



REPUBLIC OF KENYA



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Kenani v Orbit Chemicals Industries Ltd & 3 others (Environment & Land Case E001 of 2023) [2023] KEELC 21209 (KLR) (26 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21209 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E001 OF 2023
JO MBOYA, J
OCTOBER 26, 2023**

BETWEEN

YUCABETH NYABOKE KENANI APPLICANT

AND

ORBIT CHEMICALS INDUSTRIES LTD 1ST DEFENDANT

SHABBIR HUSSEIN M WALI 2ND DEFENDANT

SACHEN CHANDARIA 3RD DEFENDANT

GARAM INVESTMENT AUCTIONEERS 4TH DEFENDANT

RULING

Introduction and Background

1. Vide Notice of Motion Application dated the 30th June 2023; the Plaintiff/Applicant herein has approached this Honorable court seeking for the following reliefs;
 - i. Spent.
 - ii. Pending the inter-partes hearing of this Application, an Injunction be and is hereby issued staying auction of title L.R No. 126, 127 and 128 as scheduled for 11th July 2023 ;or such other date.
 - iii. Pending the inter-partes hearing of this Application, an Injunction be and is hereby issued restraining the Defendants, their servants, agents, employees and whatsoever from disposing of Parcel number Nairobi Block 263/1080 (previously known as Plot No's 126, 127 and 128); by way of auction, private treaty, transfer or in any way interfering with the Plaintiff/Applicant's ownership and possession of the said property.



- iv. Pending the inter-partes hearing of this Application, an Injunction be and is hereby issued restraining the Defendants whether by themselves, their employees, servants, agents or otherwise howsoever from trespassing onto, entering upon, occupying, charging, carrying on any development, evicting the Plaintiff or her agents, servants, tenants/ licenses present or in any way dealing with all that parcel of Land known as Parcel Number Nairobi Block 263/1080 (previously known as Plot No's 126, 127 and 128).
 - v. Pending the Inter-Partes hearing of this Application and suit, an Injunction be and is hereby issued staying auction of title L.R No. 126, 127 and 128 as scheduled for 11th July 2023 or such other date.
 - vi. Pending the Inter-Partes hearing of this Application and suit, an Injunction be and is hereby issued restraining the Defendants, their servants, agents, employees and whatsoever from disposing of parcel number Nairobi Block 263/1080 (previously known as Plot No's 126, 127 and 128); by way of auction, private treaty, transfer or in any way interfering with the Plaintiff/ Applicant's ownership and possession of the said property.
 - vii. Pending the inter-partes hearing of this Application and suit, an Injunction be and is hereby issued restraining the Defendants whether by themselves, their employees, servants, agents or otherwise howsoever from trespassing onto, entering upon, occupying, charging, carrying on any development, evicting the Plaintiff or her agents, servants, tenants/ licenses present or in any way dealing with all that parcel of Land known as parcel number Nairobi Block 263/1080 (previously known as Plot No's 126, 127 and 128).
 - viii. Costs be in the cause.
2. The instant Application is premised and/or anchored on the various grounds which have been enumerated in the body thereof. Furthermore, the Application is supported by various affidavits, inter-alia the supporting affidavit sworn on the 30th June 2023, further supporting affidavit sworn on the 1st August 2023; and second Further affidavit, sworn on the 25th September 2023, respectively.
 3. On the other hand, the Defendants/Respondents herein responded to the instant Application vide Replying affidavit sworn by the 3rd Defendant/Respondent on the 17th July 2023. Additionally, the Defendants also filed a Notice of Preliminary Objection dated the 27th July 2023.
 4. Suffice it to point out that the instant Application came up for hearing on the 18th July 2023; whereupon the advocates for the Parties agreed to canvass and dispose of the Application by way of written submissions.
 5. Arising from the foregoing position, the Honourable court thereafter proceeded to and circumscribed the timelines for the filing and exchange of the written submissions. Instructively, the Applicant thereafter filed written submissions dated the 25th September 2023; whilst the Defendants filed written submissions dated the 16th October 2023. Both submissions are on record.

Parties' Submissions:

a. Applicant's Submissions:

6. Vide written submissions dated the 25th September 2023; the Applicant herein has adopted the grounds enumerated in the body of the Application. Besides, the Applicant has also reiterated the contents of the averments in the body of the three sets of affidavits, which have been filed by and on behalf of the Applicant herein.



