



**Mwilu v Muyanga & another (Environment & Land Case E003 of 2021)
[2022] KEELC 4812 (KLR) (20 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4812 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND CASE E003 OF 2021
LG KIMANI, J
SEPTEMBER 20, 2022**

BETWEEN

DANIEL KILATYA MWILU APPLICANT

AND

PAUL MULI MUYANGA 1ST RESPONDENT

PHILIP MULI KITHOME 2ND RESPONDENT

RULING

1. This ruling relates to the Plaintiff/ Applicants Chamber Summons Application dated December 29, 2021, the Defendant/Respondents Notice of Preliminary Objection dated January 21, 2022 and the Notice of Motion dated February 7, 2022. The Chamber summons application seeks the following Orders:
 1. That this Honourable Court be pleased to order immediate stay of all proceedings, orders, Decrees and Judgments in Kitui Chief Magistrate Succession Cause Number 40 of 2009 to abide the outcome of ELC OS 3/2021.
 2. That pending the hearing and determination of the application/suit herein, this Honorable Court be pleased to issue an order directing Kitui Lands Registrar, to register an inhibition against the Land Parcel Number Nzambani/Kyanika/2230 pending the hearing and determination of Kitui ELC OS 3 of 2021.
 3. A permanent order of injunction restraining the Defendants whether by themselves, servants, their agents and/or anybody else whomsoever from encroaching into, selling, alienating disposing, offering for sale and/or in any other manner interfering with the plaintiff's occupation and quiet possession of the Land Parcel Number Nzambani/Kyanika/2230.



4. An order that the Plaintiff is entitled by way of adverse possession to all that Land Parcel Number Nzambani/Kyanika/2230 registered in the joint names of the Defendants.
 5. An order that the Defendants' Title to the Land Parcel Number Nzambani/Kyanika/2230 measuring 0.11 Ha has been extinguished in favour of the Plaintiff under Section 37 and 38 of the Limitations of Actions Act.
 6. An order directing that the Defendants (as the administrators of the Estate of Muli Maketi) to transfer to the Plaintiff the whole of Land Parcel Number Nzambani/Kyanika/2230 failure to which the Deputy Registrar of this Court be authorized to sign all necessary papers, documents and transfer forms, application for consent of the Land Control Board to ensure that the Plaintiff is registered as the owner of the said piece of land free from all encumbrances.
 7. An order that the District Lands Registrar and the Surveyor to dispense with the production of the original title deed and to forthwith cancel entry numbers 2,3 and 4 in the register and proceed to issue title in favor of the Plaintiff.
 8. That costs of and incidental to this suit be provided for.
 9. That this Honourable Court be pleased to issue any further relief as it may deem fit.
2. The Applicant claims to be entitled to the suit property Land Parcel Number Nzambani/Kyanika/2230 by way of adverse possession by virtue of being in continuous use, occupation and possession of the property for a period exceeding twelve years. The Applicant claims that he purchased a parcel of land from Muli Maketi (Deceased) in the 1960s and that after land adjudication the land came to be known as Land Parcel Number Nzambani/Kyanika/250 and continued to occupy the property peacefully and uninterrupted to date.
 3. He stated that he came to learn about Kitui Sucession Cause Number 40 of 2009 (In the matter of the estate of Muli Maketi (Deceased) and found out that a portion of his property Land Parcel Number Nzambani/Kyanika/250 had been parceled out and registered as Land Parcel Number Nzambani/Kyanika/2230 and registered in the name of the deceased. That he filed a protest in the succession cause which was dismissed citing lack of jurisdiction.
 4. It is his submission that having been on the land peacefully, uninterrupted and unhindered for more than 12 years, the deceased's title has been extinguished in his favour and he is entitled to be registered as the proprietor of Land Parcel Number Nzambani/Kyanika/2230.
 5. In opposition thereof, the Respondents filed a Preliminary Objection dated January 21, 2022 on the following grounds:
 - a) That there is no suit filed before the Honourable Court on adverse possession as at December 29, 2021.
 - b) That the whole suit/application as filed is incompetent, fatally defective, it is vexatious; frivolous and an abuse of the process of this court.
 - c) That the application/suit as filed is not compliant with the law as to its form.
 - d) That the Application/suit as filed is not compliant with the law on adverse possession as set out by the *Limitation of Actions Act* and the Civil Procedure Rules 2010.
 - e) That the suit property has not been properly identified.
 - f) That the Applicant does not have the locus standi to institute the suit against the Respondents.



