

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA**  
**ELCLC No. E030 OF 2025**

**NEEMA LUTHERAN COLLEGE (Suing through the  
Executive Board of Management) .....**  
**..... PLAINTIFF**

**VERSUS**

**ZEDEKIAH MAGARA .....**  
**1<sup>ST</sup> DEFENDANT**  
**DOUGLAS MARAGIA .....**  
**2<sup>ND</sup> DEFENDANT**  
**ISAIAH NDEGE .....**  
**3<sup>RD</sup> DEFENDANT**  
**JOHN OSEKO .....**  
**4<sup>TH</sup> DEFENDANT**  
**EVANS MOKUA GWACHI .....**  
**5<sup>TH</sup> DEFENDANT**  
**EVANGELICAL LUTHERAN CHURCH IN KENYA .....**  
**INTERESTED PARTY**

**RULING**

1. The Plaintiff moved the Court through Plaint dated 10<sup>th</sup> November 2025 in which it averred that it was the registered proprietor of land parcel number Kisii/Bokeira I/503 (suit property) and that the Defendants trespassed into the suit property in September 2025, broke into some premises within it, confiscated valuables and documents and started collecting rent thereby occasioning it loss and damage.

2. Consequently, the Plaintiff prayed for judgment against the Defendants as follows:

- i. A declaration that the Plaintiff is the legal and bona fide owner of Title No. Kisii/Bokeira I/503.*
- ii. An order evicting the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendant with their agents/heir/representatives from Title No. Kisii/Bokeira I/503.*
- iii. That a permanent injunction be hereby issued against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendant with their agents/heir/representatives from trespassing into the Plaintiff's Title No. Kisii/Bokeira I/503.*
- iv. Costs of the suit.*
- v. Any other relief this Honourable court may deem fit and expedient to grant.*

3. The Defendants filed Defence and Counterclaim dated 19<sup>th</sup> February 2026.

4. Contemporaneously with the Plaint, the Plaintiff filed Notice of Motion dated 20<sup>th</sup> November 2025 seeking the following orders:

- 1. [Spent]*
- 2. [Spent]*

- 3. That an order on interim injunction be issued against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants/Respondents from continued trespass, invention and developing the suit property being title No. Kisii/Bokeira I/503 pending hearing and determination of this instant suit.*
  - 4. That the OCS Ekerenyo Police Station be ordered to enforce the orders to compliance.*
  - 5. That the cost of this application be provided for.*
  - 6. That the costs of and incidental to this application be costs be provided for.*
5. The application is based on the grounds listed on its face and is supported by an affidavit sworn on 7<sup>th</sup> November 2025 by Sammy Kibore Rotich who deposed that he was Secretary to the Plaintiff's Executive Board of Management and the Chief Principal. He deposed that the Plaintiff was a duly registered college located in the suit property and a fortnight before the date of affidavit, that the Defendants had broken into some premises within it, confiscated valuables and important documents belonging to the Plaintiff. He added that he reported the matter to the relevant authorities and that the Defendants were harassing, intimidating and assaulting his staff within the suit property.
6. He further deposed that on 4<sup>th</sup> September 2025, the Defendants pruned the Plaintiff's trees and that he reported

the matter to relevant authorities. That the Defendants had gone to the extent of masquerading as the landlords of the suit property thereby issuing eviction notices to tenants and prejudicing the Plaintiff.

7. Despite evidence of service being availed, the Defendants and the Interested Party neither responded to the application nor attended Court when it first came up for inter parte hearing on 25<sup>th</sup> November 2025. Upon an application by Counsel for the Plaintiff, the Court granted a temporary injunction and scheduled a new date for inter parte hearing.
8. The Defendants responded by filing Notice of Preliminary Objection dated 26<sup>th</sup> November 2025 and Notice of Motion dated 28<sup>th</sup> November 2025. The Notice of Preliminary Objection raised the following grounds:
  1. *The plaint discloses no cause of action against the 1<sup>st</sup> to 5<sup>th</sup> defendants as the purported plaintiff is a stranger to the suit land and is not named in the title deed, hence lacks legal capacity and locus standi to institute the suit under the provisions of the Constitution of Kenya 2010, the Land Registration Act 2012, and other relevant laws.*
  2. *The plaint is incompetent and the suit amounts to an abuse of court process since the plaintiff cannot sue for ownership or possession of land where no legal or equitable interest exists.*

