



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC CASE NO. E011 OF 2024

BETWEEN

HASSAN MOHAMUD MOHAMED.....
.....PLAINTIFF

VERSUS

TAMARI RESIDENCE LTD & 8 OTHERS.....
DEFENDANT'S

AND

HEZEKIAH MWANGI.....1ST INTENDED
INTERESTED PARTY

THE DIRECTOR OF SURVEY KENYA...2ND INTENDED
INTERESTED PARTY

RULING

1. When this matter came up for directions on 3/10/2025, the court directed the parties to canvass all pending applications

by written submissions. However, counsel for the plaintiff and the defendants addressed only the applications dated 14/07/2025 and 21/07/2025. Earlier, they had filed submissions on the applications dated 15/02/2024 and 19/03/2024, as well as on the amended notice of preliminary objection (PO) of March 2024. However, these are not the only pending applications, as we have applications dated 23/10/2024, 9/01/2025, 7/03/2025, and 13/03/2025, all filed by the defendants.

2. Nevertheless, from the record and considering the various replies by the plaintiff, it is evident that the applications dated 23/10/2024, 9/01/2025, 7/03/2025, and 13/03/2025 are all rendered moot, with no remaining issues for determination, as the 2nd intended interested party has conducted a site visit and submitted a report dated 26/05/2025 in compliance with the court's orders. The court finds that these applications are spent.
3. Consequently, the pending applications that are the subject of this ruling are dated 15/02/2024, 19/03/2024, 14/07/2025, and 21/07/2025, and the PO of March 2024. Accordingly, we shall highlight the substance of each of these documents and responses thereto either in support or opposition to them.

Plaintiff's motion dated 15/02/2024

4. This motion is expressed to have been moved within the provisions of **Sections 1A, 1B, 3A and 63 (c) & (d)** of the **Civil Procedure Act** and **Order 40, Rules 1, 2, and 3** of the **Civil Procedure Rules**, and all other enabling provisions of the law. The plaintiff seeks the following reliefs from this court:

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a. Spent.

b. Spent.

c. THAT this honourable court do issue a temporary injunction restraining the defendants whether by themselves, their agents, servants, or any other persons from interfering, trespassing, encroaching, fencing, constructing and/or in any other manner interfering with the plaintiff's property, Land Reference Number 29506, IR No. 180098, Syokimau, Machakos County pending the hearing and determination of this suit.

d. Spent.

e. THAT a temporary injunction do issue restraining the defendants, their servants and/or agents from trespassing and/or continuing to trespass, alienating, entering, constructing, fencing, and/or erecting any structures or building thereon, committing

acts of waste on the portion or part of Land Reference Number 29506, IR No. 180098, Syokimau, Machakos County and or from interfering with the plaintiff's title and interest to the said property and/or from dealing with the said property in any way whatsoever pending the hearing and determination of this suit.

f. Spent.

g. THAT a mandatory injunction do issue to the defendants directing them to demolish all the structures on the portion of the plaintiff's, LR. No. 29506 Syokimau, Machakos County, measuring 6.6 meters and affecting 530 m² (0.0530 Ha) at their own cost, or, in the alternative, the plaintiff be at liberty to demolish the structures, and the defendants to reimburse the plaintiff for all costs incurred pending the hearing and determination of this suit.

h. THAT the costs of the motion be in the cause.

i. THAT the costs of this application be provided for.

5. The motion is supported by the grounds set out in the body of the motion and the supporting affidavit of the plaintiff, sworn

on 15/02/2024. In brief, he informs the court that the plaintiff is the registered owner of **Land Reference Number 29506, IR No. 180098 (“plaintiff’s land”)**. On 18/12/2023, his counsel demanded that the defendants desist from interfering with his land, but they ignored the request and have since fenced off and constructed on it without permission, to the extent of 6.6 metres (520 m² or 0.0530 ha). These actions are illegal, and he maintains that if temporary injunctive relief is not granted, he will suffer irreparable loss and damage that cannot be compensated by an award of damages.