7. Other than the foregoing, the Applicant has thereafter raised, highlighted and canvassed four (4) pertinent issues for consideration by the Honourable court.
8. Firstly, Learned counsel for the Applicant has submitted that on or about the 19th December 2002, the Applicant herein bought, purchased and acquired Plots No's 126 and 127; which plots currently comprise of and form part of L.R No. 263/1080.
9. Furthermore, Learned counsel for the Applicant has contended that upon the execution of the sale agreement with the persons who were hitherto in occupation thereof, the Applicant entered upon and took possession of the named plots.
10. Other than the foregoing, Learned counsel for the Applicant has also submitted that on the 12th August 2004, the Applicant herein again bought and acquired Plot number 128, which similarly forms part of L.R No. Nairobi Block 263/1080; which is the suit property herein.
11. It has further been contended that upon the purchase and acquisition of the named Plots, (details whereof have been alluded in the preceding paragraphs), the Applicant herein entered upon, took possession of and has occupied the plots in question, albeit without any interruption and/or interference.
12. Additionally, Learned counsel for the Applicant has submitted that the Applicant thereafter proceeded to and constructed various Commercial and Residential Buildings on what constitutes the suit property, which buildings have been in existence for a duration of more than 18 years.
13. Nevertheless, Learned counsel for the Applicant has submitted that even though the persons who sold the plots to the Applicant did not hold any legitimate title to the named Plots, however, the 1st Respondent herein who holds the title to the suit property neither took any action nor endeavored to evict the Applicant's predecessors.
14. On the other hand, Learned counsel for the Applicant has further submitted that the occupation, possession and use of what comprises the suit property herein (which was hitherto plots 126, 127 and 128); has been continuous, uninterrupted and with the knowledge of the 1st Defendant herein.
15. Further and in this regard, it has been contended that to the extent that the Applicant has been in occupation of the named Plots for more than 12 years without the permissions and/or consent of the Defendant/Respondent, the Defendant/Respondents title to and in respect of the suit property, or better still, the portion that comprise of Plots numbers 126, 127 and 128, respectively, lapsed and/or stood extinguished.
16. In a nutshell, Learned counsel for the Applicant has thus invited the Honorable court to find and hold that the Applicant herein has since acquired Adverse Possessory Rights to and in respect of the suit Property.
17. Secondly, Learned counsel for the Respondent has submitted that to the extent that the Applicant has been occupation and possession of the suit property for more than 12 years, same has therefore established and demonstrated the existence of a Prima facie case with reasonable probability of success.
18. Consequently and in the premises, Learned counsel for the Applicant has invited the court to find and hold that the Applicant is thus entitled to the orders of Temporary Injunction so as to preserve and conserve the status of the buildings which were erected on the suit property; and in any event, which have remained on the suit property with the knowledge of the 1st Defendant/Respondent.



