

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT VOI**

**ELCLPET NO. E004 OF 2025**

**KELOI**

**OLE**

**NTATOYA**

.....**PETITIONER/APPLICANT**

**-VERSUS-**

**KENYA WILDLIFE SERVICE & 6 OTHERS** .....

**RESPONDENTS**

**RULING**

1. By a Notice of Motion dated **16th February 2026**, the Petitioner/applicant seeks the following reliefs:

**(i) *Spent...***

**(ii) *A temporary injunction restraining the 1st Respondent, its servants, agents or any person acting under their instructions from harassing, intimidating or disrupting the Applicant's farming (irrigating) activities and/or those of his tenants pending the hearing and determination of the suit;***

***(iii) A temporary injunction restraining the 1st Respondent, its servants, agents or any person acting under their instructions from erecting a fence and/or carrying out any further fencing activities around the suit premises pending the hearing and determination of the suit;***

***(iv) That the status quo ante existing in the suit premises prior to 1st December 2025 be maintained pending the hearing and determination of the suit; and***

***(v) Costs.***

2. The application is supported by the affidavits of the Applicant sworn on **15th February 2026 and 3rd March 2026**. It is opposed by the 1st Respondent through the Replying Affidavit of **Judy Adipo, Senior Principal Land Surveyor**, sworn on **24th February 2026**. The 2nd to 7th Respondents did not file any responses or submissions in respect to this application.
3. Pursuant to directions issued by the Court, the application was canvassed by way of written submissions. The Applicant filed

submissions dated **12th March 2026** while the 1st Respondent filed submissions dated **7th April 2026**.

4. The dispute revolves around land at Njukini area bordering Tsavo West National Park. The Applicant claims the suit premises form part of his family's ancestral/private land which he and his predecessors have used for cattle rearing, farming and irrigation since time immemorial. He alleges that servants and agents of the 1st Respondent have been harassing him and his tenant, **John Wanyange Mwangi**, while the latter was pumping water from an adjacent river for irrigation. He further complains that the 1st Respondent has erected an electric fence which encroaches into his land.

5. The 1st Respondent maintains that the disputed watering point and the area of the Applicant's activities lie squarely within Tsavo West National Park. The Park was originally created by Proclamation No. 17 of 2nd April 1948 (Boundary Plan No. 204/2) and its boundaries were amended by Proclamation No. 23 of 29th September 1953 (Boundary Plan No. 204/28). It was formally surveyed, documented under Folio Register No. 287/34 and registered in the year 2000 as

Grant No. C.R. 36021 on L.R. No. 24360. The July 2024 boundary alignment exercise confirmed the demarcation between the Park, Njukini Group Ranch (L.R. No. 9378, Boundary Plan No. 204/16) and Ziwani Farm. According to KWS, the Ollaioni River flows from Ziwani Farm into the Park, and the point from which the Applicant abstracts water for commercial irrigation is approximately 400 metres inside the Park. The fencing works complained of constitute an upgrade from a previously vandalized four-strand fence to a nine-strand high-security fence for the Tsavo West Rhino Sanctuary, launched by the President on 9th December 2025, following an Environmental and Social Impact Assessment (ESIA) that included stakeholder consultations. KWS asserts that the Applicant's water abstraction is unauthorised and contravenes wildlife conservation, water and environmental laws.

6. The Applicant contends that the suit land has never been validly surveyed or proclaimed as part of the Park. He relies on **Legal Notice No. 249 of 1963**, arguing that the actual land alienated exceeded the notified acreage by 93 acres,

placing the watering point on his side. He asserts long-standing use of the watering point “since time immemorial” and claims the river separates his land from the Park proper. The Applicant invokes overriding interests under **Section 28 of the Land Registration Act, 2012** and **prescriptive rights under Section 32 of the Limitation of Actions Act (Cap. 22)**. He maintains that his activities are lawful, that no animal attacks have been reported from the area, and that protection of the white rhino, though noble, cannot justify fencing on private land.