6. The defendants challenge this motion through the PO, in which they aver that prayers no 2, 3, 4, 5, 6 and 7 of the motion are substantive and may conclude the entire suit at an interlocutory stage. The motion is also challenged by the replying affidavit of the 7th defendant, who admits receipt of the demand notice. She states that the 1st defendant is the registered owner of **Land Reference Number 22769, Machakos (the defendant's land)**, which is adjacent to the plaintiff's, and that an expert report revealed that the defendants occupied only what belonged to them.
7. She contends that the encroacher is the owner of **Land Reference Number 29707**, as allegedly evident from the plaintiff's expert report. She further argues that the balance of convenience tilts in their favour and that any harm or loss

cannot be quantified, as the 1st defendant is a real estate developer that has begun construction of the real estate project known as Tamari Residences (“the Development”), an off-plan project for which it has already entered into binding agreements for sale for a significant number of units.

8. In a brief rejoinder, through a supplementary affidavit of Hassan Mohamed Mohamud, sworn on 19/09/2024, the plaintiff reiterates his earlier averments and states that the dispute is not one on boundaries and the defendants were the encroachers.

Defendants’ motion dated 19/03/2024

9. This motion is moved under **Sections 1A, 1B, 3A and 63(e)** of the **Civil Procedure Act** and **Orders 1 Rule 10(2), 2 Rule 15 1(a) and 51** of the **Civil Procedure Rules (2010)** and all other enabling provisions of the law. They seek the following orders: -

a) THAT this honourable court be pleased to order that the suit as against the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th defendants be and is hereby struck out.

b) THAT the costs of this application be provided for.

10. The motion is supported by the grounds set out in its main body and the supporting affidavit of the 2nd to 9th defendants, all sworn on 19/03/2024. In summary, they state that they are merely shareholders of the 1st defendant and are not personally responsible for its actions. Moreover, no cause of action has been disclosed against them personally; they have been improperly sued and are unnecessary parties.
11. In opposition, the plaintiff, through a reply affidavit sworn on 19/09/2024, asserts that these defendants have been properly sued and that the grant of orders cannot amount to lifting the corporate veil. He further argues that these defendants are necessary parties and avers that, as evident from *paragraphs 31(a-d) and 32* of the plaint, they are sued for their acts of trespass, not for their capacity as directors of the 1st defendant.

Defendants' "amended" motion dated 14/07/2025

12. This application is stated to be brought pursuant to **Sections 1A, 1B, 3A** and **63(e)** of the **Civil Procedure Act**, and **Order 51** of the **Civil Procedure Rules (2010)** and all other enabling provisions of the law and prays for orders that:-

a) THAT pending the hearing and determination of this suit, this honourable court lifts the status quo orders issued on 18/11/2024, limited to the

alleged encroached area of 6.6 meters on the 1st defendant's property.

b) THAT pending hearing and determination of this suit, the 1st defendant to continue with construction on the undisputed area of the 1st defendant's property and limit the status quo orders to the alleged encroached area of 6.6 meters.

13. The motion is supported by the grounds outlined in its main body and the supporting affidavit of the 7th defendant, sworn on the same date. She maintains that, following a joint survey process pursuant to a court order, numerous inconsistencies, gaps, and overlaps were noted affecting the entire strip on which the properties sit. In the circumstances, it is in the interests of justice to limit the status quo orders to the alleged encroached area of 6.6 metres, allowing both parties to deal with their properties.

14. The plaintiff challenged this motion by his reply affidavit of 29/10/2025, in which he states that the defendants have continued to file frivolous and vexatious applications with the sole intention of derailing the expeditious conclusion of this matter, clogging the court process, and subjecting him to unnecessary and repetitive litigation over the same issues. Further, the surveyor's report dated 26/05/2025, filed in court,

confirms the encroachment, and the defendants should not be allowed to benefit from their illegality; there are no valid reasons warranting a lifting or variation of the existing *status quo* orders.

Defendants' motion dated 21/07/2025

15. In this motion, the defendants have petitioned the court pursuant to **Sections 1A, 1B, 3, and 3A** of the **Civil Procedure Act**, as well as **Order 51** thereof. Additionally, they invoke **Order 1 Rule 10(2)** of the **Civil Procedure Rules 2010**, and they formally pray for the following: -

a. The proposed 1st interested party, Hezekiah Mwangi, the legal and beneficial owner of L.R No. 24863, mentioned in the proposed 2nd interested party's report dated 26/05/2025, be and is hereby joined in this suit as the 1st interested party.

b. The proposed 2nd interested party, the Director of Survey Kenya, having authority under Sections 15 and 16 of the Land Registration Act, 2012, be and is hereby joined in this suit as the 2nd interested party.

c. Consequent to their joinder, the proposed 1st and 2nd interested parties be at liberty

file the necessary pleadings within 10 days or such other reasonable time as this honourable court may direct, upon being properly served with the pleadings already filed by the other parties in this suit.

d. Costs of this application be in the cause.