3. *The plaint is incurably defective for failure to disclose ownership or lawful interest in the suit land as required by Article 40 of the Constitution and the Land Act 2012.*
  4. *The suit is bad in law for non-joinder of necessary parties who have legal interests or ownership in the suit land, contrary to established principles of joinder in civil procedure.*
  5. *The plaint is vague, ambiguous, and embarrassing to the defendants, thereby preventing a proper defense in accordance with Order VI Rule 1 of the Civil Procedure Rules.*
  6. *The suit is barred either as res judicata or pending proceedings (Nyamira ELC No. E/O10/2023).*
9. In Notice of Motion dated 28<sup>th</sup> November 2025, the Defendants sought the following orders:
1. *[Spent]*
  2. *[Spent]*
  3. *That the interlocutory orders issued on 25<sup>th</sup> November 2025 and extended to 10<sup>th</sup> February 2026 be set aside, varied and/or discharged in their entirety as against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants.*
  4. *That the Plaintiff's application dated 20<sup>th</sup> November 2025 be re-opened and fixed for inter partes hearing on a*

*priority basis, with liberty to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants to file and serve their responses thereto within such period as the Court may deem fit. In the event that the filed preliminary objection does not succeed.*

*5. That the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants' Notice of Preliminary Objection dated 26<sup>th</sup> November 2025 challenging, inter alia, the Plaintiff's locus standi, capacity and competence of the suit, be set down for hearing and determination on priority, and that further proceedings herein (or enforcement of the impugned orders) be stayed pending its determination.*

*6. That this Honourable Court be pleased to make such further or other orders as may be just and expedient in the circumstances.*

*7. Costs of this application be in the cause.*

10. Notice of Motion dated 28<sup>th</sup> November 2025 is based on the grounds listed therein and is supported by an affidavit sworn by the First Defendant. He deposed that he was a Pastor/Administrator of Matongo Lutheran Cathedral Church and that the Defendants were never served with Summons to Enter Appearance, Plaint, Notice of Motion dated 20<sup>th</sup> November 2025 or any hearing notice in relation to the said application and that as a result, ex parte orders were issued against the Defendants. That the Defendants only came to

know of the orders on 27<sup>th</sup> November 2025 when they were served with a copy.

11.He further deposed that the Plaintiff had not annexed any authority to sue on behalf of Matongo Lutheran Church and that the Constitution and founding documents of Matongo Lutheran Church stated that any legal action in the name of the said institution had to be sanctioned by the board or council and/or the sponsoring church authority.

12.The Defendants also filed Grounds of Opposition dated 19<sup>th</sup> February 2026 and a Replying Affidavit sworn on 24<sup>th</sup> February 2026 by Peter Ogendi who deposed that he was the Chairman of Matongo Lutheran Church which was founded in 1958 and had continuously served the local community in spiritual, educational and charitable matters. That the land upon which the Matongo Lutheran institutions stand was willingly donated by members of the Matongo community for public, religious and educational purposes and that the Defendants were all church officials.

13.Mr Ogendi further deposed that the suit property was registered in the name of Matongo Lutheran Teaching College, but an official search revealed a different owner. He annexed copies of certificate of official search and certified copy of register and went on to state that the persons behind the Plaintiff were not recognized members or officials of Matongo Lutheran Church and are not known to the Matongo

community in matters relating to governance of the suit property. The Plaintiff had no legal, equitable or beneficial interest in the suit property.

14. The First Defendant filed a Replying Affidavit which he swore on 24<sup>th</sup> February 2026. He deposed that Neema Lutheran College was not and had never been Matongo Lutheran Teachers College and that it was a totally foreign entity registered by certain three individuals who had no roots or connection to Matongo community. He further deposed that the suit property had always been under the beneficial control and ownership of Matongo Evangelical Lutheran Church.

15. The Fifth Defendant also filed a Replying Affidavit which he swore on 24<sup>th</sup> February 2026. He deposed therein that he had conducted due diligence at the land registry and that the records revealed material discrepancies on ownership of the suit property. He annexed copies of certificate of official search dated 19<sup>th</sup> November 2025 and green card dated 19<sup>th</sup> November 2025 and stated that both indicated that the registered owner of the suit property was totally different from that claimed by the Plaintiff. He stated that the beneficial ownership and control of the land have at all times remained with Matongo Evangelical Lutheran Church and attached copy of the Church Register together with other relevant Church records demonstrating continuous occupation, use and administration of the suit property.

16.The Interested Party filed Grounds of Opposition dated 10<sup>th</sup> March 2026. It essentially supported the Plaintiff's case. It additionally filed a Replying Affidavit but the same has not been considered since it was filed outside of and in contravention of the timelines given on 10<sup>th</sup> February 2026 and 10<sup>th</sup> March 2026.

17.The two Notices of Motion and the Notice of Preliminary Objection were canvassed together through written submissions. The Plaintiff filed submissions dated 28<sup>th</sup> December 2025, the Defendants filed submissions dated 19<sup>th</sup> February 2026, while the Interested party filed submissions dated 10<sup>th</sup> March 2026.

18.I have considered the two applications, the preliminary objection and the submissions. The issues that arise for determination are whether the preliminary objection is valid and whether the reliefs sought in the applications should issue.

