



Savage v Ngunje & 2 others (Environment and Land Miscellaneous Application E006 of 2026) [2026] KEELC 2444 (KLR) (30 April 2026) (Ruling)

Neutral citation: [2026] KEELC 2444 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E006 OF 2026
FM NJOROGE, J
APRIL 30, 2026**

BETWEEN

JONATHAN PAUL SAVAGE PLAINTIFF

AND

PETER NGIGI NGUNJE & 2 OTHERS DEFENDANT

RULING

1. The application dated 26th January 2026 seeks an order that pending the hearing and determination of the suit, the 1st, 2nd and 3rd respondents be restrained by way of a temporary injunction from in any matter interfering with the Kilifi /Jimba /367 hereinafter also referred to as the suit property.
2. The grounds for the application are that the plaintiff is the lawful registered owner of the suit property and that the 1st defendant has illegally imposed himself as the owner thereof and commenced construction of a permanent structure thereon. That unless the orders sought are granted, the plaintiff would suffer permanent loss and damage.

The Response

3. The 1st defendant filed his response through his sworn affidavit dated 5/2/2026. His first defence to the application is that there is no substantive suit before the court hence the application is fatally defective. The same defence is raised by the 3rd defendant through grounds of opposition dated 5/3/2026. It is an issue that can dispose of the matter so I will begin with it.
4. The general provisions of Order 40 are what the applicant has relied upon in his application. He has not specified which of the numerous rules thereunder is relevant to his application but this court thinks it is Order 40 Rule 1 which provides as follows:

“Cases in which temporary injunction may be granted [Order 40, rule 1]



1. 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.”
5. The caveat to the above mentioned rule is that there must be a suit in existence for the court to consider an application for interim injunctive orders; besides that, there must be an affidavit proving that the property subject matter of the 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 that the defendant threatens or intends to remove or dispose of his property in circumstances outlined in Order 40 Rule 1(b). It is only then that the court can have jurisdiction to issue an interim injunction.
6. The suit must be before the court that is handling the application. That is the proper interpretation of Order 40 Rule 1(a) which appears to loosely refer to “any property in a suit...” In any event, in the present application, the reference to another suit has only been made by the respondents and not by the applicant, and this court can not presume that he wanted the court’s attention drawn to that other suit, of that that other suit be used as the basis for the securing of the orders sought in the present application.
7. It is a pleading that formally sets out the cause of action. The statements made in the pleading enable the court to know the facts and whether the facts support the cause of action under which the claim has been brought.
8. When considered together with the preliminary evidence adduced at the early stages of the suit by way of an affidavit in support of the application, those are the statements that make the court able to decipher whether the principles for the grant of an interim injunction can apply positively to the application before it.
9. Though the applicant has presented an application and a sworn affidavit complete with annexures, the assessment of the merits of the application for injunction is based not on just other material before the court but also on the on the pleadings.
10. The question is, without any pleading, how would the applicant expect this court to assess whether his case for an injunction meets the threshold set out in case law such as *Giella Vs Cassman Brown company limited* 1973 EA 358 and *Mrao Ltd v First American Bank of Kenya and 2 others* [2003] eKLR? In *Mrao* (supra) it was stated as follows:

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly



directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

11. I find that without a pleading, specifically in this case, a plaint, the application dated 21/2/2026 is fatally defective and the same is hereby struck out with costs to the respondents. This file shall be marked as closed.

DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 30TH APRIL 2026.

MWANGI NJOROGE

JUDGE, ELC MALINDI.