16. The motion is supported by the grounds set out in the body of the motion and by the 7th defendant's supporting affidavit, sworn on the same date. To summarise, she states that the proposed 1st interested party ("1st IP") has a stake in this suit because his land (**LR. 24863**) borders the defendant's property and is mentioned in the proposed 2nd interested party's report dated 26/05/2025 as encroaching on the 1st defendant's property. It is necessary that he be joined in the suit so that the court may determine all questions and issues relating to the boundaries of the properties.
17. As for the 2nd IP, she states that it is statutorily required to prepare and maintain cadastral maps for every registration unit, to inspect and consider the boundaries of registered properties, and that its input is thus vital to determining the issues raised in this suit. Moreover, it has prepared a report dated 26/05/2025 in this matter, which should be presented and explained.

18. The plaintiff and 2nd IP did not oppose this motion. As for the 1st IP, it filed grounds of opposition dated 24/10/2025 and raised the following grounds: -

- a) The application is misconceived and an abuse of the court, as it is unnecessary considering that the 1st proposed interested party has no claim or identifiable interest over the suit property in question.***
- b) The 1st proposed IP does not have an identifiable stake, legal interest, or duty in these proceedings regarding the subject matter herein.***
- c) The presence of the 1st proposed IP is not necessary for effectual adjudication of the dispute herein, this being a claim for trespass against the defendants.***
- d) The application is essentially seeking to introduce an entirely new case, distinct from the subject matter of these proceedings.***
- e) The 1st proposed interested party will not be affected by the determination of this honourable court on the suit/claim made either way.***

f) The application, as crafted, is frivolous and an abuse of the court process and should be dismissed with costs.

1. As directed by the court, the motions are canvassed by written submissions. The plaintiff's submissions dated 19/09/2024 and 5/09/2025 were filed by **Ms. Hassan, N. Lakicha & Co. Advocates**, whereas the defendants' submissions dated 15/09/2024 and 21/09/2025 were filed by **Ms. FMC Advocates LLP**. The interested parties did not file theirs. Therefore, after identifying and considering the issues for determination, this ruling shall, later in its analysis and decision, consider the arguments contained in the rival submissions regarding the particular issue and also take into account the law and judicial precedents.

2. Accordingly, having reviewed the motions, their grounds, affidavits, annexures, PO, grounds of opposition, and the opposing submissions, the ensuing issues that require resolution are:

a) Whether the PO has met the legal threshold and is merited.

b) Whether the motion dated 14/07/2025 is an abuse of court process, and if not, whether it is merited.

- c) Whether the plaintiff has met the threshold to warrant the grant of injunctive relief.***
- d) Whether the 2nd to 9th defendants should be struck out as parties to these proceedings.***
- e) Whether the intended IPs should be joined as a party to these proceedings.***

And they shall soon be addressed sequentially in this court's analysis and determination.

a) Whether the PO has met the legal threshold and is merited.

21. The first limb of this issue was not addressed by the defendants; however, the plaintiff did so. As presented by the plaintiff, the landmark case of **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors (1969) EA 696** has long established the principles of POs and what constitutes them, as follows:

“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. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving

rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. 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 is the exercise of judicial discretion.”

22. In the present case, this court is constrained from determining whether the PO has satisfied the legal threshold, as one ground admits this court has jurisdiction to grant temporary injunctive orders, whereas the other asserts that *“The injunctions sought by the Plaintiff under Prayers 2, 3, 4, 5, and 6 and 7 of the Notice of Motion are very substantive in nature and any determination on the same shall amount to terminating and/or concluding the entire suit at an interlocutory stage”*. Some of these prayers, as referenced in the PO, had long spent by the time the PO was filed, and it was unnecessary to raise them. Regarding the other grounds of attack, these are general expressions of dissatisfaction with the reliefs sought.

23. In the court’s humble view, such sweeping grounds would necessitate an assessment of the factual circumstances, which this court cannot undertake, as POs should concern only pure points of law. Put another way, the PO is lacking in specificity.

