



Mulama & 2 others v Eglyn Chepchirchir Choge & 7 others (Environment & Land Case 52 of 2011 & 57 of 2022 (Consolidated)) [2025] KEELC 1247 (KLR) (12 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1247 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 52 OF 2011 & 57 OF 2022 (CONSOLIDATED)**

CK NZILI, J

MARCH 12, 2025

BETWEEN

ABDUL MUTHEE MULAMA 1ST PLAINTIFF

**ERNEST SIKUKU (BOTH SUIING ON BEHALF OF THEMSELVES AND
ON BEHALF OF MEMBERS OF PEMBENI SQUATTERS SELF-HELP
GROUP) 2ND PLAINTIFF**

**SIRIKWA MUMBAI MULTI-PURPOSE CO-OPERATIVE LIMITED 3RD
PLAINTIFF**

AND

EGLYN CHEPCHIRCHIR CHOGE 1ST DEFENDANT

BENJAMIN KICHWEN 2ND DEFENDANT

CHRISTIAN CHOGE 3RD DEFENDANT

JOSEPH ANG'ANG'A 4TH DEFENDANT

MIRIAM CHOGE 5TH DEFENDANT

LAND REGISTRAR 6TH DEFENDANT

DIRECTOR OF SURVEYS 7TH DEFENDANT

HON. ATTORNEY GENERAL 8TH DEFENDANT

RULING

1. Through an application dated 18/9/2024, the court is asked by the 1st and 2nd applicant to:

(1) ...spent



- (2) Grant an order of mandatory injunction restoring the status quo ante to the extent that the plaintiffs who were in occupation of the suit premises comprised in LR 8915/2 situated South East of Kitale Municipality, Uasin Gishu District by virtue of a Grant registered as IR 21019 and LR 2187 situate in Trans Nzoia District by virtue of a Grant registered as IR 273 be reinstated to the portion previously occupied by themselves and their respective families, and the 1st to 4th defendants be ordered to rebuild their demolished houses.
 - (3) ...spent
 - (4) A prohibitory injunction do issue restraining the 3rd defendant by himself, agents, servants or employees, or anyone acting for and on his behalf from seeking consent to substitute, transfer, mortgage, charge, dispose, lay claim to ownership or otherwise deal with the property comprised in LR No. 8915/2 - Uasin Gichu and LR 2187 - Trans Nzoia County pending hearing and determination of this suit.
 - (5) A prohibitory injunction issue barring the 1st to 4th defendants by themselves, agents, servants, or employees or any person acting for and on their behalf from transferring, subdividing, leasing, mortgaging, alienating, disposing of, dealing, damaging, causing damage, or destructions, cutting down trees and disposing of them, defacing the boundaries or in any other way whatsoever interfering with the suit property comprised in LR No. 8915/2 and LR No. 2187 - Trans Nzoia commonly known as Pembeni Farm pending hearing and determination of this suit.
 - (6) The court makes any appropriate orders that it may deem fit in view of the nature of the proceedings for the fair determination thereof.
 - (7) The OCS Cherangani and the OCS Mois Bridge Police Station be directed to ensure compliance with the orders issued.
2. The application is supported by the grounds on the face of the application and in the supporting affidavit of Abdul Muthee Mulama sworn on 18/9/2024 on his behalf and that of the 2nd applicant. The applicants aver that after they filed an application dated 13/6/2022, interim orders were granted to remain in force until the application was heard and determined. It is averred that before the application could be heard and determined, the suit was consolidated with case No. 306 of 2016, in which the 3rd defendant was incorporated as a 3rd plaintiff. The applicants aver that in case No. 306 of 2016, the 1st, 2nd, and 4th defendants, as the plaintiffs, are seeking an order for revocation of titles to Charangani/Nzoia Block 12 and Moi's Bridge/Block 12 and for the nullification of the parcellation of the plaintiffs LR No. 2187 and 8915.
 3. The applicants aver that the 3rd plaintiff has filed a defense and a counterclaim seeking their eviction from LR No. 2187 Trans Nzoia and L.R No. 8915 Uasin Gichu, alleging to be the lawful registered owner. The applicants aver that their claim is separate and distinct from that of the 3rd plaintiff/respondent, for they are claiming ownership by way of adverse possession, while the 3rd plaintiff/respondent is claiming for eviction on account of its title deed, now challenged by the 1st - 4th respondents.
 4. The applicants aver that it has come to their knowledge that there is a sinister motive of defeating proceedings herein and, more particular, their claim against the 1st - 4th respondents, wherein the 3rd plaintiff/respondent has caused the 6th respondent to publish a gazette notice for reconstruction of a lost or destroyed land register within 60 days, dated 8/3/2024 as per annexure AMM'1', which means