- g) That the affidavit in support of the Application is defective.
 - h) That the suit/application is a non-starter as the Applicant if at all he used the property he did so as a licensee and not a trespasser and further that the Applicant admits that he only came to know of the existence of the suit property in the year 2017.
 - i) That the suit as instituted has no evidence to support Adverse Possession.
 - j) That the said Application/suit does not disclose any cause of action, it is incompetent, frivolous, vexatious and it is otherwise an abuse of the process of this court and as such ought to be dismissed with costs.
6. The Applicant later on filed a Notice of Motion Application dated February 7, 2022 seeking the following orders:
1. Spent.
 2. That this Honourable Court be pleased to issue temporary orders of injunction against the Respondents, their agents/servants or whomsoever acting on their behalf from selling, alienating, disposing, dealing/transacting in any manner with the Land Parcel Number Nzambani/Kyanika/2230 and or interfering in any way with the Applicant's quiet possession, use, occupation and enjoyment of the Land Parcel Nzambani/Kyanika/2230 pending the hearing and determination of this application.
 3. That pending hearing and determination of this Application, the Respondents either by themselves, their agents, servants, proxies or Purchaser(s) or any authority be restrained by this court from transmitting, conveying, transferring, registering, assigning, possessing or in any way dealing with Land Parcel Nzambani/Kyanika/2230 or resultant parcels thereof pending hearing and determination of this application or until further orders of the Court for purposes of preservation of the property.
 4. That this Honourable Court be pleased to order immediate stay of all proceedings, orders and decrees in Kitui Chief Magistrate's Court Land Case Number E001 of 2022(which suit seeks to evict the applicant from the suit property) Paul Muli Muyanga & Another vs Daniel Kilatya Mwilu to abide the outcome of ELC OS 3/2021 filed herewith.
 5. That pending hearing and determination of the application/suit herein, this Honourable Court be pleased to issue an order directing Kitui District Lands Registrar, to register an inhibition against the Land Parcel Nzambani/Kyanika/2230 pending hearing and determination of Kitui ELC Case Number ELC OS 3/2021.
 6. That the Respondents do pay the Applicant the costs of the application.
7. The Applicant's grounds are that the Respondents have unprocedurally applied and obtained title to the suit property and have erected posts intending to place barbed wire around the land. They have also filed an application dated January 5, 2022 to restrain him from utilizing the land that he has called home for over thirty years. He reiterated that he is entitled to be registered as the proprietor of the suit property having occupied the suit land for close to 12 years.
8. In response, the Respondents filed a Replying Affidavit stating that the genesis of this matter is Succession cause No 40 of 2009 In the matter of the estate of Muli Maketi (Deceased), who is their father and grandfather respectively. They stated that they have all along been using the suit property



to graze cattle and only temporarily stopped sometime in 2018 during the construction of the Kitui-Mutomo-Kibwezi Road.

9. It is the Respondents' averment that they have had constant disputes with the Applicant and beacons were set on the land in 2012 but have since been removed. That the court delivered its ruling on the protest in the succession cause and dismissed the same and letters of administration were confirmed to them and thereafter a Certificate of confirmation of grant was issued in their names as the beneficiaries to the estate of the late Muli Maketi.
10. What followed was that the title was registered in their names and a title deed issued on December 21, 2021. They decided to sell the suit property and the buyers paid the deposit while the balance was to be paid on January 20, 2022. The Respondents state that when they went with the buyers to inspect the plot of land and were putting up fencing poles, the Applicant and three of his sons came to the suit property carrying machetes and they had to run away from them.
11. The Respondents also filed a suit for trespass in the Magistrate's Court at Kitui and were not aware at the time that the Applicant had moved this court as they were served with the Chamber Summons Application on January 11, 2022. It is the Respondents' contention that the orders sought by the Applicant are untenable, because the statutory time of twelve years have not lapsed, there is no penal notice attached to the application and that there is no substantive suit out of which the Application can be brought under.
12. Further, the Respondents informed the Court that they already have two orders contradicting each other as the order by Hon. Kasera SPM has not been set aside or appealed against. The Respondents further raised issues regarding the Court record and stated that the Chamber Summons marked as Annexure DK N4 filed before the Magistrate's Court on January 5, 2022 and that the court's stamp was backdated to December 29th December 2021.
13. The Respondent' vehemently denied the Applicant ever being in possession of the suit property but that in November 2021, the Applicant proceeded to till the suit land when the succession matter was pending its judgment. It is their contention that the Applicant has not exhibited anything permanent that he has ever planted in the suit property as proof that he was in possession for the last 12 years.