The Court of Appeal in **Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others [2014] KECA 707 (KLR)**, a decision relied upon by the plaintiff, encountered generalised grounds of appeal and went on to state thus:

“We are in full agreement with the sentiments expressed by the High Court in RANGAL LEMEIGURAN & 3 OTHERS Vs. ATTORNEY GENERAL & 3 OTHERS, High Court Misc, Appl. No. 305 of 2004;

“We must point out from the outset that the preliminary objections as formulated above are bare and bereft of any sufficient material and are couched in such a way that it is not possible for a party to whom they are addressed to sufficiently prepare and be ready to counter them. We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the Court to know exactly the nature of the Preliminary points of law to be raised. To state that ‘the Application is bad in law’ without saying more does not assist the other parties to the suit

nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush. Such practice of course ought to be discouraged.”

24. Accordingly, this court must hold and find that the PO as formulated is incompetent and it is hereby struck out.

b) Whether the motion dated 14/07/2025 is an abuse of court process, and if not, whether it is merited.

25. Concerning this matter, it is a well-established legal principle that the court possesses inherent jurisdiction to protect itself against abuse or to prevent its processes from being misused. An abuse of court process is any departure from established good order that significantly deviates from the reasonable use of court process; such abuse occurs when an individual makes excessive, improper, or contradictory use of court procedures, thereby contravening the natural legal principles. The persuasive decision in **Satya Bhama Gandhi v. Director of Public Prosecutions & 3 others [2018] KEHC 6100 (KLR)** outlined several examples of such instances of abuse of court process, thus: -

“(a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.

(b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.

(c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.

(d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.

(e) Where there no iota of law supporting a court process or where it is premised on recklessness.

The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.

(f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.

(g) Where an appellant files an application at the trial court in respect of a matter which is already

subject of an earlier application by the respondent at the Court of Appeal.

(h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.”

26. As to the definition of the term “abuse of the court process,” reference is made to the decision in the Court of Appeal case of **Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others [2009] KECA 453 (KLR)**, which reaffirmed the definition as set forth in two foreign court decisions in the following manner: -

“In BEINOSI v WIYLEY 1973 SA 721 [SCA] at page 734F-G a South African case heard by the Appeal Court of South Africa, Mohomad CJ, set out the applicable legal principle as follows: -

“What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of “abuse of process.” It can be said in general

terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.”

Again the Court of Appeal in Abuja, Nigeria in the case of ATTAHIRO v BAGUDO 1998 3 NWLL pt 545 page 656, stated that the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it.

In the Nigerian Case of KARIBU-WHYTIE J Sc in SARAK v KOTOYE (1992) 9 NWLR 9pt 264) 156 at 188-189 (e) the concept of abuse of judicial process was defined:-

“The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice ...”

27. After a thorough examination of the record in the present matter and in concordance with the replying affidavit filed by the plaintiff, this court finds that the motion dated 10/02/2025 constitutes an abuse of court process and appears to have been filed for reasons solely known to the plaintiff. The court articulates this conclusion on well-founded grounds. Firstly, the court lacks the authority to unilaterally lift the *status quo* orders in the absence of a motion for review, setting aside, or variation of its earlier order. Furthermore, contrary to the submissions of the defendants, the *status quo* orders issued on 18/11/2024 were interim in nature and not issued pending the hearing and determination of the main suit. These orders were issued in anticipation of the hearing and determination of the application dated 15/02/2024, and the current ruling has resolved that particular application.

28. Secondly, owing to the existence of the application dated 15/02/2024, it was not permissible to file this application

seeking the grant of *status quo* orders. In the humble opinion of this court, the prayer for *status quo* restricted to the disputed portion should have constituted grounds for challenging the motion dated 15/02/2024 and not by filing the instant motion. Lastly, the defendants are seeking the court's permission to continue developing portions of their undisputed land. This court finds this prayer strange, as a reading of the plaint shows that the defendants' parcel of land is not in contention, as the plaintiff has pleaded only trespass over his land. This court need not say more on this issue.

c) Whether the plaintiff has met the threshold to warrant the grant of injunctive relief.

29. In this instance, the plaintiff has sought both temporary injunctive relief and mandatory relief. On the first aspect, the plaintiff's motion is filed in accordance with **Order 40, Rule 1** of the **Civil Procedure Rules (CPR)**, which governs this court's handling of applications of this nature. This statutory provision states: -

“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.”

