



Nzeki (Suing on Behalf of Lukenya West Association) & 2 others v Kenya Commercial Bank Limited & 3 others (Environment and Land Case E088 of 2024) [2025] KEELC 3480 (KLR) (30 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3480 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CASE E088 OF 2024**

NA MATHEKA, J

APRIL 30, 2025

BETWEEN

BENEDICT NYAMAI NZEKI (SUING ON BEHALF OF LUKENYA WEST ASSOCIATION) 1ST PLAINTIFF

FRANCISCO NGEI MUTUA (SUING ON BEHALF OF MAVOKO SYOKIMAU COMMUNITY ASSOCIATION) 2ND PLAINTIFF

ANTONY KIVWA MUTHOKA (SUING ON BEHALF OF KATHAMA WELFARE ASSOCIATION) 3RD PLAINTIFF

AND

KENYA COMMERCIAL BANK LIMITED 1ST DEFENDANT

EAST AFRICAN PORTLAND CEMENT COMPANY LIMITED 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

NATIONAL LAND COMMISSION 4TH DEFENDANT

RULING

1. The application is dated 23rd October 2024 and is brought under Section 3A of the [Civil Procedure Act](#), Order 40 Rule 1, 2 and 4 of the [Civil Procedure Rules](#), 2010, Section 68 of the [Land Registration Act](#); Article 40 & 60(1) (b) of [the Constitution](#) of Kenya seeking the following orders;
 1. This application be certified as extremely urgent and be heard forthwith and ex-parte in the first instance and service thereof be dispensed with.



2. Pending the hearing and determination of this application, this court be pleased to grant a temporary injunction restraining the 1st Defendant and all other Defendants, jointly or severally, whether by themselves, servants, agents or assigns or any other agency from advertising offering for sale, appointing agents, entering, invading, selling or otherwise alienating the suit properties being the parcels of land comprised in Land Reference Numbers 8784/4 and 8786 situated in Athi River area, Mavoko Sub-County, Machakos County, or in any other manner interfering with the Plaintiff's possession of the said land by forcible entry or otherwise in any manner whatsoever or proceeding in any manner whatsoever with advertisement or sale or taking any other action adverse to the Plaintiffs' ownership status over the properties.
 3. Pending the hearing and determination of this suit, this court be pleased to grant an injunction orders restraining the 1st Defendant and all other Defendants, jointly or severally, whether by themselves, servants, agents or assigns or any other agency from advertising, offering for sale, appointing agents, entering, invading, selling or otherwise alienating the suit properties being the parcels of land comprised in Land Reference Numbers 8784/4 and 8786 situated in Athi River area, Mavoko Sub-County, Machakos County, or in any other manner interfering with the Plaintiff's possession of the said land by forcible entry or otherwise in any manner whatsoever or proceeding in any manner whatsoever with advertisement or sale or taking any other action adverse to the Plaintiffs' ownership status over the properties.
 4. This court be pleased to grant a permanent injunction restraining the 1st Defendant and all other Defendants, jointly or severally, whether by themselves; servants, agents or assigns or any other agency from advertising, offering for sale, appointing agents, entering, invading, selling or otherwise alienating the suit properties being the parcels of land comprised in Land Reference Numbers 8784/4 and 8786 situated in Athi River area, Mavoko Sub-County, Machakos County, or in any other manner interfering with the Plaintiff's possession of the said land by forcible entry or otherwise in any manner whatsoever or proceeding in any manner whatsoever with advertisement or sale or taking any other action adverse to the Plaintiffs' ownership status over the properties. Any further relief that this court deems fit in the interest of justice
 5. This court be pleased to make a declaration that the Plaintiffs are the owners of the suit properties viz Land Reference Numbers 8784/4 and 8786 situated in Athi River area, Mavoko Sub-County, Machakos County, by virtue of the doctrine of adverse possession.
 6. Without prejudice to the Plaintiffs' established right to ownership of the suit properties by virtue of the doctrine of adverse possession, this court do direct that the 1st Defendant do engage with the Plaintiffs to negotiate and amicably agree on terms of repurchase of the suit properties to forestall any forced sale and its attendant disturbance of the status quo, including breach of peace.
 7. The costs of this application and the suit be provided for.
2. It is based on the following grounds that the Plaintiffs and over 9,000 other members of the three societies they represent, respectively, are owners and residents of the suit properties by virtue of the doctrine of adverse possession and have erected permanent homes on the properties and consistently resided in the properties uninterrupted for a period exceeding 14 years. That over the last one month or so, agents purporting to be acting on the instructions of the 1st Defendant, including Geoner Systems Limited, have been visiting the land, purporting to carry out survey work and scouting potential buyers for the properties to the exclusion of the Plaintiffs, causing serious disharmony, fear and anxiety among



the Plaintiffs' members who are the genuine owners of the properties. That neither the 1st nor the 2nd Defendants or their said agents have produced to the Plaintiffs any valid titles, charges or other legal documentation giving the 1st Defendant a basis to exercise chargees' statutory power of sale over the suit properties. That the 1st and 2nd Defendants' purported action of surveying, scouting and marketing the properties for sale to the exclusion of the Plaintiffs is an affront to the Plaintiffs' proprietary rights over the properties, which rights are guaranteed by *the Constitution* and protected by operation of law as the Plaintiffs are owners in the light of the doctrine of adverse possession.