- there is a likelihood of the Chief Land Registrar in collusion in issuing new titles to the 3rd plaintiff/respondent, in order to defeat their claim.
5. The applicants aver that the 1st - 4th respondents have also either subdivided or leased the suit land to others namely; Wamutitu Kitenya, Julius Mwangi Irungu, Maina Mwangi Francis, Amos Kiplangat/Mosmos and Clair Maiyo. Equally, the applicants aver that the respondents have also cut down trees and are ploughing a portion of the suit land, on top of burying a deceased person on the land as per photos marked as annexure AMM '2'. The applicants aver that it is for this reason that the respondents have been reluctant to proceed with the matter by making applications for unnecessary adjournments.
 6. Further, the applicants aver that in NRB HCCC No. 4335 of 1988, an order dated 20/4/1989 had been issued restraining any action prompting an appeal and civil cases as per annexures marked AMM '3' and '4', which led to a complaint letter to the DC, as per annexures AMM '5' and '6'.
 7. The applicants aver that in 2014, the 1st - 4th respondents moved the court for the issuance of letters of administration, caused them to be illegally evicted from the land, leading to a protest letter to the National Land Commission and the office of the Ombudsman, where they were not assisted as per annexures marked AMM'7' and '8'.
 8. The applicants aver that despite giving the said information to their former lawyers, Mr. Omboto, he did not act and instead filed an amended originating summons. The applicants aver that in defiance of the order, the deceased and the administrators, who are family members, disobeyed the court order by evicting them and destroying their houses. Further, it is averred that the respondents were now thriving on or making capital out of their deliberate and calculated moves to flaunt defiance and disobedience of court orders or directions.
 9. Again, he applicants aver that it is in the interest of justice that the respondents and the Attorney General be ordered to ameliorate the situation by restoring them to their former habitation in order to stop them being treated as strangers, vagabonds, in wonder from their place to another in their own country, on top of being subjected to threats by the respondents', through proxies and agents to stop pursuing the case, otherwise equity will not suffer a wrong without a remedy.
 10. The 3rd plaintiff/respondent opposes the application through an affidavit of Harrison Opana Murindah sworn 13/1/2025. It is deposed that the orders sought cannot be issued at this juncture; it is unaware of the orders issued for an injunction against them, it was not a party to the suit, and it was not notified of the said orders. The 3rd plaintiff/ respondent, however, confirms that the 6th respondent has published a gazette notice for the reconstruction of the lost or destroyed land register under the statutory mandate with influence or collusion of the 3rd plaintiff/ respondent as alleged or at all, and so far, no new title deeds have been issued. The 3rd plaintiff respondent denies that applicants are in possession or occupation of L.R No. 8915/2 Kitale Municipality and L.R No. 2187 Trans Nzoia County and Uasin Gichu County.
 11. The 3rd plaintiff/ respondent denies that it has occasioned any delay in the suit. On the contrary, it is averred that the applicants have filed numerous applications and demonstrated unpreparedness for their witnesses to testify. The 3rd plaintiff/ respondent avers that the said Christopher Kisiangani, in paragraphs 20 and 21 of the supporting affidavit, was a member of its group and was acting on its behalf, only for the applicants to hijack the case and proceed with it. The 3rd plaintiff/ respondents deposes that the order issued was time-bound and cannot be said to be subsisting.
 12. Again, the 3rd plaintiff/ respondents avers that as long as the plaintiffs' members were evicted, the only forum to address the issues is through an expeditious hearing but not through a mandatory injunction, more so since the claim is based on adverse possession. The 3rd plaintiff/ respondent avers that the orders



sought cannot be granted; otherwise, they will substantially determine the issues before the court; the court lacks enough material to grant the orders; the allegations are not substantiated through evidence; events have overtaken the orders sought; the purported orders were temporary, expired and were not enforced by way of contempt proceedings against the alleged contemnor.

