbwa 1 land adjudication section, alienating, selling, transferring, disposing of, interfering and/or in whatsoever manner from dealing with the plaintiff's land parcel Nos.1480,1481,1482,1483,1484,1485,1486,1487,1489,1490,1491,1492,1493,1493,1494,1495,1496,1497,1498,1499,1590,1591, 1592 and*

3099 situated in Mbwaa 1 Land Adjudication section in Tigani West Sub-county.

- vii. That pending inter parties hearing of this suit the Honuorable court be pleased to issue a temporary order of injuncion restraining the defendants, their servants , agents, employees, assignees, and/or anybody else acting to their behalf from erasing from the map for Mbwa 1 land adjudication section, alienating, selling, transferring, disposing of, interfering and/or in whatsoever manner from dealing with the plaintiff's land parcel Nos.1480,1481,1482,1483,1484,1485,1486,1487,1489,1490,1491,1492,1493,1493,1494,1495,1496,1497,1498,1499,1590,1591, 1592 and 3099 situated in Mbwaa 1 Land Adjudication section in Tigani West Sub-county.*
- viii. That upon the issuance of the court orders sought in Nos. 1, 2,4 and 6 hereinabove, the Honourable Court be pleased to order that the same be served upon the Defendants for compliance.*
- ix. That the costs of this Application be provided for.*

2. The application is premised on the numerous, *albeit* prolix grounds which have been enumerated on the face thereof. The grounds include: The Applicants are the lawful and legitimate owners of the suit properties; the 1st and 2nd Defendants have entered into and commenced interference with parts of the suit properties; the 3rd defendant [The Land Adjudication and Settlement Officer] has colluded with the 1st defendant and

superimposed plot number 2584 on the portion that relates to plot number 1498; the superimposition of plot number 2584 was undertaken without lawful process or authority; the superimposition is fraudulent and; the Applicants are bound to be deprived of their rights to and interest over the suit properties.

3. Furthermore, the Applicants have posited that upon the creation and illegal superimposition of plot number 2584; the said plot has since been sold to and in favour of the 2nd defendant; the 2nd defendant has since commenced construction on the suit property; the offensive construction is bound to change/alter the character of the suit properties; the Applicants are disposed to suffer irreparable loss; and a basis has been establish to warrant the intervention of the court.
4. The subject application is supported by the affidavit sworn on the **18th of December, 2025** and supplementary affidavit sworn on the **4th of February, 2026**. The deponent of the named affidavits has reiterated the grounds contained in the body of the application. In addition, the deponent has annexed assorted documents including a copy of the demarcation book demonstrating that the suit properties were demarcated and adjudicated in favour of the 2nd applicant and himself [Deponent].
5. Flowing from the foregoing, the Applicants' have contended that unless the orders are granted, their property rights to and in respect of the suit properties shall be overrun by the 1st and the 2nd Defendants. The court has therefore, been implored to grant the reliefs sought and to avert irreparable loss.

6. The 1st and 2nd Defendant opposed the application. The 1st and 2nd defendants have filed a replying affidavit sworn by James Kibaki Kailemia [the 2nd Defendant/Respondent]. The deponent of the replying affidavit has contended that though the Plaintiffs are registered as the owners of the suit properties, their ownership is subject to objections; the objections have not been heard; the Land Adjudication Officer is mandated to hear and determine the Objections; the instant suit is premature; the suit is barred by the Doctrine of exhaustion; the court is divested of jurisdiction; and the suit constitute[s] an abuse of the due process of the court.

7. The 1st and 2nd Defendant have also filed a notice of preliminary objection dated the 07.01.2026. The preliminary objection has highlighted various grounds. The grounds are: The suit by the Applicants' contravene **Sections 26 and 29 of the Land Adjudication Act, Chapter 284 Laws of Kenya**; the suit is prohibited by the Doctrine of Exhaustion; the suit is also barred by the Doctrine of Constitutional Avoidance; the court is divested of jurisdiction; and the suit does not disclose any reasonable cause of action and thus constitute an abuse of the due process of the court.

8. The 1st and 2nd Defendants have similarly filed grounds of opposition dated the 07.01.2026. The grounds of opposition have reproduced similar issues as the ones canvassed *vide* the Notice of Preliminary Objection. There is no need to reproduce same.