7. The 1st Respondent relies on the official proclamations, boundary plans, the 1998 survey, the 2000 registration and the 2024 boundary alignment. It avers that the watering point and abstraction site are inside the Park and that the Applicant’s commercial water abstraction is unauthorised. The fencing is a lawful security upgrade for the protection of critically endangered rhinos. Harassment claims are unsubstantiated by any police reports or independent evidence. Granting the orders sought would perpetuate illegality and undermine public interest in conservation.

8. In his submissions dated 12th March 2026, the Applicant reiterated the absence of a valid proclamation or survey over the suit land, relied on the alleged defective alienation under Legal Notice No. 249 of 1963, and invoked overriding interests and prescriptive rights. He submitted that he satisfies the Giella test and that the status quo ante should be preserved to protect his access to the watering point.
9. In its submissions dated 7th April 2026, the 1st Respondent submitted that the Applicant has failed to establish a prima facie case, that the boundaries are conclusively established by official records, and that the water abstraction is illegal under the Water Act, 2016. It urged the Court to find that the application fails all limbs of the Giella test and to dismiss it with costs.
10. Upon careful consideration of the application, the affidavits filed in support and opposition thereto, the annexed documents and the rival written submissions, the Court discerns the following two issues for determination:

**i). Whether the Petitioner/Applicant has made out a case for the grant of the reliefs sought in the application.**

**ii. What orders should issue as to costs.**

11. The principles governing interlocutory injunctions are well settled. They were authoritatively stated in **Giella v Cassman Brown & Co. Ltd [1973] EA 358**, where Spry V-P laid down the tripartite test: first, the applicant must establish a prima facie case with a probability of success; second, he must demonstrate that he would suffer irreparable injury which would not adequately be compensable by an award of damages; and third, where the court is in doubt, the balance of convenience must favour the grant of the injunction. These principles are sequential and have been consistently followed by this Court and the superior courts in land and environmental disputes (**see Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**).

12. A party claiming encroachment must adduce clear evidence, preferably survey evidence, to displace such official records at the interlocutory stage. This was emphasised in the

analogous case of **Christopher Nyange & 8 Others v Kenya Wildlife Service [2012] eKLR**, where a similar application to restrain electric fencing by KWS in the Tsavo West area was dismissed for failure to establish a prima facie case of encroachment beyond Proclamation No. 23 of 1953.

13. The 1st Respondent's mandate is grounded in the Wildlife Conservation and Management Act, 2013, which empowers KWS to manage National Parks, undertake necessary works including fencing, and protect wildlife, particularly critically endangered species such as the white rhino. Public interest in biodiversity conservation is reinforced by **Article 69 of the Constitution of Kenya, 2010**.

14. In the context of the facts before me, these constitutional and statutory provisions operate harmoniously to resolve the tension between the Applicant's claimed historical land use and water access rights on one hand, and the 1st Respondent's conservation mandate on the other. **Article 40 of the Constitution** safeguards the right to property, but expressly subjects it to law, while **Articles 42 and 69** underscore the right to a clean environment and the

State's duty to protect biodiversity duties directly engaged by the protection of the critically endangered white rhino in Tsavo West National Park. The **Wildlife Conservation and Management Act, (Sections 6 and 9)** expressly authorises KWS to construct and upgrade fences, such as the nine-strand high-security fence forming part of the Rhino Sanctuary launched on 9th December 2025, following an approved ESIA process. On the water abstraction issue, **Sections 36, 37 and 143 of the Water Act, 2016** make it mandatory for any commercial abstraction precisely the large-scale irrigation activities alleged to be occurring approximately 400 metres inside the Park along the Ollaioni River to be authorised by a permit.