The Applicant's written submissions

14. In their written submissions, counsel for the Applicant stated that the absence of a substantive suit appeared to be a mistake from the Registry which was regularized and the Applicant provided copies of the Originating Summons and the original receipt for filing fees. They clarified that the suit property is well stated as Land Parcel No. Nzambani/Kyanika /2230.
15. It was the Applicant's submission that he is in possession and use of the suit property and the Respondents are keen on disposing the property. That the Respondents irregularly acquired the property through succession and they have not placed any material before the court to show that they would suffer prejudice if the orders sought are granted.
16. On whether the Applicant qualifies for interlocutory orders, his counsel submitted that as soon as he discovered that a portion of his land had been registered in the name of Muli Maketi, he filed a citation on February 14, 2017 and followed up with a protest on the Succession Case. Counsel submitted that he has made several attempts to protect his interests but he has never had his claim addressed in full. He states that has a prima facie case and he stands to suffer irreparable injury by the fact that the Respondents are to transfer to suit property by way of sale to a third party and that the balance



of convenience tilts in his favour as he has been in occupation and use of the land. He relied on the authority in *Kenya Shell vs Kabiru and Another* (1989) KLR 410}}.

17. Regarding the issue of non-existence of a main suit raised in the Respondents' preliminary objection, counsel for the Applicant submitted that this was settled when an original Court receipt was availed. In terms of non-compliance with the law on adverse possession, he submitted that the Respondents have not specified the offended provisions to support their claim. This also goes for the issue of cause of action and locus standi, which they submitted have not been substantiated as they relied on the case in Kajiado ELC Case No.232 of 2017: *Jane Ngono Ngige (suing as the administrator of the estate of Boniface Ngige Waweru (Deceased) v John Ntimeri & 7 others* [2020] eKLR.

The Respondent's submissions

18. Counsel for the Respondent submitted that the Originating Summons herein is not properly before court as required by the provisions of Order 37 Rule 7(1) of the *Civil Procedure Rules 2010* as the affidavit sworn by the Applicant has not annexed a certified extract of the title to the property in question. That the application is also required to have the names of the parties sued, must show evidence of possession of the suit property thereof and must have a penal notice in it so that the orders are enforceable which it did not have. They quoted the case of Civil Appeal Number 151 of 1999-*Maina Njuguna v Paul Njuguna Mwangi and Ephantus Mibigo Ngoho v John Kongwalei Sawe & Another* [2018]eKLR.
19. Citing the authority in *Titus Mutuku Kasuve v Mwaani Investments Limited & 4 others* [2004] eKLR the Court of Appeal stated that the identification of the land in possession is an important and integral part of the process of proving adverse possession which position was reiterated in the case of *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & Another* [2015]eKLR and urged the Court to dismiss the suit with costs.
20. Submitting that the Applicant has not met the pre-requisites as required by the law for a claim of adverse possession, they cited the case of *Tabitha Waitberero Kimani v Joshua Ng'ang'a* [2017] which laid down the principles required for a successful claim of adverse possession. The Respondents submit that the Applicant has not been in possession of the suit property before November 2021 when they planted maize on the suit property while pointing out that this was noted in the ruling in Chief Magistrate in Succession 40 of 2009.
21. The Respondents gave instances that would lead to a break in the 12 year period such as a boundary dispute in 2016 as well as the incidence on December 27, 2021 when they had gone to erect fencing poles around the property and were threatened by the Respondents sons carrying machetes. For this reason, they submit that the possession cannot be said to have been peaceful and uninterrupted while relying on the authority in the case of *Wilson Kazungu Katana & 101 others v Salim Adalla Bakshwein & Another* [2015]eKLR.
22. On the issue of whether the Respondents have been properly sued, the Respondents submit that they have been sued as the proprietors of the suit property, which title they acquired in 2021 and not as administrators of the estate therefore 12 years have not lapsed while citing the case of *Titus Mutuku Kasuve v Mwaani Investments Limited & 4 others* [2004]eKLR and urged the Court to dismiss the suit with costs.