9. Premised on the contents of the replying affidavit; the grounds of opposition, and the Notice of the Preliminary Objection, the 1st and 2nd defendants/respondents have invited the court to find and hold that the entire suit is a *non-starter*. The court has also been invited to find that the application does not meet the threshold for the grant of the orders of temporary injunction. To this end, the court has been implored to dismiss the application with costs.
10. The 3rd and 4th Defendants did not file any response to the application. Nevertheless, it is instructive to state that the learned counsel Ms. Miranda [on behalf of the Honourable Attorney General] appeared before the court all through during the directions; and the hearing of the application.
11. The advocates for the respective partes consented to canvass and dispose of the application by way of written submissions. The court thereafter issued directions pertaining to the filing and exchange of the written submissions. In particular, the court circumscribed the timelines for the filing and exchange of the written submissions.
12. The Plaintiffs' filed very lengthy submissions dated the 04.02.2026; and wherein the plaintiff highlighted four [4] key issues. The issues highlighted by the Plaintiffs are: The Plaintiffs sought and obtained the consent of the Land Adjudication and Settlement Officer; the consent under reference bestows the court with the requisite jurisdiction; the doctrine of exhaustion does not defeat the subject suit/proceedings; and the Applicants have established the conditions to warrant the grant of the orders of temporary injunction.

13. The 1st and Defendants/Respondents also filed written submissions and have highlighted four [4] key issues. The issues are: The subject suit and the application are prohibited by the doctrine of exhaustion; the Applicants' suit is premature and ought to have awaited the determination of the objections; the 2nd defendant has lawful right[s] to plot number 2584; and the application does not meet the threshold for the grant of temporary injunction. The court has therefore been invited to strike out the suit; or in the alternative, to dismiss the application for temporary injunction.

14. The 3rd and 4th Defendants did not file any written submissions. Moreover, the named Defendants intimated that same shall leave the matter to the court to determine in accordance with the evidence on record and the applicable law.

15. Having reviewed the Notice of Motion application; the supporting affidavit; the supplementary affidavit; the replying affidavit in opposition thereto; the grounds of opposition; and the notice of preliminary objection, I come to the conclusion that the determination of the subject matter [the application dated 18.12.2025 and the notice of preliminary objection the 07.01.2026] turns on three [3] key issues. The issues are: Whether the preliminary objection by the 1st and 2nd respondents raise pure points of law; whether the suit and the subject application are defeated by the doctrine of exhaustion; and whether the Applicants have established a basis to warrant the grant of orders of temporary injunction.

16.Regarding the first issue, it important to highlight that a preliminary objection can only be raised and canvassed where the proponent of the preliminary objection [in this case, the First and Second Defendants] concede the facts raised by the adverse party. In this case, the adverse party is the plaintiff. consequently, the preliminary objection can only be canvassed on the assumption that the facts pleaded and captured in the body of the plaint are correct. The moment the proponent of the preliminary objection disputes the facts as posited in the pleadings of the adverse party, the preliminary objection becomes untenable and dissipates. [See **Oraro v Mbaja [2005] KEHC 3182 (KLR); Independent Electoral & Boundaries Commission v Cheperenger & 2 others [2015] KESC 2 (KLR) and Joho & another v Shahbal & 2 others (Petition 10 of 2013) [2014] KESC 34 (KLR) and Joho & another v Shahbal & 2 others (Petition 10 of 2013) [2014] KESC 34 (KLR)**].

17.Additionally, it is common ground that a proponent of a preliminary objection can also not rely on an annexure attached to own replying affidavit or to such other extraneous documents and therefore prop the preliminary objection. Such an endeavor would be tantamount to sneaking evidence through the back door. Suffice it to state that a preliminary objection must be propped by the pleadings filed by the adverse party and must canvass pure points of law and not otherwise. [See **Mukisa Biscuits Limited versus West End Distributors Limited [1969] E A 696 – 701**].

18.With regard to the instant matter, learned counsel for the 1st and 2nd Defendants has contended that there are objections, which have been

lodged against the titles held by the Plaintiffs. To this end, it has been posited that even though the Plaintiffs are registered/demarcated as the owners of the suit plots, their ownership has been objected to by way of objection[s]. In this regard, it has been submitted that the Plaintiffs suit is premature and ought to await the determination of [sic] the objections by the Land Adjudication and Settlement Officer.

19. Furthermore, learned counsel for the 1st and 2nd Defendants/ Respondents' has thereafter referenced annexure marked as JMM2 as the basis of the contention that there does exist an objection. It suffices to state that an annexure relates to and concerns evidence. In addition, there is no gainsaying that an annexure is not a pleading. In this regard, a preliminary objection cannot be anchored on the basis [sic] of an annexure.

20. In my humble view, the preliminary objection by and on behalf of the 1st and 2nd defendants; and which is premised on the impugned annexure, does not constitute a pure point of law. Moreover, the preliminary objection does arise from the pleadings and hence the purported preliminary objection is premised on misapprehension and misconception of the legal principles underpinning the rising of the preliminary objections.