19. In support of the submissions that the Applicant herein has established and demonstrated the existence of a Prima facie case, Learned counsel for the Applicant has cited and relied on, inter-alia, the case of Mrao Ltd versus First American Bank of Kenya Ltd (2003)eKLR; Nguruman Ltd versus Jan Bonde Nielsen & 2 Others (2014)eKLR and Richard Wefwafwa Songoi versus Ben Munyifwa Songoi (2020)eKLR, respectively.
20. Thirdly, Learned counsel for the Applicant has submitted that the nature of the development that have been undertaken by the Applicant on the Plots, which constitutes the suit property; are massive and extensive in nature and hence a failure to grant the orders of Temporary Injunction would subject the Applicant herein to suffer Irreparable loss.
21. To this end, Learned counsel for the Applicant has invited the Honourable court to take cognizance of the Photographs of the Buildings which have been annexed to the Second further affidavit; and which shows the massive Flats/ Apartments comprising of five floors each.
22. Based on the nature of the development that was carried out and/or undertaken by the Applicant, it has been pointed out that a suitable basis has been established to warrant a finding that Irreparable loss would occur and/or accrue, unless the Orders sought are granted.
23. Fourthly, Learned counsel for the Applicant has submitted that the instant suit by and on behalf of the Applicant is not barred and/or prohibited by the Doctrine of Res-Judicata and by extension, the Provisions of Section 7 of the Civil Procedure Act, Chapter 21, Laws of Kenya; either as alleged or at all.
24. Furthermore, Learned counsel for the Applicant has submitted that the Applicant herein was neither Party nor privy to the previous suits, namely, Nairobi HCC No. 784 of 1996, HCC No. 876 of 2004, ELC Constitutional Petition No. 62 of 2018 and ELC No. 7 of 2020 (OS), respectively; which have been alluded to in the Replying affidavit on behalf of the Defendants/Respondents.
25. Besides, Learned counsel for the Applicant has submitted that to the extent that the Applicant was not a Party to the said suits, the requisite ingredients that underpin the Doctrine of Res-Judicata, have neither been met nor satisfied.
26. Furthermore, Learned counsel for the Applicant has contended that before invoking and applying the Doctrine of Res-Judicata, the court is called upon to discern whether the Parties to the previous suits are the same as the Parties in the current suit; whether the issues are similar; and whether there was a determination on merits.
27. Be that as it may, Learned counsel for the Applicant has submitted that the various cases which have been cited and relied upon by the Respondents, have no bearing on the Applicant and by extension, the claim on behalf of the Applicant herein.
28. Arising from the foregoing, Learned counsel for the Applicant has therefore impressed upon the Honourable court to find and hold that the Applicant has indeed established and proved her case on a balance of probabilities; and thus same is entitled to the grant of the orders of Temporary Injunction.
29. In a nutshell, counsel has thus impressed upon the court to allow the Application and to grant the orders sought at the foot thereof.

b. RESPONDENT'S SUBMISSIONS:

30. The Respondents filed written submissions dated the 16th October 2023; and wherein same have similarly raised, canvassed and highlighted Four (4) issues for consideration by the Honourable court.



31. First and foremost, Learned counsel for the Defendants has submitted that the suit before the court is barred the Doctrine of Res-Judicata insofar as there had been previous suits, which were filed by various Squarters residing on / occupying the suit property and which suits were heard and determined, culminating into the delivery of various Judgments by Courts of competent Jurisdiction.
32. In particular, Learned counsel for the Respondents has submitted that arising from the occupation of portions of the suit property by various squatters, the Respondents herein proceeded to and filed various suits, namely, Nairobi HCC Misc. Application No.784 of 1986 and HCC No 876 of 2004, which matters were heard and determined. Furthermore, counsel for the Respondents has also pointed out that the various squatters occupying portions of the land also proceeded to and filed various proceedings including ELC Constitutional Petition No. 62 of 2018 and ELC Case No. 7 of 2020(OS), respectively.
33. Arising from the various suits, which were previously filed and touching on the suit property, Learned counsel for the Respondents has therefore invited the Honourable court to find and hold that the Applicant herein, who is deemed to be one of the squatters on the suit property, cannot now mount this suit. In any event, it has been contended that the suit is thus prohibited by the Doctrine of Res-Judicata.
34. Secondly, Learned counsel for the Respondents has submitted that the Applicant's entry onto, occupation and possession of the portions of the suit property was undertaken on the face of subsisting orders issued by the High Court between the years 2004/2007, respectively.
35. Furthermore, Learned counsel for the Respondents has also submitted that the Applicant's entry onto to the suit property was also forceful and without lawful authority; and to the extent that the impugned entry was forceful, Learned Counsel has thus submitted that the Applicant has therefore neither established nor demonstrated the basis to warrant a finding of Adverse Possession.
36. Simply put, Learned counsel for the Respondents has contended that the Applicant herein, has failed and/or neglected to place before the Honourable court any material to warrant a finding of Adverse Possession.
37. In support of the foregoing submissions, Learned counsel for the Respondents has cited and relied on, inter-alia, the case of Peter Okoth versus Ambrose Ochido Adatho & Another (2021)eKLR, Wilson Kazungu Katani & 101 Others versus Salim Abdala Bakshwein & Another (2015)eKLR, Lazaro Kabebe versus Ndege Makau & Another (2017)eKLR; and Andrew Kariuki Boro versus David Kinuthia Kimani (2018)eKLR.
38. Thirdly, Learned counsel for the Applicant has submitted that the Applicant herein has neither established nor demonstrated the existence of a Prima facie case, to warrant the issuance of the orders of Temporary Injunction.
39. Pertinently, it is the Respondent's submissions that though the Applicant herein has been in occupation and possession of the designated portions of the suit property, the Applicant's occupation has been undertaken on the face of various court proceedings and orders, which have interrupted the Applicant's occupation.
40. Furthermore, Learned counsel for the Respondents has also contended that the occupation and possession of the suit property by the Applicant herein was also contrary to and in contravention lawful court orders.
41. Consequently and in this regard, Learned counsel for the Respondents has thus averred that the Applicant herein cannot therefore invoke and/or apply the Doctrine of Adverse Possession.



