



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ali & 14 others v Bose & another (Environmental and Land Originating Summons E003 of 2024) [2025] KEELC 1017 (KLR) (28 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 1017 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**  
**ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E003 OF 2024**  
**LL NAIKUNI, J**  
**FEBRUARY 28, 2025**

**BETWEEN**

**MATANO KOBI ALI ..... 1<sup>ST</sup> PLAINTIFF**  
**JUMA MATANO ALI ..... 2<sup>ND</sup> PLAINTIFF**  
**BAKARI FONDO ALI & 12 OTHERS & 12 OTHERS & 12**  
**OTHERS ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**BULBULI BOSE ..... 1<sup>ST</sup> DEFENDANT**  
**TOTOTO HOME INDUSTRIES ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**I. Introduction**

1. This Honourable Court is called to determine the Notice of Motion application dated 5<sup>th</sup> November, 2024 by Matano Kobi Ali, Juma Matano Ali and Bakari Fondo Ali & 12 Others, the Plaintiffs/Applicants herein under the provisions of Order 40 Rule 1 of the Civil Procedure Rules 2010, Sections 3A and 63 of the *Civil Procedure Act* Cap. 21 Laws of Kenya and other enabling provisions of the Law.

**II. The Plaintiffs/Applicants' case.**

2. The Plaintiffs/Applicants sought for the following orders: -
  - a. Spent.
  - b. Spent.
  - c. That the Respondent by themselves, its servants and or its agents be restrained by a temporary injunction from conducting a survey, evicting, demolishing, harassing, alienating, subdividing



and or interfering in any manner with the Plaintiffs/Applicants occupation of Plot No.12474/I/MN CR. No.36051/Measuring 0.5986HA Of Section I Mainland North, Nyali, Mombasa County and the DCIO Nyali Police, OCS Nyali Police to enforce these orders pending the hearing of the main suit.

- d. That an order be issued directing the Land Registrar, Mombasa County to prohibit or restrict dealings to all that parcel of land known as Plot No. 12474/I/MN CR.No.36051/Measuring 0.5986HA of Section I Mainland North, Nyali, Mombasa County pending the hearing and determination of this application and the main suit thereafter.
  - e. That this Honourable Court be pleased to invoke its inherent powers and issue any further Orders that will be just and fair to safeguard the interests of the Plaintiffs herein.
  - f. That costs be in cause.
3. The application was premised on the grounds, testimonial facts and testimony on the face of the application and further supported by the 19 Paragraphed annexed affidavit of Matano Kori Ali, a resident in Nyali together with others on Plot No.12474/I/MN CR.No.36051/Measuring 0.5986HA of Section I Mainland North situated in Nyali in the County of Mombasa and the 1<sup>st</sup> Plaintiff herein. The Deponent averred that:
- a. The residents of PLOT NO. 12474/I/MN CR. NO.36051/Measuring 0.5986HA of Section I Mainland North situated in Nyali, in the County of Mombasa have lived and resided as a community on the said parcel of land for about 30 years and have been occupying and utilizing the suit parcel wherein the Deponent and sixty others had erected their residence, buried their grandparents, rare livestock and other farming activities. (Annexed in the affidavit and marked 'B' were Photos of his house and other Plaintiff's houses situated in the suit property.
  - b. The Defendants never asked any of the Plaintiffs herein including the Deponent for ground rent or any payments for being in occupation and possession of the portion of land stated above.
  - c. The Defendants had on several occasions been colluding with police officers to demolish their houses without any court order or eviction but later on it was reinstated (attached herein and marked 'C' see photographs).
  - d. The balance of convenience tilts in favour of the plaintiffs who will be prejudiced if the defendants evicts and demolishes their houses before the suit herein is heard and determined on merit.
  - e. The Plaintiffs herein had each occupied a sizable piece of land in the suit parcel of land.
  - f. The Deponent had peacefully coexisted with the other Plaintiffs on the subject parcel of Land without any interference for a continuous period of over 60 years.
  - g. They had continued to live and carry out their normal lives as families would do including farming, raising families, raring of livestock and running of small-scale subsistence businesses. The suit property was their home, their grandparents and parents lived on the land and they did not know of any other place that we can call home.(Annexed in the affidavit and marked as 'D' were Photos of farming activities on the suit property).
  - h. The Deponent was fully convinced that they had acquired an interest by way of adverse possession over the suit property.