13. The 1st, 3rd, 4th, and 5th respondents oppose the application through a replying affidavit sworn by Eglyne Chepchirchir Choge on 18/10/2024 on behalf of the 3rd, 4th, and 5th respondents, who are the joint legal administrators of the estate of the late Hon. Simeon Kiptum Choge. It is deposed that the applicants have availed no evidence that they were in occupation of the two suit parcels of land to be entitled to a reinstatement, which will prejudice the respondents as lawful owners and occupants of the same.
14. Equally, the 1st and 3rd - 5th respondents depose that since the parcels of land lawfully belong to them, any developments, subdivisions, and or transactions therein were conducted lawfully and transparently. The 1st and 3rd - 5th respondents denied that the applicants were ever squatters on the farm since 1972, for them to have been capable of being evicted in 2016.
15. The 1st and 3rd - 5th respondents deposed that the parcels have continuously been charged, mortgaged, and pledged over the years. It is averred that the plaintiffs have never been enjoined as parties who have an equitable interest in the land or challenged the same through demonstrating any legal or equitable interests to justify the issuance of prohibitory order of injunctions. The 1st and 3rd - 5th respondents depose that though the Chief Land Registrar under the law has statutory powers to deal with land transactions in compliance with the laid down procedures, there is no documentary evidence to substantiate the alleged collusion or fraud, otherwise the applicants would have addressed such complaints formally, or caused investigations to be undertaken, followed by judicial review application to challenge, assess and rectify the alleged procedural irregularities, which are the established legal mechanism, that the applicants could have resorted to, instead of leveling unsubstantiated claims to tarnish and damage the respondents' names.
16. In response to the alleged tree destruction, cultivation, burial of a relative in the suit land, and use of the suit parcels of land in a detrimental manner, the 1st and 3rd - 5th respondents depose that the two wives of the late David Kiplagat Choge had sought for court assistance pending succession proceedings in Kitale Chief Magistrates Court No. E004 of 2023 and in Kapsabet SPM P&A No. E078 of 2022 as well as in Kitale H.C. Succession Cause No. 259 of 2020. In particular, the 1st and 3rd - 5th depose that the utilization of Pembeni Farm has already been determined through a High Court Succession Cause judgment dated 28/4/2022, which is yet to be stayed. She attached copies of the Confirmed Grant issued on 29/9/2016, Petition for Grant of Letters of Administration, the Grant of Letters of Administration, judgment in the succession cause, decree issued on 8/7/2002, and judgment in the Chief Magistrates Court on 16/2/2023 as annexure marked EC'1'.
17. Similarly, the 1st and 3rd - 5th respondents deposes that at one time, the applicants sought to forcefully gain entry onto the contested land accompanied by a large group of people, which was thwarted by the police. The 1st and 3rd - 5th respondents depose that the resolution of land disputes ought to adhere to the law and not the manner in which the applicants had attempted to use extra-legal means with a potential outbreak of violence, contrary to the principles of justice and the rule of law.
18. The 1st and 3rd - 5th respondents aver that the estate of the late Hon. Simeon Kiptum Choge has been distributed by the High Court, which judgment and decree have not been stayed, though a notice of appeal has been filed, with each beneficiary keeping land where they already occupy, as per the wishes of the deceased regarding Pembeni Farm, so as not to disrupt the fixed developments on the ground. The 1st and 3rd - 5th respondents depose that in view of the foregoing, the applicants have failed to



- demonstrate the requisite urgency, necessity, or offer substantive evidence to justify such extraordinary and sweeping measures.
19. The applicants rely on written submissions dated 5/12/2024. It is submitted that they are members of Pembeni Squatters Self Hep Group claiming ownership of LR No. 8915/2 and 2187, in line with Section 38 of the *Limitation of Actions Act*, but were unlawfully evicted during the pendency of these proceedings after the 3rd plaintiff/respondent and the respondents fraudulently acquired title deeds in an attempt to defeat their claim. The applicants isolated four issues for the court's determination.
 20. Further, the applicants submitted that they have demonstrated long-term, continuous, and exclusive occupation of the suit parcels of land, which has been peaceful and uninterrupted until the illegal eviction that took place between March and August 2016, only that they were not informed of their rights to reinstate the status quo, despite issuance of injunctive orders in 2002 before the suit was consolidated. That notwithstanding, the applicants submitted that their claim for adverse possession remains valid. Reliance is placed on *Kuria Kiarie & others -vs- Sammy Magera* (Civil Appeal 326 of 2017 [2018] KECA 467 [KLR] CIV (13th July 2018) (Judgment).
 21. On whether the eviction was unlawful and if they should be reinstated to the suit land, the applicants submitted that the repeated evictions were unlawful despite multiple injunctive orders, which was a flagrant disregard of the court orders to preserve the status quo, starting with an order dated 20/4/1989 in NRB 4357 of 1988 annexed as AMM'3', Civil Appeal No. 133 of 1989 as per annexure AMM'4', complaint to the National Land Commission and Ombudsman as per AMM'7' and '8', when the adverse possession claim had matured, hence the need to restore their occupation.
 22. On whether the 3rd plaintiff/respondent's actions undermine their rights; the applicants submitted that the 3rd plaintiff/respondent was initially the 3rd defendant in ELC No. 306 of 2016, who fraudulently obtained title deed to defeat their claim, by seeking for the reconstruction of the lost or destroyed land register, which may result to the issuance of new title deed, with a view of undermining the claim on adverse possession.
 23. The applicants submitted that any issuance of such title deed would be against Section 26 of the *Land Registration Act*, especially when their claim is live. Reliance is placed on *Elijah Makeri Nyagwara -vs- Stephen Mungai Njuguna* [2013] eKLR.
 24. On whether the orders sought should be issued, the applicants submitted that they have met the requirements set in *Giella -vs- Cassman Brown* 1973 EA 358 and in *Malier Unissa Karim v Edward Oluoch Odumbe* (2015) eKLR,
 25. The 1st respondent relied on written submissions dated 9/12/2024, isolating three issues for the court's determination. It is submitted that no credible evidence has been tendered to sustain the claim of occupation and eviction, more so given that the defendants' actions were lawful and consented to their legal entitlements. The 1st respondent submitted that the utilization of 94.3 acres of Pembeni Farm has already been affirmed in the succession cause judgment dated 28/4/2022, which has not been vacated or set aside on appeal. It is submitted that the applicants have not met the criteria for a grant of temporary, prohibitory, and mandatory injunction with credible and substantiated evidence of long occupation since 1972 to the eviction in 2016, following the alleged collusion or grant to obtain title deeds. Reliance was placed on *Giella -vs- Cassman* (supra) and *Nguruman Limited -vs- Jan Bonde Nielsen & 2 Others* [2014] eKLR, concerning procedural integrity in the issuance of the new titles through the established legal mechanism, the 1st respondent submitted that the applicants have not produced credible and material evidence to prove any of the alleged procedural irregularities. Reliance