42. Lastly, Learned counsel has submitted that the Applicant has neither established nor demonstrated that same would suffer Irreparable loss, if the orders of Temporary Injunction are not granted.
43. In support of the submissions that the Applicant herein shall not suffer any Irreparable loss, Learned counsel for the Respondents has cited and relied on the case of Nguruman Ltd versus Jan Bonde Nielsen (2014)eKLR; and Mrao Ltd versus First American Bank Ltd & 2 Others (2003)eKLR, respectively.
44. Premised on the foregoing, Learned counsel for the Respondents has thus impressed upon the Honourable court to find and hold that the Application beforehand; as well as the entire suit, are barred by the Doctrine of Res-Judicata.
45. Other than the foregoing, Learned counsel for the Respondents has also invited the Honourable Court to find and hold that the Applicant herein has similarly failed to establish and/or demonstrate the existence of a Prima facie case or at all.
46. In short, the Respondents contend that the Application by and on behalf of the Applicant is thus devoid of merits and hence deserving of dismissal.

Issues for Determination:

47. Having reviewed the Application beforehand; as well as the Response thereto and upon consideration of the written submission filed on behalf of the Parties, the following issues do emerge and are thus worthy of determination;
 - i. Whether the Application and the suit herein are barred by the Doctrine of Res-Judicata; and by extension the Provisions of Section 7 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.
 - ii. Whether the Applicant has established and demonstrated the existence of a Prima Facie case.
 - iii. Whether the Applicant herein shall be disposed to suffer Irreparable Loss or otherwise.

Analysis and Determination

Issue Number 1 Whether the Application and the suit herein are barred by the Doctrine of Res-Judicata; and by extension the provisions of Section 7 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.

48. The Respondents herein have contended that the 1st Respondent's property, namely, L.R No. 209/12405, (hereinafter referred to as the original title) was encroached upon and trespassed onto by various squatters who thereafter sub-divided same into various Plots.
49. Furthermore, the Respondents have averred that arising from the invasion of the original parcel of land, the 1st Respondent herein thereafter filed and/or lodged various cases, inter-alia Nairobi HCC Misc. Application No. 784 of 1996 and HCC No. 876 of 2004, respectively, wherein same sought for reliefs against the squatters.
50. Additionally, it was contended that the named suits, (details in terms of the preceding paragraphs), which were filed by and on behalf of the 1st Respondent herein, were heard and disposed of culminating into the issuance of decisions (sic) in favor of the 1st Respondent.
51. Other than the forgoing, the Respondents have also contended that the various squatters who had invaded the 1st Respondent's land, also filed various suits, namely, ELC Constitutional Petition No. 62 of 2018; and ELC Case No. 7 of 2020(OS), respectively.