- i. In the last few days, Plaintiffs who occupy all that parcel of land known as Plot No.12474/I/MN CR.No.36051/Measuring 0.5986 HA of Section I Mainland North County were being threatened by eviction by people who were claiming that the land had been earmarked for private development. The said issue had caused allot of tension in the area and it may escalate to violence as witnessed in the past in adjacent areas.
- j. The Plaintiffs were apprehensive that the Defendants, servants and or agents had now resorted to demolition and evictions by ambush.
- k. Further, on several occasions the said person had been heard informing the Plaintiffs to vacate the suit premises yet the Plaintiffs know no other home.
- l. The Plaintiffs being desperate and in a helpless position, and not interested in unlawful means to counter the threats meted on them, are seeking the intervention of this Honourable Court through the prayers sought.
- m. What seemed to be a move orchestrated by the Defendants through its agents, had been accompanied by threats to harm the Plaintiffs in the event they would want to access the suit property.
- n. The Deponent applied to this Honourable Court for an order that the entries in the land registry, Mombasa showing the Defendants or any other person for that matter as the proprietor of the suit property be deleted and or expunged forthwith and Plaintiffs be registered as the joint proprietors of part of the suit property which they occupy.
- o. The Deponent had never known any other home hence it was in the interest of justice that this suit was heard and determined by way of viva voce evidence.
- p. The Deponent had proved his case on a balance of probabilities.

### **III. Submissions**

4. On 11<sup>th</sup> December, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 5<sup>th</sup> November, 2024 be disposed of by way of written submissions. Unfortunately, by the time of penning down this Ruling, the Honourable Court had not been able to access the written submission. Pursuant to that, the Honourable Court proceeded on to deliver its Ruling on its own merit on 28<sup>th</sup> February, 2025 accordingly.

### **IV. Analysis and Determination**

5. I have carefully read and considered the pleadings herein, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes. In order to arrive at an informed decision, the Honorable Court has framed the following issues for determination.
  - a. Whether the Notice of Motion dated 5<sup>th</sup> November, 2024 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.
  - b. Who will bear the Costs of Notice of Motion application 5<sup>th</sup> November, 2024.



**Issue No. a). Whether the Notice of Motion dated 5<sup>th</sup> November, 2024 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.**

6. Under this sub – title, the main issue here is whether the Plaintiffs are entitled to be granted the relief of an interlocutory injunction. The application herein is premised under the provision of Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst the provisions of the law. Which provides as follows: -

Order 40, Rule 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.

7. Fundamentally, the principles applicable in an application for an injunction were laid out in the celebrated case of “Giella – Versus - Cassman Brown & Co Limited (1973) EA 358”, where it was stated: -

“First an applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

8. The three conditions set out in “Giella (supra)”, need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of “Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others [2014] eKLR”: -

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Limited - Versus - Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between”.



9. In dealing with the first condition of prima facie case, the Honorable Court guided by the definition melted down in the famous case of “MRAO Limited – Versus - First American Bank of Kenya Limited & 2 others (2003) KLR 125” of: -,

“So, what is a prima facie case, I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself would 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”

10. As the Court previously observed in this ruling, the residents of Plot No. 12474/I/MN CR. No. 36051/Measuring 0.5986HA of Section I Mainland North situated in Nyali, in the County of Mombasa have lived and resided as a community on the said parcel of land for about 30 years and have been occupying and utilizing the suit parcel wherein the Deponent and sixty others had erected their residence, buried their grandparents, rare livestock and other farming activities. The Defendants never asked any of the Plaintiffs herein including the Deponent for ground rent or any payments for being in occupation and possession of the portion of land stated above.

11. The Defendants had on several occasions been colluding with police officers to demolish their houses without any court order or eviction but later on it was reinstated. In the case of “Mbutia – Versus - Jimba credit Corporation Ltd 988 KLR 1”, the court held that;

“In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the party’s cases.”

12. Similarly, in the case of “Edwin Kamau Muniu – Versus - Barclays Bank of Kenya Ltd” the court held that;

“In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria.”

13. In the present case, it is clear that the Plaintiffs feel threatened by the actions of the Defendants/ Respondents, who according to the Plaintiffs were trying to deprive the Plaintiffs of the suit property. Regarding this first condition though, the Plaintiffs/ Applicants have demonstrated a prima facie case with a probability of success at the trial as enunciated in the case of “Giella -Versus - Cassman Brown & Co. Ltd (Supra)”.