- was placed on Ndolo -vs- Ndolo [2008] I KLR 743 and Kagina -vs- Kagina & Others [2021] KECA 242.
26. More so, the 1st respondent submitted that mandatory injunctions are granted sparingly and only in precise and exceptional circumstances in which the applicants have failed to establish; and or substantiate their claim with the required evidence. On the other hand, the 1st respondent submitted that the defendants have provided clear and unchallenged documentation to support their ownership and use of the suit properties.
27. On whether the applicants were in occupation of the suit properties and were unlawfully evicted, the 1st respondent submitted that concrete evidence to sustain the alleged occupation by way of photos, utility bills, tenancy agreements, or receipts of rates paid to local authorities to establish a presence on the land for over four decades is lacking, to affirm their claim. Reliance is placed on Section 107 of the *Evidence Act*.
28. Further, the 1st respondent submitted that no independent witnesses such as local administration, neighbors, and community elders have come forward and corroborated the applicants' claim; otherwise, the applicants would have been listed as beneficiaries to the deceased's estate in the confirmed grant.
29. On unlawful eviction, the 1st respondent submitted that the same is substantiated, given that the two wives of the deceased were acting within their legal rights as administrators of the estate who sought access and use of the 104 acres of Pembeni Farm through the court process as per EC'1'. The 1st respondent submitted that the applicants have failed to meet the legal threshold for urgent and extraordinary relief on illegal eviction by way of eyewitness accounts, police reports, or other documentation; hence, the application lacks the foundation necessary for the reliefs sought. Again, the 1st respondent submitted that tethered tests for granting a temporary injunction have not been met; hence, the said procedural and evidentiary deficiencies further weaken the plaintiffs' application for there to be a case meritorious of the reliefs sought. Lastly, the respondent submitted that the respondents are lawfully administering the estate of the deceased in compliance with the court's orders.
30. The issues calling for my determination are:
- (1) If the applicants have made a case for issuance of a mandatory injunction to restore the status quo ante before they were evicted from the suit premises in 2016.
 - (2) If the applicants are entitled to prohibitory orders of injunction to restrain the 3rd plaintiff/ respondent and the respondents from seeking consent to substitute, transfer, mortgage, charge, dispose, lay claim to ownership, or otherwise deal with the property comprised in LR No. 8915/2 - Uasin Gichu and LR 2187 - Trans Nzoia County pending hearing and determination of this suit.
31. What the applicants are seeking are mandatory and prohibitory injunctions before the suit is heard and determined. In Kenya Breweries Ltd & Another -vs- Washington Okeyo [2002] eKLR, the Court of Appeal stated as follows:
- “A mandatory injunction ought not to be granted, on an interlocutory application in the absence of special circumstances, and only in clear cases, either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the respondent had attempted to steal a march on the applicant. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial, it would appear that the



injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction”.