21. The next issue that has been canvassed by learned counsel for the 1st and 2nd Defendants' touches on and concerns the doctrine of exhaustion. It has been contended that the Land Adjudication Act contains internal

disputes resolution mechanisms, which ought to be invoked by any party before approaching a court of law. In particular, it has been contended that the Plaintiffs herein ought to have lodged an objection against the creation of [sic] plot number 2584 Mbwaa 1 Adjudication Section in accordance with **Sections 25 and 26 of Land Adjudication Act, Chapter 284 Laws of Kenya.**

22. In addition, it has been contended that subject to the outcome of the objection [if at all], the Plaintiffs would still have filed/lodged an appeal to the Cabinet secretary [read, the Minister] in terms of **Section 29 of the Land Adjudication Act.** To this end, learned counsel for the 1st and 2nd defendants has contended that the suit before the court is premature and prohibited by the doctrine of exhaustion. Simply put, the counsel for the 1st and 2nd Defendants contends that the Plaintiffs have jumped the gun.

23. I have considered the substratum of the 1st and 2nd defendants' arguments. However, it is imperative to underscore that the Plaintiffs sought for and obtained the consent of the Land Adjudication Officer. The consent is dated the 30.10.2025. The consent letter was issued by the Land Adjudication Officer on the basis of **Section 30 [1] of the Land Adjudication Act Chapter 284 Laws of Kenya.**

24. The provisions under reference stipulate thus:

Staying of land suits

(1) Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication

section until the adjudication register for that adjudication section has become final in all respects under section 29 (3) of this Act.

25. Though the Land Adjudication Officer was/is bestowed with the statutory mandate to entertain and adjudicate upon objections, the moment the Adjudication officer issues the consent, the adjudication officer divest[s] him/herself of jurisdiction. The jurisdiction to entertain the resultant dispute moves to the court and thus the court cannot forsake its jurisdiction.

26. On the converse, once the land adjudication officer has issued a consent to a party, in this case to the Plaintiffs, the court cannot send away the Plaintiffs to go back to the Land Adjudication Officer and to partake of internal dispute resolution mechanisms. To my mind, the issuance of the consent in favour of the Plaintiffs closed the door on the doctrine of exhaustion and opened the door for the Plaintiffs to access the jurisdiction of this court.

27. Additionally, it is worthy stating that the doctrine of exhaustion, which learned counsel for the 1st and 2nd Defendants has highlighted, has known exceptions. The exceptions were well articulated vide **Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] KEHC 10266 (KLR)**. The five [5] judge bench of the High Court stated thus:

“59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others Ex Parte The

*National Super Alliance Kenya (NASA) (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus: What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in [the Constitution](#) or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.*)*

60.As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in [the Constitution](#) or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

28.In respect of the instant matter, the Land Adjudication Officer has since divested himself/herself of the statutory mandate. The divestiture has

taken the trajectory of the consent in terms **of Section 30 [1] of the Land Adjudication Act**. In this regard, the Land Adjudication Officer cannot retake the dispute; and hear the matter. Essentially, the doctrine of exhaustion has been rendered moot, by operation of the law.

29. Secondly, the Plaintiffs have also accused the land adjudication and settlement officer of fraud and collusion. The particulars of fraud and collusion have been highlighted the foot of paragraph 16 of the plaint. The bottom line is that the land adjudication and settlement officer cannot now be a judge in a matter where same has been accused of collusion. Certainly, the determination of the dispute [if at all] by the said office would run afoul the provisions of **Articles 25 [c] , 10 [2], 47 and 50 of the Constitution, 2010**.

30. To my mind, the forum [the office of the Land Adjudication and Settlement Officer] which is the stipulated internal dispute resolution organ would not render an appropriate and effective remedy. Simply put, any action by the said office [if at all] would violate the rule of natural justice and hence the proposed forum would be ineffectual.

31. Flowing from the foregoing, I am not persuaded by the submissions of learned counsel for the 1st and 2nd Defendants that the subject suit and the attendant application, are barred by the doctrine of exhaustion.

32. The last issue that merits consideration and determination is whether the Applicants have established the conditions to warrant the grant of an order of temporary injunction. To start with, it is imperative to

underscore that a party seeking to partake of an order of temporary injunction is obligated to demonstrate the existence of a prima facie case. [See the holding in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KECA 175 (KLR)**]

33.As pertains to the subject matter, the Plaintiffs have contended that plot number 1498 Mbwaa 1 Adjudication Section was demarcated and adjudicated in their names. In addition, it has been posited that the ground location was well delineated. However, the Plaintiffs have averred that the 1st and 2nd Defendants have colluded with the Land Adjudication Officer and thereafter superimposed plot number 2584 on top of plot number 1498. Furthermore, it has been contended that the superimposition has operated to dislocate/ dislodge plot number 1498 from its lawful and legitimate place.