3. The question of ownership of land within Mavoko Municipality in Machakos County was the subject of a Taskforce appointed by the Cabinet Secretary, Ministry of Lands & Physical Planning vide Gazette Notice No. 12623 of 7th December 2019 which Taskforce tendered a Report of findings recommending, inter alia, that all disputes of ownership of such lands, which include the suit properties, should be addressed by the 4th Defendant herein, the National Land Commission. That the 4th Defendant should be permitted to implement the recommendations of the Taskforce and determine the true ownership position vis a vis the suit properties before any action is taken by whatever entity, including the 1st Defendant, affecting or touching upon the Plaintiff's right of ownership over the suit properties. It is therefore unlawful, unprocedural, premature and preemptive of the aforesaid action for the 1st Defendant to purport to exercise power of sale over the suit property before the question of ownership of the property is determined with finality.

4. This court has considered the application and the submissions therein. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella vs Cassman Brown (1973) EA 358*. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 others CA No.77 of 2012* (2014) eKLR where 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, allay 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".

5. Consequently, the Plaintiffs ought to, first, establish a prima facie case. The Plaintiff/Applicant submitted that they have established a prima facie case. In the case of *Mrao Ltd vs First American Bank of Kenya Ltd* (2003) EKLR in which the Court of Appeal gave a determination on a prima facie case. The court stated that;

"... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

6. In support of their application, the Plaintiffs state that the Plaintiffs and over 9,000 other members of the three societies they represent, respectively, are owners and residents of the suit properties by virtue of the doctrine of adverse possession and have erected permanent homes on the properties and consistently resided in the properties uninterrupted for a period exceeding 14 years.



7. Secondly, The Plaintiff 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 vs 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.

8. The Plaintiffs submitted that That the acts of the 1st Defendants and its agents are further threatening the Plaintiffs' right to shelter and decent residence as their homes are at a danger of unlawful advertisement and sale. That the 1st Defendant's intended sale has also caused panic, uncertainty and consternation on the Plaintiffs and other residents of the suit property and there is imminent danger of breach of peace in the neighbourhood. That the High Court in a Judgment delivered on 7th May 2021 in Machakos ELC Petition No. 20A of 2020 *East African Portland Cement Company Limited vs Attorney General* faulted the 2nd Defendant's claim of ownership of the suit properties, effectively vitiating the validity of any charge or other security instruments purported to be created against the affected titles. As the aforesaid judgment of the Court has never been overturned, all charges or encumbrances placed against the annulled titles, including any such charges or encumbrances created upon the suit properties are concomitantly null, void and of no legal effect. That it would therefore be an illegality for the 1st Defendant to purport to exercise chargee's statutory right of sale over the suit properties based on illegal charge instruments created upon an impugned titles.
9. Thirdly, the Plaintiffs have to demonstrate that the balance of convenience tilts in their favour. In the case of *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* (2018) EKLR 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".

10. In the case of *Paul Gitonga Wanjau vs 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.”

11. The Plaintiff/Applicant contends that the balance of convenience tilts in his favour that the Plaintiffs’ right to ownership of the suit properties by virtue of the doctrine of adverse possession, in the event that the verification and validity of the title claimed by the 2nd Defendant and the charge purported to be held by the 1st Defendant are determined in their favour, the Plaintiffs would be willing to negotiate and amicably agree on terms of repurchase of the suit property to forestall forced sale and its attendant disturbance of the status quo, including breach of peace. Indeed, there have been numerous “without prejudice” efforts made by the Plaintiffs and other residents of the suit property to engage the 2nd Defendant and agree on amicable repurchase of the suit property but these have never been conclusively pursued hence the same should be given a chance in the interest of amicable preservation of the respective parties rights and interests over the suit property. That unless conservatory and injunctive orders are granted, the Plaintiffs shall be deprived of their property and suffer irreparable damage and loss as the 1st Defendant intends to take steps to forcefully enter and sell the Plaintiffs’ land through illegal and unconstitutional means. That no significant prejudice would be suffered by the Defendants on the grant of the injunctive orders sought pending determination of the issues raised in the Plaint herein.
12. The decision of *Amir Suleiman vs 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.”
13. The 1st Respondent submitted that this matter is sub judice as they are other outstanding matters relating to the suit properties being Machakos ELC Case No. 4 of 2023, Machakos ELC Case No. 37 of 2024, Machakos HCCHR Pet No. E003 of 2025 and Machakos ELC Case No. E116 of 2024. That the applicants have grossly misrepresented material facts surrounding the historical ownership of the suit properties. That the High Court in a Judgment delivered on 7th May 2021 in Machakos ELC Petition No. 20A of 2020 East African Portland Cement Company Limited vs Attorney General never vitiated the titles to the suit properties.
14. Bearing this in mind, I am convinced that there is a lower risk in not granting orders of temporary injunction than granting them, as I wait 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 Plaintiffs/Applicants claim. I have also not had the opportunity to interrogate the Respondent’s documents.
15. In *Robert Mugo Wa Karanja vs 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...”



16. Consequently, I find that this application is not merited and is dismissed with costs. Parties are advised to comply with orders 11 and fix this matter for hearing.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 30TH DAY OF APRIL 2025.

N.A. MATHEKA

JUDGE

