



**Topees Housing Co-operative Society Limited v Mwongela (Environment & Land Case E081 of 2024) [2025] KEELC 810 (KLR) (25 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 810 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ENVIRONMENT & LAND CASE E081 OF 2024**  
**NA MATHEKA, J**  
**FEBRUARY 25, 2025**

**BETWEEN**

**TOPEES HOUSING CO-OPERATIVE SOCIETY LIMITED ..... PLAINTIFF**

**AND**

**DAVID MWONGELA ..... DEFENDANT**

**RULING**

1. The application is dated 26<sup>th</sup> September 2024 and is brought under order 40 rules 1, 2 and 3 of the Civil Procedure Rules and Section 3A of the [Civil Procedure Act](#) seeking the following orders;
  1. That this application be certified as urgent, service be dispensed with in the first instance and the application be heard on a priority basis.
  2. That pending the hearing and determination of this application inter-partes, the Respondent, whether acting in person, by proxy, through his agents, servants, employees or any other person acting at his behest, be restrained by way of a temporary injunction from carrying out any construction, fencing, demarcation of boundaries on the lands known as LR NO. 28614 & LR NO. 28615 and/ or dealing in any other way with the said lands or in any other manner whatsoever interfering with the quiet possession, occupation and utilization of the parcels belonging to the Applicant herein.
  3. That pending the hearing and determination of this suit, the Respondent, whether acting in person, by proxy, through his agents, servants, employees or any other person acting at his behest, be restrained by way of a temporary injunction from carrying out any construction, fencing, demarcation of boundaries on the lands known as LR NO. 28614 & LR NO. 28615 and/ or dealing in any other way with the said lands or in any other manner whatsoever interfering with the quiet possession, occupation and utilization of the parcels belonging to the Applicant herein.



4. That costs of this application be borne by the Respondents.
2. It is premised on the the annexed affidavit of Patrick Kyalo and grounds, that the Applicant is the lawful and registered owner of the lands known as LR NO. 28614 & LR NO. 28615 both situated in Mulinge Scheme, Syokimau/Mlolongo ward in Mavoko Municipality, Machakos County. That the Applicant has indeed been occupation of the said land parcels since it purchased the same on or about 23<sup>rd</sup> July 2014 at a consideration of Kenyan Shillings Four Million Five Hundred Thousand (Kshs 4,500,000/-) each from its previous owner Gabbie Holdings Limited who in turn had purchased the same from its previous owner Kathuku Musau Dammas. That indeed the Applicant herein had the said lands transferred to it on 4<sup>th</sup> December 2014 and 21<sup>st</sup> November 2014 respectively. That after purchaser of the land parcels, the vendor identified to the Applicant all the beacons on the ground. On or about July 2014 the Applicant engaged an independent Surveyor Malik Development Company and Land Surveyors to reconfirm beacons on the ground. The said Surveyor reconfirmed beacons to the Applicant and recommended that the land parcels be fenced off since there were signs of encroachment from intruders. That on or about February 2016 the Applicant herein commissioned the survey of its properties which was carried out by Covenant Geo-Surveys Systems who proceeded to establish the boundaries and beacon markings of the Applicant's properties. That on or about 21<sup>st</sup> March 2016 and upon establishment of the said boundaries the Applicant proceeded to commission the construction of a perimeter wall around the entirety of its property at a cost of Kenyan Shillings Four Million Six Hundred and Seventy Two Thousand and one Hundred (Kshs 4,672,100). That on or about the month of August 2016 the Respondent herein repeatedly and without any regard to the Applicants rights as a registered land owner encroached upon land parcels and proceeded to start excavations for construction in the dead of night & demolished the aforementioned perimeter wall carting away all the material and gate. That the matter was reported to the police under OB Number 35/01/08/2016 and the Respondent was arrested but was later released on police bond. That recently towards the end of 2023 the Respondent descended upon said land again and commenced aggressive construction of his own perimeter wall after demolition of the perimeter wall. The Applicant reported the matter to Directorate of Criminal Investigation Mlolongo. That officials of the Applicant herein through Directorate of Criminal Investigation caused an official survey to be carried out by the Surveys of Kenya to once and for all establish the boundaries of the suit properties. The survey of Kenya visited the ground for the suit properties sometimes December 2023 and reconfirmed the beacons as it had been established by the previous private surveyors.
3. This court has considered the application, affidavits, annexures and submissions therein. The prayer for temporary injunction is well discussed in the celebrated case of *Giella vs Cassman Brown* (1973) EA 358. In *Nguruman Limited vs Jan Bonde Nielsen & 2 others* [CA No.77 of 2012](#) (2014) eKLR 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”.
4. On the first pillar, the Applicant states that they LR NO. 28614 & LR NO. 28615 both situated in Mulinge Scheme, Syokimau/Mlolongo Ward in Mavoko Municipality, Machakos County. (Annexed



is a copies of searches as “PK1”). That the Respondent in this suit has deprived them of the use and quiet enjoyment of the suit property by his illegal actions of encroaching into the said property by encroached upon land parcels and proceeded to start excavations for construction in the dead of night and demolished the aforementioned perimeter wall carting away all the material and gate.

5. Section 26 of the *Land Registration Act* states as follows;

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
  - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

6. On the 2<sup>nd</sup> pillar of temporary injunctions, the Applicants are required to show irreparable injury and I am guided by Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) eKLR where court held;

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.”

7. The Applicants state that Respondent herein have engaged in blatant encroachment, despite prior warnings from the Applicant with an aim to muscle out/exclude the Applicant from the use of said land whilst it is the registered owner. That should the said encroachment and construction not be stopped immediately by this court the Applicant, its members and community stands to suffer irreparable damage. That should the Respondent herein not be compelled to cease, with immediate effect, the ongoing development being undertaken on the suit parcel the Applicant stands to suffer greatly.

8. The 3<sup>rd</sup> pillar which is the balance of convenience. In Pius Kipchirchir Kogo case (Supra) the court held;

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”.



9. The Respondent submitted that he has been in occupation of property known as L.R No. 21119 F/R 282/88 and not LR No. 28614 and LR No. 28615. That between the two properties there is a 20 meter road which is a public road and they are not neighbours. They annexed a letter from the Director of Surveys and the Surveyor's report dated 24<sup>th</sup> March 2024 confirming the position of the road and re establishing the same. The report stated that all concerned parties were present when the survey was conducted on the 7<sup>th</sup> March 2024. The Respondent insist they have not encroached. I find that this appears to be a boundary dispute. It is not clear at this stage to determine whether there is any encroachment by the Respondent due to the various reports from different Surveyors. I find that the Applicants have failed to established a prima facie case and order that the status quo be maintained pending the hearing and determination of this suit. Costs of this application to be in the cause. Parties are advised to comply with order 11 and fix the matter for hearing.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 25<sup>TH</sup> DAY OF FEBRUARY 2025.**

**N.A. MATHEKA**

**JUDGE**