34.In my humble view, the contention by the Plaintiffs raises a pertinent and salient issue, which requires due interrogation, investigation and determination. Suffice it to state that the interrogation and [sic] investigations can only be undertaken during the plenary hearing. The stage for plenary hearing is yet to be arrived at. However, on the face of it, there does appear a pertinent issue. Quite clearly, fraud; collusion; and superimposition of land on top of another is a serious issue.

35.I am aware that in determining whether or not a prima facie case has been established, I am not called upon to undertake a mini trial. Moreover, it is trite that a court addressing an interlocutory application is not called upon to make precipitate and substantive findings of law or facts. [See **Mbuthia versus Jimba Credit Finance Limited [1988] eKLR; and**

Nguruman Limited versus Jan Bonde Nielsen and another [2014] eKLR]. Nevertheless, the Court is called upon to form some opinion [credible opinion] based on the evidence tendered.

36. *In a nutshell*, I am persuaded that the issues highlighted in the body to the plaint dated the 18.12.2025 demonstrate the existence of a prima facie case with probability of success. There is a probability of success. I so find.

37. The next sub issue that falls for consideration relates to whether the Plaintiffs shall be disposed to suffer irreparable loss unless the orders sought are granted. It is not lost on me that irreparable loss connotes such loss which cannot be compensated by an award of damages. Moreover, irreparable loss must be that loss which is proximate and realistic. It must not be speculative or remote. In addition, the Claimant must substantiate same by way of affidavit evidence. It must not be assumed or; imagined.

38. What constitutes irreparable loss was expounded in the case of **Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others [2014] KECA 153 (KLR)**. The Court of Appeal stated thus:

“The second limb of the principles upon which an injunctive remedy is granted in our jurisdiction as set out in

GIELLA V CASSMAN BROWN & CO LTD (supra) stipulates that 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. In NGURUMAN LIMITED V. JAN BONDE NIELSEN & 2 OTHERS (*supra*), this Court stated as follows on irreparable injury or damage:

“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 face, 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.”

39. The crux of the Plaintiffs’ application is to the effect that the 1st and 2nd Defendants are likely to alienate or dispose of plot number 2584. In addition, there is the apprehension that the alienation or disposal of the said property during the pendency of the suit, would not doubt, defeat the final orders that the court may grant. The dealings, alienation and disposal will certainly occasion irreparable loss. Moreover, there is the fear that the construction [if any] undertaken on the suit property will change the character of the same.

40. Without belaboring the point, I am equally persuaded that the Plaintiffs' shall be disposed to suffer irreparable loss/harm, unless the court intervenes. The intervention of the court is indeed apposite. The intervention of the court will ensure that the suit property remains *in situ*; and does not dissipate *pendete lite*.

Conclusion

41. Flowing from the analysis in the body of the ruling, it is apparent that the preliminary objection which was raised by/on behalf of the 1st and 2nd Defendants was based on misapprehension of the law. The preliminary objection was clearly misconceived.

42. Additionally, it is imperative to observe that the alienation and disposal of plot number 2584 Mbwaa 1 Adjudication Section, will no doubt, occasion irreparable loss. The sale or disposal of the said property, may place same beyond the reach of the Plaintiffs, in the event the suit succeeds. Such an endeavor would defeat the doctrine of *Lis Pendense*.

43. Consequently, and in the premises, it is my finding that the Plaintiffs have established and demonstrated a basis for the grant of orders of temporary injunction.

Final orders:

44. From the foregoing, the final orders of the court are:

- i. *The Application dated 15.12.2025 be and is hereby allowed in terms of prayer 7 thereof. In particular, an order of temporary injunction be and is hereby issued pending the hearing and determination of the suit.*
- ii. *The Plaintiffs' shall provide an undertaking as to damages that may arise as a result of the orders of temporary injunction herein. The undertaking shall be way of depositing the sum of Kshs. 150,000/= only with the Deputy Registrar of the court.*
- iii. *Further and in addition the sum of Kshs. 150,000/= only which was deposited vide the orders of the court issued on 22.12.2025, shall operate as the undertaking and same shall be held by the court [The Deputy Registrar] pending the hearing and determination of the suit; or until further orders of the court.*
- iv. *The Costs of the Application be and are hereby awarded to the Plaintiffs'/Applicants'.*

45.It so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 27TH DAY OF FEBRUARY, 2026.

OGUTTU MBOYA FCIArb ;CPM [MTI- EA]

JUDGE

In presence of:

Naserian; Court Assistant

Mr. Nyamu Nyaga for the Plaintiffs/Applicants

Ms. Miranda [Senior Litigation Counsel] for the 3rd and 4th Defendants
/Respondents

N/A for the 1st and 2nd Defendants/Respondents.