32. In *Nation Media Group & Others -vs- John Harun Mwau* [2014] eKLR, the court observed that for an interlocutory mandatory injunction to be issued, an applicant must demonstrate the existence of exceptional and unique circumstances. In *Malier Unissa Karim -vs- Edward Oluoch Olumbe* (supra), the court held that the test for granting a mandatory injunction is different from that enunciated in the *Giella -vs- Cassman Brown* (supra). In *Dickson Mwangi -vs- Braeburn Ltd T/A Braeside School* [2004] 2EA 196, the court observed that interlocutory mandatory injunction should only be granted with reluctance and only in very special circumstances. See *Gusii Mwalimu Investment Co. Ltd & Others -vs- Mwalimu Hotel Kisii Ltd* [1995-1998] 2EA 100.
33. Regarding prohibitory injunction, in *Kamau Mucuha -vs- The Ripples Ltd* [1990-1994] EA 388, the court said that whereas a prohibitory injunction requires abstention from acting, an interlocutory injunction requires the taking of positive steps and may require the dismantling or destruction of something already erected or constructed. The court further said that a mandatory injunction is exceptionally granted on motion since once granted, there will usually be no question of granting a further mandatory injunction at the trial, for what is done is done, and the plaintiff has, on motion, obtained once and for all, the demolition or the destruction that he seeks. The court said that with regard to a prohibitory injunction, there will often still be a question at the trial whether the injunction should be dissolved or contained. See also *Joseph Kaloki T/A Royal Family Assembly -vs- Nancy Atieno Ouma* [2020] eKLR.
34. In *Sheriff Abdi Hassan -vs- Nadhif Jama Adan* [2006] eKLR, the court held that courts have been reluctant to grant mandatory injunction at the interlocutory stage unless where it is prima facie established as per the standards, that the party against whom the mandatory injunction is sought is on the wrong, the court needs to take action to ensure that justice is meted out without the need to wait for a full hearing of the entire case.
35. In *Ramadhan Salim -vs- Evans M. Maabi T/A Murphy Auctioneers & Another* [2016] eKLR, the court cited *New Ocean Transport Ltd & Another -vs- Anwar Mohamed Bayusuf Ltd* (2014) eKLR, that a positive injunction would direct a party to do something whereas a negative one will restrain such a person from doing something. The court went on to say that a mandatory injunction is a positive one that directs an act to be done and may include a restorative injunction, which is issued directed at a person to undo a wrongful act, to restore the status quo ante, so that the damage does not continue. Further, the court said that there is also a mandatory injunction per se, which compels a party to carry out some positive act to remedy a wrongful omission. As an example of a negative injunction, the court listed prohibitory, perpetual, interlocutory, and quia timet injunction. Further, in *Locabail International Finance Ltd -vs- Agroexport & Others* [1989] 1 ALL ER 901, the court observed that the court has to have a high degree of assurance that at the trial, it would appear that the injunction had rightly been granted.
36. From the cited case law, the burden of proof falls on the applicants to show that there are exceptional circumstances for this court to grant mandatory and prohibitory injunction at an interlocutory stage. What, then, are exceptional circumstances?
37. In *Bell Maison Ltd -vs- Taifa Towers Ltd* NRB HCCC 2225 of 1992, the court said that such an applicant must not only satisfy the general principles for granting an order of injunction but must also satisfy the court that there are exceptional circumstances that would justify the granting of such orders. In *Shepherd Homes Ltd -vs- Sandham* [1971] ICH 34, the court said that at the interlocutory stage,



when the final result of the case is not known, there must unusually be a strong and clear case before a mandatory injunction can be granted.