14. The court has further considered the annexures on record against the second principle for the grant of an injunction, that is, whether the Plaintiffs/Applicants might suffer irreparable injury which cannot be adequately compensated by an award of monetary damages. With regards to the second limb of the Court of Appeal in “Nguruman Limited (supra)”, held that:-

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be



compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

15. On the issue whether the Applicants will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Applicants must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. It is not hidden that the Applicants’ property. The Applicants averred that this is the only home they know. The Plaintiffs/Applicants 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 – Versus - 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.”

16. Quite clearly, the Applicants would not be able to be compensated through damages being that this was their home. The Applicants have therefore satisfied the second condition as laid down in “Giella’s case”.

17. Thirdly, the Applicants have to demonstrate that the balance of convenience tilts in their favour. In the case of “Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (Supra)” 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”.

18. In the case of “Paul Gitonga Wanjau – Versus - Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR”, the court dealing with the issue of balance of convenience expressed itself thus:-

“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right..... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an



injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

19. The balance of convenience tilts in the favour of the Applicants who will be prejudiced if the defendants evicts and demolishes their houses before the suit herein is heard and determined on merit. The decision of “Amir Suleiman – Versus - 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.”

20. The balance of convenience lies with the Plaintiffs/ Applicants in this case. Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as the Court waits 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 claim of the Applicants and it will be in the interest of both the Applicants and the Respondents that the suit property is preserved until the hearing and determination of the suit.

21. In the case of:- “Robert Mugo wa Karanja – Versus - 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 grant a temporary injunction to restrain such acts...”

22. I am convinced that if orders of temporary injunction are not granted in this suit, the property in dispute might be in danger of being dealt in the manner set out in the application and apprehended by the Plaintiffs/Applicants. In view of the foregoing, I strongly find that the Plaintiffs/Applicants have met the criteria for grant of orders of temporary injunction.

ISSUE c). Who will bear the Costs of Notice of Motion application 27<sup>th</sup> May, 2024.

23. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 Laws of Kenya holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise.



24. I have well stated in previous precedence and most especially in “Sagalla Lodge Limited – Versus - Samwuel Mazera Mwamunga & another (Suing as the Executors of Eliud Timothy Mwamunga – Deceased) [2022] eKLR”, that:

“ 58. The Black Law Dictionary defines “Cost” to means, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

The provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. The issue of Costs is the discretion of Courts. From this provision of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in this case is that the Notice of Motion application dated 7<sup>th</sup> December, 2021 by the Plaintiff has succeeded and hence they are entitled to costs of the application and that of the Defendants dated 21<sup>st</sup> December, 2021.”

25. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In the present case, the Honourable Court elects to have the costs in the cause

## V. Conclusion and Disposition

26. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Clearly, the Plaintiff/ Applicant has a case against the Defendants/ Respondents.

27. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-

- a. That the Notice of Motion application dated 5<sup>th</sup> November, 2024 be and is hereby found to have merit and is allowed.
- b. That an order of temporary injunction do issue restraining the Defendants/Respondents either by themselves, officers, agents, employees, assigns, principles or any person acting on their behalf from conducting a survey, evicting, demolishing, harassing, alienating, subdividing and or interfering in any manner with the Plaintiffs/Applicants occupation of Plot No.12474/I/MN CR. No.36051/Measuring 0.5986HA of Section I Mainland North, Nyali, Mombasa County and the DCIO Nyali Police, OCS Nyali Police to enforce these orders pending the hearing of the main suit.
- c. That an order do and is hereby issued directing the Land Registrar, Mombasa County to prohibit or restrict dealings to all that parcel of land known as Plot No. 12474/I/MN CR.No. 36051/Measuring 0.5986HA of Section I Mainland North, Nyali, Mombasa County pending the hearing and determination of this application and the main suit thereafter
- d. That there shall be a mention on 6<sup>th</sup> March, 2025 for purposes of conducting a Pre – Trial Conference trial pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010
- e. That the cost of the Notice of Motion application dated 5<sup>th</sup> November, 2024 shall be in the cause.



It is so ordered accordingly.

**RULING DELIVERED THROUGH THE MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 28<sup>TH</sup> DAY OF FEBRUARY 2025.**

.....

**HON. MR. JUSTICE L. L. NAIKUNI**  
**ENVIRONMENT AND LAND COURT**  
**MOMBASA AT**

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, Court Assistant.
- b. No appearance for the Plaintiffs/Applicants.
- c. No appearance for the Defendants/Respondents.

**HON. JUSTICE LL NAIKUINI (ELC JUDGE)**

