

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELCLC CASE NO. E110 OF 2024

BEATRICE NGINA MUTUKU:::::::::::::::::::::::::PLAINTIFF/RESPONDENT

VERSUS

KIPKAI ENTERPRISES LTD:::::::::::::::::::::::::DEFENDANT/APPLICANT

RULING

The application is dated 4th October 2025 and is brought under Articles 50 and 159 of the Constitution of Kenya, 2010, Sections 1A, 1B, 3A, and 63 of the Civil Procedure Act, Cap. 21; Order 40 Rules 1, 2, 4 & 7 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 seeking the following Orders;

1. That this Application be certified urgent, its service be dispensed with, and it be heard ex parte in the first instance due to the imminent threat of encroachment and trespass to the suit property.
2. That pending the inter-partes hearing and determination of this application, an Order of Temporary Injunction be and is hereby issued restraining the Respondent, whether by themselves, their agents, servants, employees, or any person acting under their instructions, from trespassing upon, wasting, damaging, alienating, selling, developing, demolishing, destructing, removing from, constructing on, or in any other way interfering with the

Applicant's quiet possession and use of the property known as Land Parcel Number L.R. 12715/627.

3. That pending the hearing and determination of the main suit, an Order of Temporary Injunction be and is hereby issued restraining the Respondent, whether by themselves, their agents, servants, employees, or any person acting under their instructions, from trespassing upon, wasting, damaging, alienating, selling, developing, constructing on, or in any other way interfering with the Applicant's quiet possession and use of the suit property.
4. That a Conservatory Order be and is hereby issued to preserve the subject matter of the suit, namely the suit property, and to maintain the status quo prevailing before the Respondent's interference, pending the hearing and determination of this suit.
5. That the Officer Commanding the Police Station (OCS) of the area in Mlolongo be and is hereby directed to ensure compliance with the orders issued by this Honourable Court.
6. That the costs of this Application be provided for.

It is based on the Supporting Affidavit of JANE NYABOKE NJAGI and on the following grounds that the Defendant/Applicant holds a demonstrably superior and unimpeachable claim to the suit property, L.R. No. 12715/627, having been lawfully registered as the proprietor on 3rd November 1999 and having been in

continuous possession since that time. That the Plaintiff/Respondent's claim is fatally defective from its inception. Her alleged ownership, which she claims crystallized in 2008, is legally untenable, as the title of her purported predecessor, Reuben Mutuku Kiva, was extinguished by a Deed of Rectification registered against the title way back on 4th March 1999. That the Plaintiff/Respondent's claim is irredeemably tainted by illegality, as her purported title documents are the subject of an active criminal prosecution in Mavoko Criminal Case No. MCCR/E437/2025, where she faces six counts of forgery and uttering false document. That the Plaintiff/Respondent misled the Magistrate's Court in MCELC/E067/2024 and subsequently committed a profound abuse of court process by weaponizing the prohibitive injunction of 6th September 2024, using police officers to unlawfully execute a forcible entry and eviction of the Defendant/Applicant's security agents on 12th September 2024. That the Order of the 25th September 2024, notwithstanding, there existed an Order of Status Quo issued on 8th February 2022, by the Environment and Land Court (Hon. Lady Justice Anne Nyukuri, presiding over ELC No. E007/2022), which preceded the Magistrate Court's Order in both jurisdictional competence and precedential value. That in light of the Plaintiff's contemptuous disregard for orders and the "flurry of activity," the Magistrate's Court, on 25th September 2024, issued clear directions ordering both parties to maintain status quo and specifically directed them to "halt

all construction works, development and or putting up fresh/new structures on the suit property with immediate effect"