38. In *Concelia Ondieki -vs- George Achieng Otieno & Another* [2019] eKLR, the court observed that an injunction being a declaratory relief, a party seeking such remedy must act in good faith and disclose all material facts before the court and not hand pick that which she believes to be beneficial to her while keeping away from the court material facts. The court said that a mandatory injunction will not be granted if the damage feared by the plaintiff is trivial or when the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. The court said that save for the clearest of cases, the rights of the parties to a fair and proper hearing of their disputes, entailing calling and cross-examination of witnesses, and should not be sacrificed or substituted by a summary hearing.
39. The court said that exceptional circumstances that may justify the grant of a mandatory injunction at the interlocutory stage include; where the injunction involves a simple act that could be easily reversed or remedied should the court find otherwise after trial; where the defendant has accelerated the development that the plaintiff seeks to restrain with the intention of defeating the plaintiff's claim or when the defendant is otherwise bent on stealing a march on the plaintiff.
40. Applying the foregoing, caselaw exceptional circumstances have to be demonstrated by an applicant meeting the principles in *Giella -vs- Cassman Brown* (supra). The first step is for the applicants to establish a prima facie case. A prima facie case was defined in *Mrao Ltd -vs- First American Bank (K) Ltd & Others* [2003] KRL 125, as a case where on the material presented before the court, it would conduct, concludes that there exists a right which has apparently been breached by the opposite party that calls for an explanation or rebuttal from the latter. In *Kuloba Richard- "Principles of Injunctions"* Oxford University Press 1987, page 95 paragraph (j), it was observed that the plaintiff to be entitled to a mandatory injunction to stop a continuing trespass must establish both on facts and in law, that he has some legal rights, title or interest in the suit premises, sufficient to enable him to maintain an action for trespass.
41. In *Pay Super Power Cash and Carry Ltd -vs- Nairobi City Council & Others* [*CA No. 111 of 2002*](#), the court observed that it is the trespasser who should give way pending the hearing and determination of a dispute and that there is no answer that the alleged acts of trespass are compensable in damages, since a wrongdoer cannot keep what he has taken. The second step the applicants must surmount is to show that in the absence of the reliefs sought at the interlocutory stage; they will suffer irreparable injury.
42. In *Nguruman Ltd -vs- Jan Bonde Neilsen & Others* (supra), irreparable loss was defined as an injury that cannot be adequately compensated or remedied in the absence of an injunction. The court said that the burden is on the applicant to demonstrate prima facie, the nature and extent of the injury since the speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant, since the equitable remedy of injunction is solely issued to prevent grave and irreparable injury, that is actual, substantial and demonstrated that an award or damage cannot adequately compensate it. The court said that such an injury is irreparable if there is no standby where the amount can be measured with reasonable accuracy or where the injury or harm is of such a nature that monetary compensation of whatever amount will never be an adequate remedy. See *Elijah Arap Bii -vs- KCB Ltd* [2001] eKLR.
43. The third hurdle the applicant must meet is the balance of convenience. In *Pius Kipchirchir Kogo -vs- Frank K. Tenai* [2018] eKLR was defined as that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiff, the inconvenience caused to the plaintiff would be greater than the which would be caused to the defendant if an injunction is granted, but the suit is ultimately



- dismissed. Should the inconvenience be equal, the court said that the plaintiffs have to show that the comparative mischief from the inconvenience that is likely to arise will be greater than what is likely to arise from granting it.
44. In assessing whether the above parameters have been met, a court does not conduct a minitrial or make any conclusive or definitive finding of fact or law. See *Airland Tours & Travel Ltd -vs- NIC Bank NRB Milimani HCCC No. 1234 of 2002*, and *Lucy Nungari Ngigi & Others -vs- NBK Ltd & Another eKLR*. The purpose of the inquiry is to determine whether there is a need to protect any discernible legal or equitable rights of a party in litigation that have been or are being or are likely to be violated by the adversary.
 45. In *Simon Waiharo Chege -vs- Paramount Bank (K) Ltd NRB Miliman HCCC No. 360 of 2001*, the court said that if it is in doubt on the existence of a prima facie case, it should be decided on a balance of convenience and that being a discretionary relief a court will not issue such an order to a party whose conduct does not meet the approval of the eye of equity. The case must be there be so clear and free from objection on an equitable grant that it ought to interfere to preserve the property without waiting for the right to be finally established at the hearing. In doing so, in *Esso (K) Ltd -vs- Mask Makwete Okiya C. A No. 69 of 1991*, it was observed that the court has to look at the allegations in the affidavits by the plaintiff and the defendant and determine whether there is a possibility of the plaintiff succeeding or whether there is a possibility of quantifying damages.
 46. In *Nguruman Ltd -vs- Jan Bonde Nielsen & Others(supra)* the court observed that the party on whom the burden of proving a prima facie case lies, must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the envision of the right have to be material and substantive, and that there must be an arguable necessity to prevent the irreparable damage that may result from the invasion.
 47. What the applicants are seeking as the primary relief in the suit is to be declared entitled to the suit lands by virtue of adverse possession. They take the view that they began occupying the suit land as of right, openly, continuously, notoriously, and uninterruptedly in 1972. They aver that the rights of the valid owner were extinguished after 12 years by virtue of Section 38 of the *Limitation of Actions Act*. The applicants aver that the alleged eviction from the suit parcels of land in 2016 was illegal since there were interim orders of stay and injunction both from the High Court and the Court of Appeal, before this suit was transferred and consolidated.
 48. The respondents, on the other hand, generally and in particular the 1st respondent, take the view that such orders were not in existence, and if they were, they expired and or were not served, enforced, or implemented against the estate of the deceased. More importantly, the 1st respondent takes the view that the estate was legally determined and shared among the beneficiaries; hence, the respondents and the 3rd plaintiff/respondent, are legally occupying and dealing with the suit parcels of land.
 49. The respondents aver that the applicants have no credible evidence to substantiate the alleged long occupation, developments of the land, and the illegal eviction, superior to the crystalized and affirmed rights by the succession cause, whose decree and orders remain valid to justify the grant of such exceptional and drastic reliefs at interlocutory stage. The respondents aver and submit that there are no exceptional circumstances to grant a mandatory and prohibitory injunction.
 50. What the applicants are seeking is restoration to the suit parcels of land after an alleged illegal eviction that took place in 2016. They seek a restorative injunction directing the 1st - 4th respondents to take positive steps to undo what has already been done in breach of an alleged existing court order and accrued rights, extinguishing the title holders' rights after uninterrupted occupation for 12 years before