Analysis And Determination

The Preliminary Objection Dated 21st January 2022

23. Having considered all the relevant documents pertaining to the matter at hand, it is important to deal with the Respondents' Preliminary Objection dated January 21, 2022 first.
24. According to the *Black Law Dictionary* a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
25. The above legal definition has been cemented in the now famous case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* [1969] E A 696. The Court then held that:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”
26. The first ground in the Preliminary Objection is that there is no suit filed before the Honourable Court on adverse possession as at December 29, 2021 when the Chamber Summons Application of the same date was filed. This issue was first raised by Counsel for the Respondents by a letter dated January 12, 2022 addressed to the court indicating that their client had only been served with the Chamber summons dated December 29, 2021, supporting affidavit to which was attached copy of a map, Kenya gazette notice, grant of letters of administration and a copy of extract of title deed. Counsel requested confirmation that these were the only documents on the court record and expressed fear that the Applicant would try to introduce other documents not originally filed together with the Chamber summons. This suit came up for directions on January 24, 2022 when the issue was raised again that the court record did not contain the Originating summons that would have commenced the suit herein. In response Counsel for the Applicant sought time to regularise the documents on record. The court noted that the Originating Summons said to have been filed together with the chamber summons was not on the court record and neither was there a receipt for payment of filing fees. The court directed the Counsel for the Applicant to have the filed Originating summons placed on the court file together with a receipt for payment of filing the same. I note that Counsel for the Applicant placed on the court record a copy of the Originating Summons with a court stamp showing that the same was filed on December 29, 2021. An original receipt was also placed on record issued on December 29, 2021 for Kshs 2,000/- for payment for filing of what is indicated as a “Non-liquidated claim or Originating summons”. From the foregoing copies of documents on the court record I am satisfied that the Originating summons herein dated December 29, 2021 was filed in court on the same date but for some reason the original court copy was not placed on the court file.
27. I do find that the copy of the said Originating Summons and the official receipt for the same are properly before the court. I also note that a copy of the same originating summons was filed and a court stamp affixed for February 8, 2022. I find that the said copy is not properly before the court and it is hereby directed that the same be expunged from the court record.



28. The second and third ground on the preliminary objection are that the application/suit as filed is not compliant with the law as to its form and that the Application/suit as filed is not compliant with the law on adverse possession as set out by the [Limitation of Actions Act](#) and the Civil Procedure Rules 2010.

29. The Applicant has applied for a right of adverse possession over the suit property. Section 38 of the [Limitation of Actions Act](#) provides that:

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act(registered land), or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

30. The procedure for making such an application is set out by Order 37 rule 7 of the Civil Procedure Rules(2010) which provides that:

“An application under section 38 of the [Limitation of Actions Act](#) shall be made by originating summons. (2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.”

31. The Applicant in the Originating Summons herein has not attached a certified extract of the title to the suit property. However, I note that the Title to Land Parcel Nzambani/Kyanika/2230 has been annexed by the Applicant in his Supporting Affidavit to the Notice of Motion Application dated February 7, 2022 also for determination herein and the Respondents have annexed a copy of the title as well to their Replying Affidavit. In the case of [Joseph Omol Kowiti v Micheal Okworo Wanga](#) [2020] eKLR where the Court was faced with a similar Preliminary Objection, the court found that:

“Both the plaintiff and the defendant referred to the suit land, LR No Gem/Kanyamwa/683 in their respective pleadings. So, has the suit attained the threshold in Section 38 and Order 37(1) and (2) (*supra*)”

The term “Title” referred to under the said legal provisions, is defined in the Black’s Law Dictionary, 10th Edition at page 1712 *infra*; “Legal evidence of a person’s ownership rights in property, an instrument (such as a deed) that constitutes such evidence.”

This court is aware of Article 159(2)(d) of the [Constitution](#) of Kenya, 2010 on undue regard to procedural technicalities. Section 19(1) of the [Environment and Land Court Act](#), 2015(2011) also speak to the said Constitutional provision..... In the final analysis, it is abundantly clear from the entire pleadings herein that the plaintiff’s failure to comply with Order 37 Rule 7 (*supra*) is curable through the defendant’s replying affidavit and possible amendment of the originating summons further to Article 159 (2) (d), Kanwal and Chemwolo cases (*supra*). Whereas I note Kweyu Wambura and Watuko cases (*supra*), the same are distinguishable in the circumstances. On that score, the second issue is resolved thereby.”