30. The principles for this court's consideration in exercising its unfettered discretion to grant a temporary injunction are now well established through authoritative pronouncements. The three requirements are that an applicant, in this case the plaintiff, must: (a) establish his case at a *prima facie* level; (b) demonstrate irreparable injury if a temporary injunction is not granted; and (c) resolve any doubts by showing that the balance of convenience is in his favour. **See Giella v.**

Cassman Brown & Co. Ltd [1973] EA 358 and reiterated in the Court of Appeal decision of **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] KECA 606 (KLR)**. In the latter decision, the court stated: -

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to; (a) establish his case only at a prima facie level, (b) demonstrate 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. 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.”

31. Consequently, the plaintiff must initially establish a *prima facie* case. In his arguments, the plaintiff oscillated between temporary and mandatory injunctions and failed to adequately substantiate this test. In this court’s humble view, it was prudent for the plaintiff to seek either but not both. Conversely, the defendants merely contended that the plaintiff had failed to establish a *prima facie* case. Accordingly, after

reviewing the court records, this court finds no difficulty in determining that the plaintiff has indeed established a *prima facie* case, as he has presented a certificate of title demonstrating his status as the registered owner of the land, and the surveyor's reports dated 11/11/2023 and 26/05/2025 allegedly consistently indicate the existence of trespass.

32. In other words, these reports indicate that the defendants have allegedly occupied a portion of the plaintiff's land. The pertinent question, then, is whether this court is authorised to issue a temporary injunction in such circumstances. The court's response is in the negative, as it is settled that an injunction cannot be granted for acts that have already occurred. A series of judicial decisions support this position. This is well articulated in **Stanley Kirui v. Westlands Pride Limited (2013) eKLR**, which states:

“...the court cannot injunct what has already happened. I will be guided by the findings in case of Mavoloni company Ltd vs Standard Chartered Estate Management Ltd, Civil Appeal No. 266 of 1997 (1997) LLR 5086, where the court held that “an injunction cannot be granted once the event intended to be injuncted has been overtaken by events.” Similar findings were held in the case of Esso Kenya Ltd Vs Mark Makwata

Kiya, Civil Appeal No. 69 of 1991 where it was stated “an injunction cannot issue to restrain an event that has taken place.”

33. Accordingly, the grant of the temporary injunctive orders requested would primarily result in evicting the defendants from the plaintiff’s land, constituting a mandatory injunction. Therefore, this court concludes that temporary injunctive reliefs are not available to the plaintiff and also determines that it is unnecessary to examine the other tests. We shall now proceed to address the second aspect of the mandatory injunction.

34. On this aspect, it is settled law that a mandatory injunction is granted in clear cases and where exceptional circumstances subsist. Guidance on this derived from [Mugenda & another v Okoiti & 4 others \[2016\] KECA 663 \(KLR\)](#), which held thus:

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“Nowhere in the ruling does the trial judge give reasons for granting final orders at the interlocutory stage; no special circumstances have been explained to warrant the grant of final orders and the balance of convenience and question of irreparable injury have not been addressed. In our view, then, the ruling of 18th December 2015 does not pass the persuasive

Indian threshold and criteria for grant of final orders at the interlocutory stage.

Applying the decisions of this Court in Vivo Energy Kenya Limited -v- Maloba Petrol Station Limited & 3 Others (2015) eKLR and Stephen Kipkebut t/a Riverside Lodge and Rooms -v- Naftali Ogola (2009) eKLR it has often been stated that an order which results in granting of a major relief claimed in the suit ought not to be granted at an interlocutory stage.”

A similar position was taken by the appellate court in **Joseph D. K. Kimani & Another v Simon Chege Kamangu [2016] KECA 263 (KLR)** when it held: -

“With regard to the grant of a mandatory injunction, the test is correctly set out in Vol. 24 Halsbury's Laws of England 4th Edition, Paragraph 98, thus:

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances it will not normally be

granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff... a mandatory injunction will be granted on an interlocutory application".

Also in Locabail International Finance Ltd -v- Agroexport and Others [1986] 1 All ER 901, at page 901, it was stated:

"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly

been granted, that being a different and higher standard than was required for a prohibitory injunction".

Our courts have approved the above principles over time. See for instance Belle Maison Limited -v- Yaya Towers Limited [HCCC No. 2225 of 1992] (UR), The Ripples Limited -v- Kamau Mucuha [HCCC No. 4522 of 1992] (UR), Malindi Air Services Ltd. -v- Halima Abdnoor Hassan (C.A. 202 of 1998), (UR) and Kenya Breweries Limited & Another -v- Washington Okoyo, [NAIROBI C.A. NO. 332 OF 2000] (UR)."