52. Similarly, it has been contended that the suits which were filed by and on behalf of the various squatters and whose details have been outlined in the preceding paragraphs, were equally heard and determined by courts of competent Jurisdiction(s).
53. Based on the foregoing, the Respondents have therefore contended that the Applicant herein cannot commence and file the instant suit, on the face of the various proceedings which have hitherto been filed, heard and determined between the squatters and the 1st Respondent herein.
54. Notably, the Respondents have thus invoked the Doctrine of Res-Judicata and invited the Honourable court to find and hold that the current suit runs a foul the Doctrine of Res-Judicata. In this regard, the Respondents have thus invited the court to strike out the entire suit.
55. Despite the contention by and on behalf of the Respondents, it is imperative to note and recall that neither of the various proceedings which were alluded to at the foot of the Replying affidavit involved the Applicant herein. Simply put, the Applicant herein was not a Party to any of the previous suits.
56. Secondly, the Applicant herein has brought forth a separate and distinct claim, wherein same contends that she bought the named plots from persons who were hitherto in occupation of the designated plots; and that thereafter, same was placed/put in possession of the designated plots.
57. Instructively, none of the previous suits touched on and/or related to the distinct claim which has been made and/or lodged by the Applicant herein. For coherence, the Claim by the Applicant herein has never been adjudicated upon by the Court herein or otherwise.
58. Thirdly, it is also not lost on this court that even though the previous suits were stated to have been filed by Representatives of the squatters, who were in possession of the suit property, no list was ever attached thereto to show that the Applicant herein was one of (sic) the squatters, who had sanctioned and/or authorized the filing of the previous suit.
59. Fourthly, no evidence has been placed before the court to show that any of the previous suits was truly a Representative suit; and that the Applicant herein was duly issued and served with the requisite Statutory Notice envisaged by dint of Order 1 Rule 8(2) of the Civil Procedure Rules, 2010.
60. To my mind, the Doctrine of Res-Judicata can only be adopted and applied once it is shown and demonstrated that indeed the Applicant was Party to the previous suit or that the previous suit was instituted by the Applicant's Representatives with the authority of the Applicant.
61. Similarly, there is also no gainsaying that prior to and before invoking the Doctrine of Res-Judicata the court would also be called upon to ascertain whether the issue in dispute was also the same between the previous suit and the subsequent one.
62. In my humble albeit considered view, the Respondents herein have neither demonstrated nor proved that the Applicant herein was Party to and/or knowledgeable of the previous proceedings, which are being relied upon to advance the Plea of Res-Judicata.
63. Consequently and in this regard, I come to the conclusion that the Plea of Res-Judicata which has been advanced by the Respondents is misconceived and based on misapprehension of the facts underpinning the subject suit.
64. Instructively, the Doctrine of res-judicata ought to be applied sparingly and only after the Honourable court has appraised him/herself of the obtaining issues and not otherwise.
65. To underscore the foregoing holding and particularly that the court needs to appraise the facts and the issues before invoking the Doctrine of Res-Judicata, it is appropriate to cite and reiterate the holding of



the Supreme Court in the case of John Florence Maritime Services Limited & another versus Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), where the court held as hereunder;

“This court in the case of Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another Motion No 42 of 2014 [2016] eKLR (Muiri Coffee case) held as follows regarding the doctrine of res judicata:”⁵² Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights. Such a perception has a basis in comparative jurisprudence; in the Ugandan case of Hon Norbert Mao v Attorney-General, Constitutional Petition No 9 of 2002; [2003] UGCC3, the petitioner brought an action on behalf of 21 persons from his constituency, for declarations under article 137 of the Uganda Constitution, and for redress under article 50 of that Constitution. The matter arose from an incident in which officers of the Uganda Peoples Defence Forces attacked a prison, and abducted 20 prisoners, killing one of them. Unknown to the petitioner, another action had already been filed under article 50, seeking similar relief; and Judgment had been given in Hon Ronald Reagan Okumu v Attorney-General, Misc Application No0063 of 2002, High Court HCT 02 CV MA 063 of 2002. The Constitutional Court dismissed the petition, on a plea of res judicata, declining the petitioner’s pleas that certain important constitutional declarations now sought, had not been accommodated in the earlier Judgment.

58. Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case³⁴ to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction.

This test is summarized in Bernard Mugo Ndegwa v James Nderitu Githae & 2 others, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.

59. That courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in ET v Attorney-General & another, (2012) eKLR, thus: The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi v National Bank of Kenya Limited and others, (2001) EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J, in the case of Njangu v Wambugu and another Nairobi HCCC No 2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face-lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....’



66. Nourished by the test enunciated in the decision (*supra*) and upon appraising the issues that underpin the subject suit, this court comes to the conclusion that the issues herein have never been canvassed before nor adjudicated upon in any previous proceedings.
67. In a nutshell, my answer to issue number one is to the effect that the Plea to Res-Judicata, which has been highlighted by the Respondents herein, is irrelevant and inapplicable

Issue Number 2 Whether the Applicant has established and demonstrated the existence of a Prima Facie case.