32. While the Court did not dismiss the suit referring to Order 37 Rule 18 of the [Civil Procedure Rules \[2010\]](#) in Nyaloya Lukwa (suing as the legal representative of the estate of the late [Julius Mubambi](#)



Amayi (Dcd) v Antony Panga Imbuusi [2021 eKLR the Court held that the availing of a copy of the title in the Replying affidavit did not relieve the Applicant of this duty. The Court held that:

“It seems to me therefore that the court has discretion and power to remedy non-compliance with Order 37 Rule 7 (2) prior to trial. That is more so in the context of the provisions of Article 159 (2) (d) of the *the Constitution* of Kenya and Section 19 of the *Environment and Land Court Act* which emphasise the overall mission of the court to do substantive justice. Consequently, the preliminary objection herein which is founded entirely on non-compliance with Order 37 Rule 7 (2) cannot succeed. In line with the mission of the court to do substantive justice, I will give the applicant a chance to comply. Adverse consequences will only follow in the event of failure to comply upon expiry of the period given. I am aware that prior to filing the Notice of Preliminary Objection, the respondent had filed a replying affidavit in which he asserted that he is the registered proprietor of the suit property. Such a concession does not relieve the applicant of her obligations under Order 37 Rule 7 (2). It is for good reason that the law expects that all registrable details of the suit property in a claim for adverse possession be vouched for by the land registrar and not just the parties. Among other possibilities, the parties may be genuinely mistaken as to such details.” The court ordered the Applicant to avail a certified copy of the Title.

Order 37 Rule 18 which the Court referred to in the precedent above provides:

“At the time of directions, if the parties do not agree to the correctness and sufficiency of the facts set forth in the summons and affidavit, the judge may order the summons to be supported by such further evidence as he may deem necessary, and may give such directions as he may think just for the trial of any issues arising thereupon, and may make any amendments necessary to make the summons accord with existing facts, and to raise the matters in issue between the parties.”

33. On one hand since copies of the Title have been availed and is in the court record and the existence of the said land and the title document has not been denied by any of the parties, and in keeping with the spirit of Article 159 of the *Constitution* of Kenya (2010), I do find that it would be draconian to dismiss the suit on this ground. The requirement that it should be certified still stands and considering that the court is dealing with an interlocutory application and directions have not been given there is still an opportunity for the Applicant to provide a certified copy of the extract of title to the suit land.
34. The other grounds raised in the Preliminary Objection are that the suit property has not been properly identified. In my view this ground is not clear since the Applicant has identified the suit property as Land Parcel Number Nzambani/Kyanika/2230. The Respondent further raises the grounds number f) to j) that the Applicant does not have the locus standi to institute the suit against the Respondents, the affidavit in support of the Application is defective, that the suit/application is a non-starter as the Applicant if at all he used the property he did so as a licensee and not a trespasser and further that the Applicant admits that he only came to know of the existence of the suit property in the year 2017, that the suit as instituted has no evidence to support Adverse Possession and finally that the said Application/suit does not disclose any cause of action, it is incompetent, frivolous, vexatious and it is otherwise an abuse of the process of this court and as such ought to be dismissed with costs. It is clear that all these issues and grounds in the notice of preliminary objection require an ascertainment of facts and therefore do not meet the threshold that preliminary objections should not require the Court to go into evidence for ascertainment of facts. This position has been taken in many cases and in *Oraro*



v Mbaja [2005] eKLR the court found that if facts must be proven using the rules of evidence, then this is not a true preliminary objection based on a point of law:

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement with learned counsel, Mr. Ougo , that “where a Court needs to investigate facts, a matter cannot be raised as a preliminary point.” This legal principle is beyond dispute, as there are diverse weighty authorities carrying the message..... As already remarked, anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence. If the Applicant’s instant matter required the affidavit of Barak Eston Mbaja dated and filed on October 7, 2004 to give it validity before the Court, then it could not be allowed to stand as a preliminary objection which must be on a pure point of law.”

35. The *Black’s Law Dictionary* 11th Edition the definition of adverse possession is:

“The enjoyment of real property with a claim of right when that enjoyment is opposed to another person’s claim and is continuous, exclusive, hostile, open and notorious”

In my view for the above requirements for a claim for adverse possession to be shown to exist or not to exist it is necessary that the same be tested through full trial. It is therefore my opinion that the Preliminary Objection lacks merit and should be dismissed.

