



REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE’S COURT AT MAKINDU

ENVIRONMENT AND LAND CASE NO E044 OF 2025

GREGORY

KASYOKA

KATUMO.....PLAINTIFF

VERSUS

ALPHONCE MUEMA JOSEPH.....DEFENDANT

RULING

THE APPLICATIONS

This Ruling is in respect of two applications filed by the parties in a rather interesting scenario. Both parties filed applications seeking injunctive orders against each other in respect of the suit parcels of land. The court urged them to find a middle ground so that the applications could be done away with and focus on the main suit but the plaintiff through his counsel, was adamant. Directions were taken to the effect that the two applications would be canvassed simultaneously by way of written submissions. The first application is dated 11/9/2025 and was filed by the plaintiff contemporaneously with the plaint. The application mainly seeks a temporary injunction restraining the defendant either by himself or through anybody claiming through him from entering, remaining on, cultivating, cutting down trees, grazing livestock or in any manner whatsoever interfering with the plaintiff’s quiet possession of Plot numbers 188, 189 and 190 Kathyaka Settlement Scheme, Kibwezi.

The plaintiff's application is based on the following grounds as can be discerned from the face of the application and the affidavit in support of the application:

- a) The plaintiff is the lawful registered proprietor of the suit parcels of land;
- b) The plaintiff sold plot No. 190 to the defendant but the latter failed to pay the full purchase price and the transaction was cancelled;
- c) The defendant trespassed onto the suit parcels of land and took possession thereof;
- d) Unless restrained by the court, the defendant will continue with the acts of trespass to the detriment of the plaintiff.

The 2nd application is dated 30/10/2025 and was filed by the defendant. The defendant seeks injunctive orders against the plaintiff, restraining him either by himself or any person claiming through him from disposing of or interfering with the suit parcels of land. From the face of the application and the supporting affidavit, the defendant relies on the following grounds:

- 1) The defendant is the legal owner having purchased the suit parcels of land;
- 2) The defendant has been in occupation and use of the suit parcels of land for over 19 years;
- 3) Following institution of the suit, the plaintiff invaded the suit parcels of land and caused damage.

Both parties attached documents in support of their rival applications. The plaintiff alleged that the agreements relied upon by the defendant were forgeries.

MAIN ISSUES FOR DETERMINATION

In my view, the main issues for determination are:

- a) Whether the plaintiff is entitled to orders of injunction as against the defendant as prayed for in his application;
- b) Whether the defendant is entitled to the orders of injunction against the plaintiff as prayed for in his application;
- c) What other orders should the court make?
- d) Who should bear costs of the applications?

PARTIES' SUBMISSIONS**Plaintiff's submission on the application dated 17/9/2025**

The plaintiff submitted that he was the undisputed registered owner of the suit parcels of land and that his ownership was supported by documentary evidence. That the defendant has no valid sale agreement, no consent, no transfer nor lawful or equitable interest in the suit parcels of land. The plaintiff contended that he had established a *prima facie* case, that if the defendant is not restrained, the plaintiff would suffer irreparable loss that cannot be compensated by way of damages and that the balance of convenience tilted in his favour. The plaintiff relied on several authorities but did not bother to attach copies thereof. He urged the court to allow his application.

Defendant's submissions on the application dated 17/9/2025

The defendant submitted that the plaintiff had not established a *prima facie* case with a probability of success as the documents relied upon do not show ownership of the parcels of land. The defendant argued that he bought the suit parcels of land and has been in occupation for at least 19 years. That the plaintiff has not proven occupation of the suit parcels of land either previously or currently. The defendant further argued that one cannot trespass on their own land. The defendant submitted that he has developed the suit parcels of land and would be the one to suffer irreparable harm should the orders sought by the plaintiff be granted. He urged the court to maintain the *status quo*.