15. The Applicant's annexed document (**Annexure P5**) is merely an application for a borehole permit and does not confer any right to abstract river water from a protected area. **Section 28 of the Land Registration Act, 2012**, which recognises overriding interests such as long-standing water rights, cannot prevail over a duly proclaimed and registered National Park under Proclamations Nos. 17 of 1948 and 23 of

1953 and the subsequent registration as L.R. No. 24360. Likewise, **Section 32 of the Limitation of Actions Act (Cap. 22)** does not assist the Applicant in the absence of proven continuous, open and uninterrupted use as of right against the proclaimed Park boundaries. The ESIA compliance under the Environment Management and Coordination Act (EMCA), Cap. 387, further validates the fencing upgrade as a measured response that even included stakeholder consultations for controlled community water access. Read together, these provisions affirm that conservation imperatives and lawful Park management prevail where, as here, the disputed activities occur within officially demarcated Park boundaries.

16. The Applicant's core claim rests on assertions of long-standing family ownership, historical use of the watering point and alleged encroachment through fencing. However, the 1st Respondent has placed before the Court clear and cogent official records establishing that Tsavo West National Park was created and its boundaries defined by Proclamations Nos. 17 of 1948 and 23 of 1953, formally surveyed and registered as

L.R. No. 24360. The July 2024 boundary alignment confirmed the demarcation with Njukini Group Ranch and Ziwani Farm. The watering point and abstraction site lie approximately 400 metres inside the Park.

17. As held in **Christopher Nyange case (Supra)** official proclamations and boundary plans carry significant weight, and mere assertions of encroachment or historical use cannot displace them at the interlocutory stage without compelling survey evidence. The Applicant has not produced any title deed, adjudication register or expert survey map contradicting the 1st Respondent's demarcation. The alleged 93-acre shortfall under Legal Notice No. 249 of 1963 does not, without more, establish a prima facie case that the disputed area lies outside the Park.

18. Moreover, the Applicant's commercial water abstraction from within the Park is prima facie unauthorised. Sections 36, 37 and 143 of the Water Act, 2016 require a permit for such activities; the document annexed as Annexure P5 is only an application for a borehole permit and does not authorise river

abstraction. The claims of harassment are unsupported by any police reports or independent evidence.

19. The fencing in question is a lawful upgrade of an existing security barrier to protect critically endangered rhinos in the Tsavo West Rhino Sanctuary. It is undertaken pursuant to the 1st Respondent's mandate under Sections 6 and 9 of the Wildlife Conservation and Management Act, 2013, and in compliance with ESIA requirements.

20. Applying the principles in **Giella v Cassman Brown & Co. Ltd [1973] EA 358 and Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**, the Applicant has failed to demonstrate a prima facie case with a probability of success. He has equally not shown that he would suffer irreparable injury not adequately compensable by damages, especially when weighed against the public interest in conservation of biodiversity under Article 69 of the Constitution and the protection of a National Park. The balance of convenience clearly favours the 1st Respondent. Granting the orders would undermine lawful conservation

efforts and perpetuate alleged illegal activities within a protected area.

21. Consequently, it is the finding of this court that the Petitioner has not made out a case for the grant of the temporary injunctions or the order maintaining the status quo ante as prayed.

22. In respect to costs, although the 1st Respondent has successfully opposed the application, I am satisfied that this is a proper case in which each party should bear its own costs and this court so directs.

23. In the end and for the reasons set out above, the Petitioner's/Applicant's Notice of Motion dated 16th February 2026 fails in its entirety and is hereby dismissed. Each party shall bear its own costs of the application.

**Dated, Signed and Delivered Virtually at Voi this 14<sup>th</sup> day of April 2026.**

**E. K. WABWOTO**  
**JUDGE**

**In the presence of: -**

**Mr. Mwanyumba and Ms. Nasimiyu for the  
Petitioner/Applicant.**

**Mr. Nyaga for the 1<sup>st</sup> Respondent.**

**Ms. Khaoya for the 3<sup>rd</sup> Respondent.**

**Ms. Kagoi for the 2<sup>nd</sup>, 4<sup>th</sup> to 7<sup>th</sup> Respondents.**

**Court Assistants: Mary Ngoira and David Ngoosa.**