That the contempt of the said court order of 25th September 2024, the Plaintiff/Respondent has recently encroached upon the suit property and commenced acts of wastage, demolition, and construction, thereby actively altering the character of the very subject matter that the court sought to preserve. That the Plaintiff/Respondent's foundational suit in the Magistrate's Court (MCELC/E067/2024) was legally dead when this suit was filed, having been definitively declared a "nullity ab initio" by this Honourable Court (Koros, J.) in a Ruling dated 10th June 2025, due to lack of pecuniary jurisdiction. That the said superior court Order of Status Quo (in ELC No. E007/2022) lapsed on 16th September 2025, when this Honourable Court Koros, J.) struck out the entire pleadings in ELC Civil Suit No. 7 of 2022 on an application by the Defendant/Applicant, thereby rendering the interim injunctive orders that were subsisting nugatory and spent. That the Defendant/Applicant has established an overwhelming prima facie case with a high probability of success as required by the principles in *Giella v Cassman Brown & Co Ltd*. The Applicant is the registered proprietor since 1999, against a Respondent whose claim is a declared nullity and is tainted by forgery charges. That unless the orders are granted by this Honourable Court, the Defendant/Applicant will suffer irreparable injury which

would not be adequately compensated by an award of damages. The Plaintiff/Respondent's ongoing and contemptuous acts of wastage and construction are destroying the very substratum of the suit, which is irreparable. That the Conservatory Order is necessary because, if denied, the substratum of the suit will be rendered nugatory. This Court, being the court of competent jurisdiction (unlike the initial Magistrate's Court), must exercise its authority to preserve the property given that all other predecessor preservation orders are now either being contemptuously ignored (25.09.2024 order) or have been spent (08.02.2022 order struck out on 16.09.2025).

This court has considered the application and the submissions therein. The principles of granting temporary injunctions are well settled and are set out in the judicial decision of *Giella vs Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that;

“in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates 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 rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.

Consequently, the Plaintiff ought to, first, establish a prima facie case. In *Mrao Ltd vs First American Bank of Kenya Ltd (2003) EKLK* the Court of Appeal gave a determination on a prima facie case. The court stated that;

“... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

In support of the application, the Applicant, the proprietor L.R. No. 12715/627 having been lawfully registered on 3rd November 1999 and has been in continuous possession since that time.

Secondly, the Plaintiff has to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision

of Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) eKLR provides an explanation for what is meant by irreparable injury and it states;

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

The Applicant states that the Plaintiff/Respondent misled the Magistrate's Court in MCELC/E067/2024 and subsequently committed a profound abuse of court process by weaponizing the prohibitive injunction of 6th September 2024, using police officers to unlawfully execute a forcible entry and eviction of the Defendant/Applicant's security agents on 12th September 2024.

Thirdly, the Plaintiff has to demonstrate that the balance of convenience tilts in their favour. In the case of Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) EKLK which defined the concept of balance of convenience as:

‘The meaning of balance of convenience will favour of the Plaintiff’ is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than

that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.

The decision of Amir Suleiman vs Amboseli Resort Limited (2004) eKLR where the learned judge offered further elaboration on what is meant by “*balance of convenience*” and stated;

“The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”

The Applicants stated that the contempt of the said court order of 25th September 2024, the Plaintiff/Respondent has recently encroached upon the suit property and commenced acts of wastage, demolition, and construction, thereby actively altering the character of the very subject matter that the court sought to preserve.

The Plaintiff/Respondent stated that the land was bequeathed to her by her father the late Reuben Mutuku Kiva. Attached and marked BNM1 is a copy of the title deed. That no evidence has been adduced to support the deed of rectification that could have removed her father from being the registered owner of the suit land which he held a title from 4th April 1989.

I find that there has been previous litigation concerning the suit land and orders had been granted. Bearing this in mind, I am convinced that there is a risk in not granting orders of temporary injunction than granting them, as I wait to hear the suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the current situation on the ground. I have also not had the opportunity to interrogate the annexures therein.

In *Robert Mugo wa Karanja vs Ecobank (Kenya) Limited & Another* (2019) eKLR where the court in deciding on an injunction application stated;

“circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property;

the court is in such situation enjoined to a grant a temporary injunction to restrain such acts...”

In view of the foregoing, I find that the application is merited and order that status quo be maintained pending the hearing and determination of this suit. Status quo prohibits any dealings on the suit land by either party. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 29TH DAY OF APRIL 2026.

N.A. MATHEKA

JUDGE