35.As previously established, the plaintiff has demonstrated a *prima facie* case. This court possesses jurisdiction to entertain the trespass claim, given that it is evident the plaintiff's land has a fixed boundary, and the dispute does not fall within the jurisdiction of the Land Registrar.

36.Nonetheless, this case is not straightforward, as the extent of the alleged trespass varies: the plaintiff states 0.0530 ha, 2nd intended IP 0.0601 ha, whereas the February 2024 report submitted by the defendants shows 0.00035 ha. Consequently, a hearing on the merits will serve to examine and test the veracity of these expert reports. Furthermore, no exceptional

circumstances are justifying the granting of final orders at this interlocutory stage. Therefore, this court concludes that the reliefs for temporary and mandatory orders are unwarranted. It also determines that the most appropriate orders to issue are those of the *status quo*, thereby preserving the plaintiff's land.

a) Whether the 2nd to 9th defendants should be struck out as parties to these proceedings.

37. As properly submitted by the defendants, the relevant law is found in our **Order 1 Rule 10 (2)** of the **Civil Procedure Rules** which confers authority upon this court to, at any stage of the proceedings, either upon or without the application of either party, and on such terms as it deems just, order that the name of any improperly joined party be struck out. Accordingly, the motion is duly filed before this court.

38. Before deciding whether to strike out a party, the court must first review all relevant facts to determine if a cause of action exists against them. However, it must avoid examining the case's merits at the early stage to ensure that the right to a fair trial is preserved. This position was stated by *Madan J*, in the case of **DT Dobie and Company (K) Ltd vs Joseph Mbaria Muchina & Another (1982) KLR 1**, thus: -

“The power to strike out should be exercised only after the court has considered all the facts, but it

must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.”

39. Further, as held in **Yaya Towers Limited v Trade Bank Limited (In Liquidation) [2000] KECA 427 (KLR)**, which affirmed **Paolo Murri v Gian Battista Murri & another, Civil Appeal No 59 of 1999 (unreported)**, the power to strike out should be exercised only in plain and obvious cases and is applicable whenever it can be shown that the action cannot succeed, is an abuse of the process of the court, or is unarguable.

40. In the present case, the defendants have tendered a CR12 form showing that the 2nd to 9th defendants are directors or shareholders of the 1st defendant. They contend that, as established by the case of **Salomon v Salomon & Co (1897) AC 22**, a company is a separate legal entity from its directors. Therefore, they argue that the claim against the 2nd to 9th defendants is unwarranted. The plaintiff acknowledges this legal principle but asserts that, in *paragraphs 31(a-d)* and 32 of the plaint, these particular defendants are sued as trespassers and not in their capacities as directors or shareholders.

41. This court has considered the case of **Jepkemoi v Zaburi Enterprises Company Ltd & 2 others [2024] KEHC 2343 (KLR)**, which the defendants have referenced, and concurs with its findings. However, it is distinguishable from the present case based on differing facts. From the plaint, the court understands that the 1st defendant is sued as the owner of an adjacent parcel, along with the 2nd to 9th defendants in their individual capacities, for allegedly unlawfully entering the plaintiff's land; consequently, a cause of action has been established against all these defendants. This assertion of trespass, together with the issue of whether the defendants are directors or shareholders of the 1st defendant, will be determined on the merits. Therefore, this court finds that the 2nd to 7th defendants are necessary parties to these proceedings.

e) Whether the intended IPs should be joined as a party to these proceedings.

1. As earlier stated, **Order 1 Rule 10(2)** of the **Civil Procedure Rules (CPR)** has predominantly been construed to mean that the party who ought to be joined or added to civil proceedings- whether as a defendant, plaintiff, or interested party, whose presence in the proceedings would be essential to assist the court in determining the matter effectively and comprehensively should be incorporated into the proceedings.

This proviso, which has been relied upon by the 1st IP states as follows: -

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

2. **The Black’s Law Dictionary, 11th Edn, page 1351**, defines an interested party in the following terms:

“A party who has a recognizable stake (and therefore standing) in a matter.”