The defendant submitted that the plaintiff had not established that the balance of convenience tilts in his favour for the grant of injunctive orders as prayed in his application. That the application lacks merit for not meeting the requirements for a grant of the orders sought. The defendant prayed for the court to find that the plaintiff had not discharged his duty of satisfying the court of the merits of the application. The defendant urged the court to dismiss the application with costs. He relied on several authorities but did not bother to attach copies thereof.

Defendant's submissions on the application dated 30/10/2025

The defendant's submissions were a replica of the submissions on the application dated 17/9/2025 save that he tweaked them in his favour.

Plaintiff's submissions on the application dated 30/10/2025

The plaintiff relied on his replying affidavit and urged the court to dismiss the application. He submitted that the defendant has never acquired legal title to the suit parcels of land. The plaintiff disputed the sale agreements relied upon by the defendant and averred that even if they were genuine, the law is settled that a sale agreement does not by itself pass ownership or confer proprietary rights in land. The plaintiff argued that the defendant's alleged occupation of the suit parcels of land was without legal basis and that occupation, however long, does not confer ownership or a proprietary right capable of protection by an injunction.

The plaintiff contended that Article 40 of the Constitution of Kenya protects property that has been legally acquired. That the defendant has failed to establish irreparable harm. That if there any developments, the same can be quantified and compensated by way of damages. The plaintiff argued that even the balance of convenience tilts in his favour as he is the registered owner of the parcels of land. The plaintiff submitted that granting the orders would prejudice him and effectively determine the dispute without a full hearing. As usual, the plaintiff did not annex copies of authorities relied upon.

ANALYSIS AND DETERMINATION**The Legal provisions**

Section 1A of the Civil Procedure Act provides as follows:

"(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court".

Section 1B provides as thus:

"(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims

— (a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology".

Section 3A provides:

"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court".

Order 40 rule 2 provides as follows:

"(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit".

I have carefully considered the application together with the documents in support thereof as well as the response by the 1st and 2nd defendants. I have further considered submissions by the parties and directed my mind to the applicable law. In the case of **Assand v Pettitt [1989] KLR 241**, it was held that the object of a temporary injunction is to keep things in *status quo* so that if at the hearing the plaintiff obtains a judgment in his favour, the defendant will have been prevented from dealing in the meantime with the property in such a way as to make that judgment ineffectual. The principles to be considered by the court when considering an application for a temporary injunction were laid down in the leading authority of **Giella v Cassman Brown & Co. Ltd [1973] EA 358**. The principles are that:

- i. The applicant must establish a *prima facie* case with a probability of success;
- ii. The applicant must show that he will suffer irreparable harm which cannot be adequately compensated by an award of damages;
- iii. If the court is in doubt, it should decide the application on the balance of convenience.

However, in considering such an application, the court should be careful not to decide substantive issues at the interlocutory stage. My view is fortified by the Court of Appeal's finding in the case of **Shitakha v Mwamodo & 4 Others [1986] KLR 445**. A similar view was held by the same court in the case of **Mbuthia v Jimba Credit Finance Corporation & Another [1988] KLR 1** where the court held that the correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions. The court further held that where the disputed facts raised doubt in the court's mind as to which party would be proved right at the trial, the court would comfortably consider the balance of convenience.

The Court of Appeal in the case of **Mureithi v City Council of Nairobi, Nairobi Civil Appeal No. 5 of 1979 (UR)** held that the power to grant or deny an application for a

temporary injunction is within the discretion of the court but such discretion must be exercised judiciously. It is a fundamental rule that the court will grant an injunction only to support a legal right. This position was buttressed in the English case of *Montgomery v Montgomery* [1964] 2 ALL ER 22. It has been held that the injunction sought must relate to the claim in the suit or rather the relief sought in the suit. The case of *Winstone v Winstone* [1953] 3 ALL ER 580 is germane on this point. In the said case, Winn J held as follows:

“In my view these words are to be construed and understood as limited to the granting of an injunction ancillary to and comprised within the scope of the substantive relief sought in the proceedings in which the application for injunction is made ”.