the said eviction. In *Belle Maison Ltd -vs- Yaya Towers Ltd* CIV No. 2225 of 1992, the court held that an unlawful eviction does not create a basis for any claim of right to a lessor, to put in a new tenant to benefit from an illegality. In *Kamau Mucuha -vs- The Ripples Ltd* (supra), the court held that a tenant illegally evicted was entitled to reinstatement and restoration of the status quo ante, namely; the lawful condition prevailing before the commission of the illegality.

51. Though the applicants have insisted that there were court orders in existence before they were illegally evicted, evidence of moving before the court that had issued the order to complain and seek to cite the offenders particularly the respondents with contempt of court, is lacking.
52. There is no evidence that the applicants lodged a formal complaint with the police, itemizing the nature, status, and value of the properties that were allegedly destroyed or demolished in 2016 or thereabouts. Above all, the applicants did not and have not identified the perpetrators of the illegal acts and connected them with the respondents. Similarly, the applicants had not brought before this court the particulars of the persons who were allegedly illegally evicted when there was a valid court order for them to continue occupying the suit premises.
53. There is no evidence tendered that after the illegal eviction, the applicants itemized their total loss and damage and demanded compensation for it from the respondents. Additionally, the applicants have not demonstrated before this court that other than the suit land, they have nowhere else to live. The delay in applying for the restorative orders from 2016 to 2024 is not satisfactorily explained. It is not enough to blame lawyers. A case belongs to a party. A party must follow up on his case and ensure that his rights are protected. If there were existing court orders during the alleged eviction in 2016, one would have expected the applicants to have, at the very least, shared the orders with the police and immediately moved the court that had issued the orders to cite and punish the alleged contemnors with contempt of court.
54. The law does not define what is inordinate delay. It all depends on the circumstances of each case and the explanation given. In this matter, the delay is not only inordinate but also unreasonable to apply for orders after close to 8 years. The mandatory injunction asked by the applicants is discretionary in nature. He who comes to equity must come with clean hands. Delay defeats equity. Unreasonable delay may disentitle a party to equitable remedies. The applicants have blamed a lack of advice that they could apply for restoration on the former advocates on record. It is not every time a party must blame its advocates on record. The advocate is instructed on what to do and not the other way around. If the applicants knew that the eviction was illegal by virtue of existing court orders, it is unclear why the same was not resisted, followed by moving the court to restore them to the land as soon as was practically possible.
55. Due to the inordinate delay, the 3rd plaintiff/respondent and the 1st-4th respondents have explained to the court the change of circumstances in the suit parcels of land including affirmation of their legal rights through a court decree in the succession cause at the High Court. The applicants have not filed a further affidavit to refute the contents of the 1st respondent's replying affidavit and the annexures thereto that the estate of the late Hon. Choge has been shared and that there is no stay, review, or setting aside of the judgment and the decree attached as EC '1'. Undoing the alleged illegal eviction and the accrued superior rights to the 1st - 4th respondents by way of a restoration injunction in my view would create greater hardship amounting to injustice, at an interlocutory stage. In *East African Fine Spinners Ltd and Receivership & 2 Others -vs- Bedi Investment CA* Civil Appl. No. Nai 72 of 1994, the court cited with approval of *Shepherd Homes Ltd -vs- Sandham* (supra), that the court has to consider whether, in the circumstances as they exist after the breach, a mandatory injunction order can still be issued, and if so, if issued it will produce a fair result to the two parties.