19.The law relating to preliminary objections has been settled since the now familiar statement of Law, JA. in **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696** thus:

***So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.***

***Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.***

20. The import of the foregoing is that for a preliminary objection to be valid, it must raise a pure point of law which is argued on the assumption that all the facts pleaded by the party against whom it is raised are correct. A point cannot be raised as a preliminary objection if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

21. In **Oraro v Mbaja [2005] eKLR**, Ojwang, J. (as he then was) held:

***I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement with learned counsel, Mr. Ougo, that “where a***

***Court needs to investigate facts, a matter cannot be raised as a preliminary point.***

22.The objection contends that the Plaintiff is a stranger to the suit property by virtue of not being its registered proprietor, that the suit is an abuse of Court process since the Plaintiff is not registered proprietor of the suit property and that the suit is barred by *res judicata*. All those are issues that require the Court to receive and consider evidence prior to determining them. In that regard, the objections on those points are not valid preliminary objections.

23.The objection also contends that there has been non-joinder of necessary parties. In view of that objection, it is necessary to recall **Order 1 Rule 9** of the **Civil Procedure Rules** which provides:

***No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.***

24.Further, **Order 1 Rule 10 (2)** of the **Civil Procedure Rules** provides:

***The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the***

***court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.***

25. The combined effect of the foregoing provisions is that the Court has discretion to cure any non-joinder by ordering addition of necessary parties. Any matter that admits of exercise of discretion ipso facto excludes the possibility of raising a preliminary objection on the issue.

26. In sum, Notice of Preliminary Objection dated 26<sup>th</sup> November 2025 is not a valid preliminary objection. I dismiss it.

27. I now turn to consider whether the reliefs sought in the applications should issue. Notice of Motion dated 28<sup>th</sup> November 2025 essentially sought setting aside of orders issued on 25<sup>th</sup> November 2025. The said orders were issued and remained in force pending hearing and determination of Notice of Motion dated 20<sup>th</sup> November 2025. I have not therefore found it necessary to determine Notice of Motion dated 28<sup>th</sup> November 2025. Nevertheless, I have considered the material supplied through the affidavit in support of the

said application as a response to Notice of Motion dated 20<sup>th</sup> November 2025.

28. Through Notice of Motion dated 20<sup>th</sup> November 2025, the Plaintiff seeks an injunction to restrain the Defendants from continued trespass and development of land parcel number Kisii/Bokeira I/503 (suit property) pending hearing and determination of this suit. To succeed in such an application, the Plaintiff/Applicant must establish a *prima facie* case with a probability of success. Even if it succeeds on that first limb, an injunction will not issue if damages can be an adequate compensation. Finally, if the Court is in doubt as to whether damages will be an adequate compensation then the Court will determine the matter on a balance of convenience.

29. The foregoing conditions and stages are to be applied as separate, distinct, and logical hurdles which the Plaintiff/Applicant is expected to surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. See **Giella - vs- Cassman Brown & Co Ltd [1973] EA 358** and **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**.

30. It is also important to define "*prima facie* case." That phrase was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR** to mean:

***... a case in 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... [it] is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.***

31. The core of the Plaintiff's case, as can be gleaned from paragraph 4 of the Plaint, is that it is the registered proprietor of land parcel number Kisii/Bokeira I/503 which is the suit property. The Plaintiff has not exhibited any certificate of search or certified copy of a register to support its contention. Instead, it annexed a copy of a title deed in respect of land parcel number Kisii/Bokeira I/508 which is a different parcel from the suit property and whose registered proprietor, according to the said copy, is not the Plaintiff.

32. On the other hand, the Defendants have exhibited certificate of search 19<sup>th</sup> November 2025, and certified copy of a register dated 19<sup>th</sup> November 2025, both of which show that the registered proprietor of land parcel number Kisii/Bokeira I/503 as of that date was Ojuang Siro who is not a party in this suit. It follows therefore that the Plaintiff has failed to demonstrate

that it has any right in respect of the suit property and that such a right has been infringed by the Defendant.

33.The Plaintiff has not established any *prima facie* case with a probability of success. I find no merit in Notice of Motion dated 20<sup>th</sup> November 2025.

34.In view of the foregoing discourse, I make the following orders:

**a) Notice of Preliminary Objection dated 26<sup>th</sup> November 2025 is dismissed with costs to the Plaintiff.**

**b) Notice of Motion dated 20<sup>th</sup> November 2025 is dismissed with costs to the Defendants.**

**Dated, signed, and delivered at Nyamira, this 6<sup>th</sup> day of May 2026.**

**D. O. OHUNGO  
JUDGE**

Delivered in the presence of:

Mr Ondima for the Plaintiff

Mr Abincha for the Defendants

Mr Otieno for the Interested Party

Court Assistant: B Kerubo