68. The Applicant herein has averred that same entered upon and took possession of what were hitherto described as plots 126, 127 and 128; but which now form part of the suit property between the years 2002 and 2004, respectively.
69. Additionally, the Applicant has ventured forward and averred that upon purchase of the named plots, same commenced and undertook extensive developments thereon, culminating into the erection of two massive commercial cum residential apartments, (whose details have been captured at the foot of annexure (c) attached to the affidavit sworn on the 25th September 2023).
70. Other than the erection of the two massive Commercial cum residential apartments, the Applicant has also placed before the court evidence that same proceeded to and caused the apartments to be connected with various utilities, namely, electricity and water. For good measure, the evidence pertaining to such connection has also been attached to the second Further affidavit sworn by the Applicant.
71. On the other hand, the Respondents herein and in particular, the 1st Respondent, does not dispute that the Applicant entered upon and took possession of the suit property between the years 2002 and 2004, respectively.
72. Additionally, the Respondents herein have also not disputed the fact that the Applicant has since constructed and or erected a massive Commercial cum Residential apartment and which apartment has been in existence for a duration in excess of 12 years.
73. Arising from the foregoing sets of facts, what becomes apparent is that the Applicant has been in occupation and possession of the designated suit property for more than 18 years, albeit without any adverse proceedings being taken against her or otherwise.
74. Suffice it to point out that if the Respondents herein and in particular the 1st Respondent, had filed and/or lodged any suit against the Applicant herein, then time for computing the Duration for Adverse Possession would stop and/or lapse.
75. Nevertheless and in any event, it is common knowledge that such a suit, if any; ought to be filed and/or commenced prior to and or before lapsed of the statutory 12-year period. See Sections 7, 12, 13 and 17 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.
76. However, as concerns the instant matter, what is discernable is that the Applicant seems to have been in occupation and possession of the suit property for more than the requisite 12-year period. For good measure, I say “appears” because at this juncture this court is not called upon to arrive at a substantive and precipitate finding of fact or law.
77. Suffice it to point out that the determination of whether or not Adverse Possession shall have been proved to the requisite standard, namely, on a balance of probabilities, shall have to await the plenary hearing.



78. As for this court, what is required of same is to discern whether on the basis of the Evidence tendered, there is prima facie evidence, which underpin and/or premised a claim for Adverse Possession.
79. Notably, upon review of the totality of the evidence, which have been placed before the court, it is evident and apparent that the Plaintiff herein has, no doubt, established the existence of a Prima facie case with probability of success.
80. To this extent, it becomes necessary to elaborate on what constitutes a Prima facie case. Nevertheless, it is worthy to recall that the definition of what constitutes a prima facie case, it is now trite and established.
81. To buttress the foregoing exposition, it suffices to cite and reiterate the ratio decidendi in the case of Mrao Ltd versus First American Bank Ltd & 2 Others (2003)eKLR, where the court held thus;

“What I have to determine here is whether on the material presented, this court properly directing itself can conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. The plaintiff’s case is that the 3rd defendant in its present form was conceived from a joint venture between the plaintiff and the 1st defendant. It is his case that the 1st defendant was at one point the majority shareholder of the 3rd defendant which shares he held both for himself and the plaintiff before he transferred the same to the 2nd defendant, his wife. It is not contested that the 2nd defendant is the wife of the 1st defendant as well as the averments that the 2nd defendant is now the majority shareholder in the 3rd defendant a clout, she acquired courtesy of the 1st defendant’s magnanimity. The 3rd defendant’s position is that he, 3rd defendant, is a separate legal entity and therefore arrangement between the 1st defendant and the plaintiff should not affect the 3rd defendant. However, it is well established that in deserving cases, courts of law are empowered to unmask the veil of incorporation.....

There are also copies of correspondences (sic) purportedly emanating from the 1st defendant and a reading of the same show, prima facie at least, that there was a relationship in existence between the plaintiff and the 1st defendant which relationship went beyond the ordinary principal and agent. There are implied indicators that the two had some venture one way or another. What else would someone make out of the employment of such phrases as “and you are the only counterpart for me”? I am not saying conclusively that there was a partnership. What I am saying is that the evidence on record shows that the relationship ran deeper than suggested by the defendants. The 3rd defendant, however, would have nothing to do with this relationship since it is a different person and was not privy to the on goings (sic) between the two friends-turned-foes.

A company registered under Cap 486 is, of a course, a distinct legal entity from the shareholders. However, that incorporation, as already stated above may be unmasked. When the same is done, the individuals behind the company are revealed and according to the plaintiff, when that revelation comes out it will be clear that he is also part and parcel of whatever constitutes the 3rd defendant. That however, will await the main suit.”