3. The meaning of this definition was reiterated in the Supreme Court of Kenya's decision in **Trusted Society of Human Rights Alliance v Matemo & 5 others [2014] KESC 32 (KLR)**, as follows:

“3. An interested party was one who had a stake in the proceedings, though they were not initially a party to the cause. Such a person felt that their interest would not be well articulated unless they personally appeared in the proceedings, and championed their cause.”

4. When considering a motion for joinder, the court exercises prudent discretion rooted in law and reason. Therefore, this court adopts the guiding principles established in **Muruatetu & another v Republic; Kenya National Commission on Human Rights & 2 others (Interested Parties); Death Penalty Project (Intended Amicus Curiae) [2016] KESC 12 (KLR)**, thus: -

“37. From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party: One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements: The personal interest or stake that the party has in the matter must be set out in the application. The interest

must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”

5. In this case, the defendant and the 1st IP party are in opposition, with the latter asserting that the motion has not satisfied the required threshold as it has no stake, it is not a necessary party and joining him will in effect be introducing a new claim to the subject of the proceedings, whereas the former claims the 1st IP has a stake in this suit since his land borders the defendant's property and is mentioned in the proposed 2nd IPs report dated 26/05/2025 to be encroaching on the defendant's property.

6. Having considered these arguments, and although it is acknowledged that the 1st intended party (IP) is mentioned in this report, this court concurs with the 1st intended IP that his joinder to this suit would introduce a new claim, as no claim has been made by the plaintiff either against the 1st defendant's land or that of the 1st intended IP. Therefore, this court determines that the criteria for the joinder of the 1st intended IP have not been satisfied. Regarding the 2nd intended IP, this court concludes that it is a necessary party because it fixed the boundaries and has a stake in these proceedings. Having made this positive finding, it is necessary for its counsel, the Office of the Attorney General, to be joined as a party.
7. In light of the aforementioned reasons and findings, and considering that all these applications are preliminary, costs shall be the cause, except for that of the 1st intended IP. Furthermore, it is essential that this matter be scheduled for pre-trial directions, particularly given that the defendants have congested the court with numerous applications, some of which have been deemed an abuse of the court process. Therefore, this court issues the following final orders: -

a) The defendants' applications dated 23/10/2024, 9/01/2025, 7/03/2025, and 13/03/2025 are marked as spent.

- b) The plaintiff's application dated 15/02/2024 is hereby dismissed.**
- c) The defendants' PO dated 19/03/2024 is hereby struck out.**
- d) The defendants' application dated 14/07/2025 is hereby struck out.**
- e) The defendants' application dated 19/03/2024 is hereby dismissed.**
- f) The intended 2nd interested party and the Office of the Attorney General are hereby joined to these proceedings as interested parties.**
- g) The plaintiff and defendants are directed to serve all pleadings on the joined interested parties within 14 days hereof.**
- h) Upon being served, the joined interested parties shall file responses to the pleadings within 45 days of service, and they shall serve their filings on all the parties hereto.**
- i) Pending the hearing and determination of the main suit herein, the status quo that is currently prevailing on Land Reference Number 29506, IR No. 180098, to the extent of the portion allegedly encroached by the defendants as identified in the 2nd intended interested party's report of 26/05/2025 and filed in court on 4/06/2025 shall be maintained.**

j) Status quo means that from the date of issuance of this orders, there shall be no further dealings with, transacting on, entering, trespassing, fencing, taking-over, damaging, constructing on, developing, marketing, offering for sale, selling, transferring, charging, alienating or in any other manner dealing with the portion of Land Reference Number 29506, IR No. 180098 to the extent of the portion allegedly encroached by the defendants as identified in the 2nd intended interested party's report of 26/05/2025 and filed in court on 4/06/2025 by either of the parties, their proxies, agents, servants, employees and/or any other person acting on their behalf.

k) That parties are directed to comply with Order 11 of the Civil Procedure Rules.

l) That, from now henceforth, no other or further applications shall be entertained by the court unless with leave.

m) That a mention date shall be given for purposes of pretrial directions

n) Save for the defendants bearing the costs of the 1st intended interested party, costs shall be in the cause.

Orders accordingly.

Delivered and Dated at Machakos this 17th day of March, 2026.

**HON. A. Y. KOROSS
JUDGE
17.03.2026**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Ms Kanja Court Assistant

Mr. Lakicha Senior Counsel for Plaintiff/ Applicant.

Mr. Asige for Defendant.

Mr. Ochieng for 1st Intended Interested party.