56. Above the three pillars as stated, the applicants are mandated to demonstrate that there exist exceptional circumstances that warrant the grant of mandatory injunction. The applicants, if they were aware of the illegal eviction, should have taken advantage of Section 152 A-1 of the Land Act 2012. They did not report the same or take any precipitate action to safeguard their rights. The applicants acquiesced to the same. The applicants did not register any restrictions on the titles, using the court orders issued in their favor.
57. A grant of mandatory injunction inevitably determines the suit in a summary manner. The principles as distilled from the cited case law are that the court, at this stage, must feel, based on the facts presented, with a high degree of assurance that the injunction granted will appear after the trial to have rightly been granted.
58. In my considered view, the claim by the 1st and 2nd plaintiffs would not be weakened in the absence of occupation of the suit premises at the hearing. Adverse possession is a matter of fact based on evidence showing that there was dispossession and discontinuance of possession of the actual owner from his land, for a period of 12 years. See *Wambugu -vs- Njuguna* (1983) KLR 173.
59. On whether the court should issue a prohibitory injunction, the applicants contend that the 1st - 4th respondents are interfering with the suit parcels of land by dint of Order 40 of the Civil Procedure Rules. On the other hand, the 1st - 4th respondents aver that they are lawful owners of the suit parcels of land by virtue of transmission, following affirmation of the same without dispute through a succession cause, whose judgment and decree have not been stayed or varied.
60. The applicants have not filed a supplementary affidavit to refute the assertion on oath by the 3rd plaintiff/respondent, that there is a valid judgment and a decree dated 28/4/2022 and 8/7/2022 in Kitale High Court Succession Cause No. 259 of 2020 marked EC'1'.
61. It is trite law that a claim based on adverse possession affects the predecessors and successors in title to land, said to be subject to adversity. See *Mukindia -vs- Mutwiri* (Sued as the legal representative of the estate of Fabian Mutwiri Rugiri (Deceased) & Others (E&L O.S E007 of 2023[2024] KEELC 6344 [KLR] (25th September 2024) (Judgment), the court cited *Mwangi & Another -vs- Mwangi* [1986] KLR 328, that a claim for adverse possession binds not only the predecessors but also the successor to title, with no interval between the death of the registered owner and the grant of letters of administration by virtue of Section 16 of the Limitation of Actions Act.
62. Further, in *Peter Gichuki Wanjohi -vs- Juliah Mumbi Muturi* [2021] eKLR, the court cited *Peter Thuo Kairo -vs- Kuria Gacheru* [1988] 2 KAR 111, that a claim for adverse possession subsists not only against the present holders of title, but also their predecessors in title. A mere change of ownership of land that another person occupies under adverse possession does not, therefore, interrupt such person's adverse possession.
63. From the pleadings by the applicants, it is averred that there are imminent attempts to subdivide, lease, transfer, mortgage, alienate, deal, damage, dispose, deface, and or interfere with the suit parcels of land following gazettment purported lost or destroyed title register by the 6th respondent.
64. The gazette notice is dated 8/3/2024 as per annexure AMM'1, which, if effected, may pave the way for the issuance of a new title deed. The applicants aver that the 1st - 4th respondents have also either subdivided or leased the suit parcels of land to some third parties. Unfortunately, the applicants have not explained the inordinate delay in seeking the prohibitory injunctive orders since the publication of the gazette notice by the 6th respondent. There are no copies of recent official search certificates from the 6th respondent supporting the allegation of subdivisions and or dealings with the suit parcels of



land since the filing of the suit. More importantly, other than the complaint as per annexures AMM'5 and '6', there is no evidence that the applicants attempted to lodge cautions over the title register(s) to protect their interests as occupants of the suit parcels of land since 1972 or soon after they were issued with orders in NRB HCC No. 4335 of 1988 and as per annexures AMM'3 and '4'.

65. Similarly, the applicants admit that in 2014, they were aware the 1st-4th respondents filed for the letters of administration. The 1st-4th respondents now say that the suit properties have been distributed as per the confirmed grant to the beneficiaries of the estate. There is no evidence of a stay of execution of the decree issued on 8/7/2022.
66. Between 2014 and the filing of the instant application, the applicants knew that the 1st – 4th respondents were out to defeat their equitable interest on the land. They should have moved with speed to seek declaration orders as to their legal right or validity of ownership by virtue of Section 38 of the Limitation of Actions Act. Those equitable rights must be proved first through evidence as held in *Kasuve -vs- Mwaani Investment Ltd & Others* [2004] 1 KLR 184 before they can crystallize under Sections 9, 10, 11, 12, 13, and 38 of the Limitation of Actions Act. See *Kimani Ruchine -vs- Swift Rutherford & Co. Ltd* [1980] KLR 10.
67. In the circumstances, I find no exceptional circumstances to warrant the issuance of prohibitory orders of injunction. The applicants, other than asserting possession of the land prior to demolition and eviction in 2016, have been unable to demonstrate irreparable damage and the balance of convenience. The operative period for adverse possession is 1972 and 2016, when the applicants allege to have been on the land by virtue of adverse possession. Their claim would not be defeated if they were no longer in occupation. On the contrary, if the eviction were in total disregard of any existing valid court decrees, facts and evidence would be relevant in their claim.
68. The upshot is that I find the application lacking merits. It is dismissed with costs.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 12TH DAY OF MARCH 2025.

In the presence of:

Court Assistant - Laban

Murage for the 3rd plaintiff/respondent present

Waweru for Katwa for the 1st and 2nd defendants present

No appearance for applicant.

HON. C.K. NZILI

JUDGE, ELC KITALE.