A similar view was made in the case of *McGibbon v McGibbon* [1973] 2 ALL ER 836, where it was held that an injunction must bear some relationship to the cause of action.

From the above authorities, it is my considered view that while considering an application for a temporary injunction, the court must consider the plaint and the statement of defence alongside the affidavits in support of or in opposition to the application. The injunction must be based on the relief claimed by the plaintiff in the plaint. Numerous court decisions have held the position that an interlocutory injunction ought not to be granted if the prayers in the application are at variance with the suit. The leading case on this point appears to be the case of *Dismas Oduor Owuor v Housing Finance Co. (K) Ltd & Another*, HCCC No. 630 of 2001 where Ringera J (as he then was) held as follows:

“The plaintiff's interlocutory application of 7th June, 2001 is inconsistent with the prayers sought in the suit. Whereas in the suit he is seeking an injunction to restrain the sale of the charged property, in the application he is seeking to restrain the transfer of the said property to the auction purchaser and other consequential or subsequent dealings with the property. The plaintiff, in my opinion, cannot be granted interlocutory orders, which are at variance with the permanent orders sought. I think he goofed in not amending his plaint before amending the chamber summons. He could not be allowed to injunct a transfer by the chargee to the auction purchaser without amending his plaint to challenge the auction sale complained of...”

I have perused the plaint as well as the statement of defence and counter-claim and find that the prayers sought have a bearing on the applications. The Supreme Court of India in the case of ***State of Orissa v Madan Gopal Rungta [1952] AIR 12, 1952 SCR 28*** held that it was a well stated principle of law that an interim relief can always be granted in the aid of and as ancillary to the main relief available to the party on final determination of his rights in a suit or any other proceeding. The foundation of an interlocutory application such as the instant one is the plaint. I have considered the averments made by both parties. The following stand out:

- a) The plaintiff is the registered proprietor of the suit parcels of land;
- b) It is not clear whether the plaintiff is in actual occupation of the suit parcels of land and to what extent, but there is an indication that the defendant is in occupation and use of the said parcels of land;
- c) Both parties claim ownership of the suit land. There is even a counter-claim by the defendant.

One thing is clear to me. That there is need to preserve the suit properties pending the hearing and determination of the suit. If the defendant is in occupation and use of the land, granting the order sought as suggested by the plaintiff would amount to evicting him and determining the suit prematurely. In the same breath, allowing the plaintiff to dispose of the suit parcels of land would defeat the purpose of the suit and counter-claim. In my view, when dealing with matters involving land, the court must look beyond the traditional principles of ***Giella v Cassman Brown***. The court must seek to preserve the subject matter of the suit which is land. In as much as the value of land is quantifiable, there is more value to it than just monetary. The court must however be cautious with the extent of the preservation. In my view, neither party will be prejudiced if the suit properties are preserved in a manner that will not cause hardship to the parties. There is need to maintain the *status quo* upon defined terms.

DISPOSITION

In view of the foregoing and in the interest of justice, I make the following orders:

- a) The applications dated 17/9/2024 and 30/10/2024 are hereby compromised in the following terms;
- b) Both parties are hereby restrained either by themselves, their agents, servants, employees or anyone acting on their behalf, from sub-dividing, charging, selling, alienating or in any other manner substantially changing the character of land parcels Nos. 188, 189 and 190 Kathyaka Settlement Scheme, Kibwezi, pending the hearing and determination of the suit;
- c) No further developments such as constructions should be undertaken by either party pending the hearing and determination of the suit. This extends to cutting down of trees on the suit parcels of land;
- d) No party should interfere with the other's property currently on the suit land pending the hearing and determination of the suit;
- e) Parties are directed to keep the peace and should there be a breach of the same, the aggrieved party will be at liberty to move the court appropriately or the relevant authorities for redress;
- f) The costs of the application shall abide by the outcome of the suit.

DATED, SIGNED AND DELIVERED VIA CTS THIS 16TH DAY OF MARCH, 2026.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.