The Chamber Summons Dated 29th December 2021

36. The Applicant’s Chamber Summons Application dated December 29, 2021 seeks an order of stay of all proceedings, orders, Decrees and Judgments in Kitui Chief Magistrate Succession Cause Number 40 of 2009 to abide the outcome of ELC OS 3/2021. In the final part Ruling dated November 29, 2021, Hon S Mbungi Chief Magistrate at Kitui held that:

“I proceed and confirm the grant and the distribution of the estate to be distributed as proposed by the administrator. Right of Appeal 30 days explained.”

37. It seems that the Applicant did not Appeal or apply to review this Order. The Appellate Court for succession matters is reserved for the High Court and this court lacks the jurisdiction to grant such an order in this suit. Order 42(6) of the *Civil Procedure Rules [2010]* applies to stay of execution pending appeal and cannot apply in this case. In any case, confirmation of grant is the final step in succession proceedings and there is nothing further to stay. The Respondents have already had their Grant confirmed, had the Title to the suit property processed in their names as a result of the Grant and the succession proceedings are effectively at an end as far as the suit property is concerned.

38. The Applicant further prays for an order that, pending the hearing and determination of the application/suit herein, this Honourable Court be pleased to issue an order directing Kitui Lands Registrar, to register an inhibition against the Land Parcel Number Nzambani/Kyanika/2230 pending



the hearing and determination of Kitui ELC OS 3 of 2021. In the case of *Peter Kariuki Njue v Severina Njira Kithumbu & another* [2020] eKLR the court found:

“The purpose of an order of inhibition is to prohibit further dealings with the suit property. The court is thus of the opinion that it has a duty to preserve any property which is the subject of a dispute to prevent the risk of its alienation before the suit is heard and the rights of the parties conclusively determined. That legal duty was recognized in the case of *Shivabhai Patel v Manibhai Patel* [1959] EA 907. Accordingly, the court is inclined to grant an order of inhibition to preserve the suit property pending the hearing and determination of the suit.”

39. The Respondents have confirmed that they have entered into a sale agreement with a third party and a deposit of the sale price paid. They were indeed in the process of giving possession of the land to the buyer when they commenced fencing of the land and were stopped by the Applicant. I am of the view that in order to preserve the property herein and to prevent the risk of its alienation before the suit is heard and the rights of the parties conclusively determined this order ought to be granted.

40. Prayer number 3 of the Chamber Summons Application is a permanent order of injunction. It is trite in law that a permanent order is granted upon hearing and determination of a suit unless there are special compelling circumstances. The Court in *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR where it was held inter alia as follows:

“...A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties...”

41. In my opinion, the Applicant has failed to demonstrate any special circumstances that would warrant the granting of a permanent injunction as his claim on the suit property is yet to be determined. The effect of a permanent injunction would be to keep the Respondents permanently away from the land they hold title to without having the claim heard and determined. This applies to the other prayers number 4, 5, 6 and 7 sought in the Chamber summons Application which are of a permanent nature and require the suit to be fully heard and determined.

Notice of Motion Dated February 7, 2022

42. Turning finally to the Notice of Motion Application dated February 7, 2022, praying for orders of temporary injunction. The well and oft cited case of *Giella vs Cassman Brown* sets out the principles required for grant of a temporary injunction. Regarding whether the Applicant has shown a prima facie case, I am of the opinion that it is evident that there is a real dispute between the parties regarding the suit property that has been ongoing for a while and therefore have established an interest in the suit and a *prima facie* case with a probability of success of the same is proved. In the case of *Vivo Energy*



Kenya Limited v Maloba Petrol Station Limited & 3 others [2015] eKLR, the Court of Appeal detailed what probability of success means when it stated that:

“In *Habib Bank Ag Zurich v Eugene Marion Yakub*, ca No 43 Of 1982 this Court considered the role of the court when determining whether or not a *prima facie* case has been made out. The Court expressed itself thus:

“Probability of success means the court is only to gauge the strength of the Plaintiff’s case and not to adjudge the main suit at the stage since proof is only required at the hearing stage.”

The same caution was repeated in *National Bank Of Kenya v Duncan Owour Shakali & Another*, Ca No 9 Of 1997 when Omolo JA stated:

The question of finally deciding whether or not there is a contract between the parties and if there is what terms ought to be implied in the contract is not to be determined on affidavits. All a Judge has to decide at the stage of an interlocutory injunction is whether there is a *prima facie* case with a probability of success. A *prima facie* case with a probability of success does not, in my view, mean a case, which must eventually succeed.”