82. In short, my answer to issue number two is to the effect that the Applicant herein has ably demonstrated and established the existence of a prima facie case. Instructively, all that the Applicant was called upon to demonstrate is the existence of a genuine and arguable case, which warrants investigations by the court with a view to ascertaining whether or not the Applicant’s rights have been infringed upon or otherwise.



Issue Number 3 Whether the Applicant herein shall be disposed to suffer Irreparable loss or otherwise.

83. There is no gainsaying that even where an Applicant proves and demonstrates the existence of a prima facie case, such proof by itself does not guarantee an Applicant the grant of an order of Temporary injunction.
84. To underscore the exposition alluded to in the preceding paragraph, is worthy to recall the holding of Kenya Commercial Finance Co. Ltd Versus Afraha Education Society [2001] Vol. 1 EA 86, where the court held thus;
- “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.
85. Arising from the foregoing position, it then behooves this court to venture forward and to ascertain whether the Applicant herein is disposed to suffer irreparable loss, in the event that the orders of temporary injunction are not granted.
86. To start with, there is no denying that the Applicant herein has erected and/or constructed two massive Commercial cum Residential apartments, comprising of five floors each, which have been rented out and/or demised to various tenants.
87. Furthermore, there is also no gainsaying that a colossal sum of monies were spent by the Applicant herein to put up the named apartments. Nevertheless, the Applicant avers and same has not been disputed, that the apartments in question now constitute her sole source of income and livelihood, taking into account that she has since retired.
88. In my humble view, if the suit property and the apartments thereon, which were constructed by the Applicant, are sold and/or alienated by the Respondents, no doubt, the Applicant would be deprived of her sole source of income.
89. Furthermore, there is no gainsaying that the deprivation of the source of income, which the Applicant now relies upon after retirement, may very well push the Applicant into a state of denial/ deprivation; and by extension, render her a destitute.
90. Clearly, the net effect of the alienation and/or disposal of the suit property, with the Applicant’s apartments thereon would culminate into and subject the Applicant to irreparable loss, not compensable in monetary terms or otherwise.
91. As pertains to what constitutes and/or amounts to Irreparable loss, I can do no better than to quote and cite the holding of the Court of Appeal in the case of Nguruman Limited versus Jan Bonde Nielsen & 2 others [2014] eKLR, where the court held as hereunder;

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.

92. Evidently, it is my finding and holding that the Applicant herein has similarly established and demonstrated that same shall suffer irreparable loss, unless the orders sought at the foot of the Application are granted.

Final Disposition

93. Having reviewed the issues for determination, which were itemized in the body of the Ruling, it has become apparent that the Applicant herein has established and demonstrated that there exists a prima facie case with reasonable probability of success.

94. Furthermore, the Applicant has similarly met and/or satisfied the threshold relating to proof that same is disposed to suffer Irreparable loss, unless the orders of temporary injunction; are granted over and in respect of the matter.

95. Consequently and in the premises, the Application dated the 30th June 2023; is meritorious. In this regard, same be and is hereby allowed on the following terms;

- i. There be and is hereby granted an order of injunction staying auction of title L.R No. 126, 127 and 128 as scheduled for 11th July 2023 or such other date.
- ii. An order of Temporary Injunction be and is hereby issued restraining the Defendants, their servants, agents, employees and whatsoever from disposing of parcel number Nairobi Block 263/1080 (previously known as Plot No’s 126, 127 and 128) by way of auction, private treaty, transfer or in any way interfering with the Plaintiff/Applicant’s ownership and possession of the said property.
- iii. An order of Temporary Injunction be and is hereby issued restraining the Defendants whether by themselves, their employees, servants, agents or otherwise howsoever from trespassing onto, entering upon, occupying, charging, carrying on any development, evicting the Plaintiff or her agents, servants, tenants/ licenses present or in any way dealing with all that parcel of land known as parcel number Nairobi Block 263/1080 (previously known as Plot No’s 126, 127 and 128).
- iv. Costs of the Application shall abide the outcome of the suit

96. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF OCTOBER, 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of:

Benson - Court Assistant.



Mr. Saka h/b for Mr. Omwanza for the Plaintiff/Applicant.

Mr. Omondi h/b for Mr. Odiwor Kenyatta for the Defendants/Respondents.

