

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ELCLC NO. E031 OF 2025**

**LEONARD MUSEMBI MUTISYA:.....:PLAINTIFF**  
**VERSUS**  
**FLORENCE MUEKE PETER:.....:1<sup>ST</sup> DEPENDANT**  
**MUYO AND DELAITI LIMITED:.....:2<sup>ND</sup> DEFENDANT**

**RULING**

The application is dated 15<sup>th</sup> July 2025 and is brought under Order 26 of the Civil Procedure Rules and all other enabling Provisions of the Law seeking the following orders;

1. THAT this Application be heard in priority to the Plaintiff's Notice of Motion dated 10<sup>th</sup> March 2025.
2. THAT this Honourable Court be pleased to order the Plaintiff to give security for the 2<sup>nd</sup> Defendant's costs by depositing the value of the suit property being KES 10,000,000 within thirty (30) days of the Order.
3. THAT the Plaintiff be ordered to deposit the said security for costs amount into a joint interest earning account to be opened by the Advocates for the Plaintiff and the 2<sup>nd</sup> Defendant.
4. THAT the suit be dismissed with costs to the 2<sup>nd</sup> Defendant in default of the provision of the said security for costs within the prescribed period.

5. THAT the costs of the Application be borne by the Plaintiff.

The application is made on the following grounds that the Plaintiff filed a suit against the 1<sup>st</sup> Defendant at the Chief Magistrates Court at Mavoko, Environment and Land Case Number E011 OF 2024. That the subject matter of the suit was the same as the subject matter of the suit herein. That the suit was dismissed in a Ruling delivered by Honourable Derrick K. Kuto on 6<sup>th</sup> June 2024. That the 1<sup>st</sup> Defendant was awarded the costs of the suit and the Notice of Motion dated 28<sup>th</sup> February 2024. That the costs were assessed at KES 129,750/= on 25<sup>th</sup> April 2025. That to date, the Plaintiff has failed, refused and or neglected to settle the Decretal Sum and the 1<sup>st</sup> Defendant is in process of executing the Decree against the Plaintiff. That the 2<sup>nd</sup> Defendant is now apprehensive that the enforcement of any Judgment or costs against the Plaintiff in this Honourable Court, should his claim be dismissed, will be difficult to enforce. That it is in the interest of Justice that this Application is allowed as prayed.

The matter came up for mention on the 11<sup>th</sup> March 2026 and counsel for the plaintiff Mr. Odhiambo and Counsel for the Defendants Mr, Kilonzo entered a consent for the said application to be allowed as prayed as it was not opposed. The said consent was adopted in court.

The second application is dated 10<sup>th</sup> March 2026 and is brought under Article 40, of the Constitution, Sections 1A, 1B, 3A & 63 of the Civil Procedure Act, CAP 21, Order 40 Rule 1 of the Civil Procedure Rules seeking the following orders;

1. That this Application be certified urgent, fit and proper to be heard ex-parte in the first instance.
2. That pending the hearing and determination of the application, the Defendants/Respondents either by themselves, their agents, assignees or proxy be restrained from accessing, entering, trespassing, encroaching property known as Title No. I.R. 62284.
3. That pending the hearing and determination of the suit, the Defendants/Respondents either by themselves, their agents, assignees or proxies be restrained from further harvesting sand or in any other manner dealing with the property known as Title No. I.R. 62284.
4. That the O.C.S Kyumbi Police Station be directed to ensure compliance and enforce the Orders issued by this Honourable Court.
5. That cost of this Application be in favor of the Applicant/Plaintiff.

It is premised on the affidavit of Leonard Musembi Mutisya and the following grounds that the Plaintiff/Applicant is the registered owner and lawful proprietor of all that land known as LR No.355/27 situated at Kyumbi in Machakos County.

That the Respondent/Defendant without any right under law or fact have, recently trespassed and or caused others to trespass on the Applicants Parcel of land causing unprecedented havoc and damage by harvesting sand and selling to unsuspecting members of the public. That Applicant reported the matter to the police with whose help a few trucks ferrying sand at night were apprehended, upon questioning the culprits it emerged that the 1<sup>st</sup> Respondent/Defendant has been selling them sand purporting to be connected to the owner of the land. That the Respondents/Defendants acted in utter disregard of the law since they have no right or authority whatsoever to trespass into the Applicants property, thereby grossly infringing on the Applicant's constitutional right to quiet possession of land and enjoyment thereto. That the Defendants/Respondents agents, Assignees and proxies have been engaging in cat and mouse games of trespassing at night to dig sand and ferried the same off the property in tens of Lorries. That there is a real probability that the Respondents/Defendants their agents, proxies and assignees will continue trespassing and encroaching on the suit land. That it is just and fair that the Orders sought herein be granted to prevent further illegalities and the perpetuation of barbarism in a civil society. That no prejudice shall be occasioned upon the Defendant if the Orders sought herein are granted.

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) EKLR 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 stated that Applicant is the registered owner and lawful proprietor of all that land known as LR No.355/27 situated at Kyumbi in Machakos County. He attached a certificate of title marked LMM 1.

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 Respondent/Defendant without any right under law or fact have, recently trespassed and or caused others to trespass on the Applicants

Parcel of land causing unprecedented havoc and damage by harvesting sand and selling to unsuspecting members of the public. Photos showing the damaged caused were attached and marked LMM2.

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 he reported the trespass and sand harvesting to the police with whose help a few trucks ferrying sand at night were apprehended, upon questioning the culprits it emerged that the 1<sup>st</sup> Respondent/Defendant has been selling them sand purporting to be connected to the owner of the land. Photos of the OB report entry number and lorry carrying sand were attached and marked LMM3 and LMM4.

The 2<sup>nd</sup> Respondent stated that he is the registered proprietor of the suit land and attached a title deed marked A. That they purchased the same from one Benjamin Musyoka. That they have been in possession of the land for over 28 years and have developed the same extensively.

I find that there are two competing titles in this matter. Bearing this in mind, I am convinced that there is a risk in granting orders of temporary injunction than not 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 not merited and I dismiss it with costs.

It is so ordered.



**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 28<sup>TH</sup> DAY OF  
APRIL 2026.**

**N.A. MATHEKA**

**JUDGE**

**ORIGINAL**