43. Regarding whether the Applicant stands to suffer irreparable loss or harm incapable of being compensated, I am of the opinion that the fact that the Respondents have confirmed that they have entered into a sale agreement for the land and have received a deposit of the sale price is a clear indication that the Applicant stands to lose the property and the substratum of the suit will have been lost unless a court order is issued. On the other hand, the Respondents hold a title deed obtained through the legal court process of succession. The Applicants claim is based on the ground that the title deed obtained by the Respondents is subject to subsisting rights of adverse possession. The claims of the Applicant and the Respondent ought to be established by this court and in my view the property ought to be preserved pending hearing and final determination of the claims. In my opinion, an order of *status quo* would be appropriate in this case.

44. The Court in the case of *Thugi River Estate Limited & another v Naitonal Bank of Kenya Limited & 3 others* [2015] eKLR stated that a *status quo* order must be specific and clear to the parties. The court observed as follows:

“*Status quo*” in this respect, as maintained by an injunctive or conservatory or stay order, is the then existing state of affairs. Often the order is very specific and descriptive in such instances and parties are expected, nay bound, to observe the order. The order will often be issued after a balance of all the factors and circumstances. As was stated by Lord Diplock in *American Cyanid Co v Ethicon* [1975] 1 All ER 504 at 511 “where factors appear to be evenly balanced, it is a counsel of prudence to take such measures as are calculated to preserve the *status quo*.....” The second or alternative order for *status quo* is the one issued by the court as a case management strategy. It is issued to provide assistance to the case. It also maintains a particular state of affairs or set of facts.”

45. In issuing an order of *status quo*, the Court must be specific to order the Respondents not to effect transfer of the suit property to another third party pending the hearing and determination of the suit property in order to preserve the subject matter of the suit. This is in line with prayer number 2 of the Notice of Motion Application, which in my view, may be allowed.

46. Lastly, the Applicant has prayed for an order that the Court stay proceedings in Kitui Chief Magistrate’s Court Land Case Number E001 of 2022 (which suit seeks to evict the applicant from the suit property) Paul Muli Muyanga & Another vs Daniel Kilatya Mwilu to abide the outcome of this



suit. This suit is the preceding one while the one before the Chief Magistrate’s Court is the latter one. They both relate to the same suit property and contain the same parties.

Section 6 of the Civil Procedure Act provides as follows on the issue of sub judice:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

47. The Court in Daniel Kipkemoi Bett & another v Joseph Rono [2022] eKLR made the following observation:

“The import of the concept is that as soon as the Court finds a matter sub judice it stays immediately the proceedings until the prior one is heard and determined. “

48. For the foregoing reasons I find make the following final orders;

- A. The preliminary objection dated January 21, 2022 lacks merit and the same is hereby dismissed.
- B. The Chamber Summons Application dated December 29, 2021 is allowed in terms of prayer 2 only and in the following terms:

Pending the hearing and determination of this suit an order be and is hereby issued directing the Land Registrar, Kitui to register an inhibition inhibiting any dealings in Land Parcel Number Nzambani/Kyanika/2230.
- C. Prayers number 1,3,4,5, and 7 of the Chamber summons application dated December 29, 2021 are hereby disallowed.
- D. The Notice of Motion dated February 7, 2022 is hereby allowed in terms of prayer 4 in the following terms:-

An order of stay of all proceedings, orders and decrees in Kitui Chief Magistrates Court Land Case Number E001 of 2022, Paul Muli Muyanga & Another vs Daniel Kilatya Mwilu be and is hereby granted pending hearing and final determination of this suit.
- E. The order issued by this court on February 16, 2022 be and is hereby confirmed in the following terms: -

That the *status quo* prevailing on land parcel Nzamabani/Kyanika/2230 be maintained. The staus quo being that the title deed to the land shall remain in the name of the Respondents and shall not be transferred, that the crops on the suit land belong to the Applicant.
- F. That all other prayers in the Notice of Motion dated February 7, 2022 be and are hereby disallowed.
- G. Each party to bear their own costs of the applications herein.

DELIVERED, DATED AND SIGNED AT KITUI THIS 20TH DAY OF SEPTEMBER 2022

L G KIMANI

JUDGE ENVIRONMENT AND LAND COURT

Ruling read in open court in the presence of-



Musyoki Court Assistant

M/S Wambua Advocate holding brief for Atonga for the applicant

Wambua Advocate for the Respondent

