



**Ondaba v Ondima (Environmental and Land Originating Summons E003 of 2025) [2025] KEELC 4394 (KLR) (10 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4394 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E003 OF 2025**

**M SILA, J  
JUNE 10, 2025**

**BETWEEN**

**GEORGE MARITA ONDABA ..... APPLICANT**

**AND**

**FRED OMAI ONDIMA ..... RESPONDENT**

**RULING**

1. The applicant is son of Billiah Kemunto Ondaba (the deceased or simply Billiah) and the legal representative of her estate. He commenced suit through an Originating Summons filed on 13 March 2025 vide which he seeks orders that it be declared that the estate of the deceased has acquired title, by way of adverse possession, to the land parcel Nyaribari Chache/B/B/Boburia/3468. Together with the Originating Summons, the applicant filed an application of even date seeking orders of injunction to restrain the respondent from demolishing the structures on the suit land, evicting the tenants therein, or dealing with the suit land pending hearing of the suit. It is this application which is the subject of this ruling.
2. The case of the applicant is that his late father, one Marita Ondaba (deceased) was the third registered proprietor of the suit land having obtained registration on 16 February 1984. He died on 14 February 2002. He had charged the property and the bank sold the same in exercise of its statutory power of sale to one Peter Kimori Maranga who got title on 13 May 2005. The property was subsequently transferred to his wife Callen Kemunto, who sold it to the respondent. The respondent acquired title on 22 January 2025. The applicant avers that despite the transfers of the suit land, his mother Billiah, maintained possession of the suit land from the death of her husband in 2002. He avers that they have rental units on the suit land which they have been leasing out to tenants. It is thus his view that he has a good case for adverse possession and pending hearing, he seeks to have the respondent restrained from the suit land.



3. The respondent has opposed the motion by filing a replying affidavit and a preliminary objection. He avers that he purchased the suit land from the legal representative of Peter Kimori Maranga (deceased) and therefore the title is protected by dint of Section 93 of the Law of Succession Act, Cap 160, Laws of Kenya, and the same is indefeasible and incapable of being invalidated. He contends that the estate of Peter Kimori had given consent to Billiah (the deceased) to manage the suit property, pay rates, debts, expenses, and salaries, from the rent collected pending development of the suit property. He has annexed what he asserts is the letter of authority. He thus avers that there can be no adverse possession given this permission. He deposes that Billiah never filed any claim over the suit property as she was aware of the said authority. He mentions that the applicant does not reside on the suit property. He states that the property fetches rent of over Kshs. 100,000/= which should be remitted to him as the purchaser for value. He also points out that the applicant had filed a previous suit, i.e *Kisii ELCOS E001 of 2025* that was struck out.
4. In the preliminary objection, he has raised issue that the suit offends Section 93 of the Law of Succession Act, that the claim violates Section 7 of the Limitation of Actions Act, that there is no averment of previous proceedings contrary to Order 4 Rule 1 (f) of the Civil Procedure Rules, and there is no ground report which renders the claim for adverse possession fatal.
5. The applicant filed a supplementary affidavit. He deposes that the respondent has never been in possession of the suit property and that he should have done due diligence before purchasing it. On the letter said to be a letter of authority, he has stated that it is strange to him, and there is no evidence to show that it was ever sent or received. On the rent payable he has stated that it is of Kshs. 49,000/= and not Kshs.100,000/= which he has broken down. He avers that this shows that the former proprietor did not even know how much rent was being collected.
6. The application was urged through written submissions and I have taken note of the submissions filed by both Mr. Gichaba, learned counsel for the applicant, and Mr. Nyambati, learned counsel for the respondent.
7. This is an application for injunction and I stand guided by the principles laid down in the case of Giella v Cassman Brown (1973) EA 358. It was held that to succeed, one needs to demonstrate a prima facie case with a probability of success, show that he stands to suffer irreparable loss if the injunction is not granted, and where the court is in doubt, it will decide the application on a balance of convenience.
8. Before I embark on these, there is the preliminary objection raised by the respondent. Section 93 of the Succession Act has been pointed at and it provides as follows :
  93. Validity of transfer not affected by revocation of representation
    - (1) All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act, by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.
    - (2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties, and legacies of the deceased have not been discharged nor provided for.
9. At this stage, I will not dispute Mr. Nyambati's submissions that the respondent obtained registration procedurally, but the contest herein is not about the manner in which the respondent obtained title.



The dispute is whether he is now holding that title in trust for the plaintiff by reason of the long possession that is claimed by the plaintiff. I do not therefore see how Section 93 can be used to claim that the suit herein is fatal from inception.

10. Neither am I persuaded to strike out the case for failure to disclose the previous suit. In his submissions, Mr. Gichaba tried to contend that Order 4 Rule 1 (f), which enjoins a plaintiff to disclose any previous suit, only applies to plaints and not Originating Summons. I do not agree. This is by dint of Order 37 Rule 19 (4) which provides that :

“any reference in these Rules to proceedings begun by a plaint, shall, unless the context otherwise requires, be construed as including a reference to a cause proceeding under an order made under subrule (1).

11. It follows that if there is a requirement in the plaint for disclosure of a previous suit, then an applicant in an Originating Summons needs to also comply with that rule.
12. In instances of non-compliance, the court has wide discretion, and in exercise of my discretion I opt not to strike out the suit but let it stand as I do not think that the failure to disclose the previous suit in the Originating Summons was aimed at stealing a march on the respondent. It was actually a suit for adverse possession against the previous proprietor which had to fall by the wayside as the suit land had changed hands to the respondent.
13. The other part of the preliminary objection regarding failure to have a ground report would not be a solid preliminary objection since the need for a ground report is for purposes of proving the fact of possession on a particular parcel of land. It is a matter to be canvassed at the trial of the suit.
14. On the claim of violation of Section 7 of the [Limitation of Actions Act](#), I am not persuaded. Section 7 provides as follows :

7. Actions to recover land

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

15. I think Mr. Nyambati has misinterpreted this section for it cannot be used against a person claiming adverse possession. It is actually used by the person claiming adverse possession to support his case. The person entitled to bring an action to recover land is the land owner, i.e the registered proprietor, and his right is barred if he does not bring action within 12 years of the right accruing to him or a person through whom he claims. In fact, an adverse possessor must wait for lapse of 12 years before his right crystallises, so it will be paradoxical to claim that he is barred by Section 7 of the [Limitation of Actions Act](#).
16. There is within the submissions of Mr. Nyambati, an argument that the claim is not ripe because the respondent obtained registration in January 2025 and therefore 12 years are yet to lapse. In his submissions he made mention of the case of [Edward Moonge Lengusurunga v James Lanaiyara & Another](#) (2019) eKLR but unfortunately he did not attach a copy of the decision for me to digest it and I cannot therefore vouch that the holding of the case was that time starts running afresh when there is a change in title. I am however aware of the Court of Appeal decision in [Gitbu v Ndeete](#) (1984) KLR 776, where it was held that mere change of ownership of land does not interrupt a person's adverse possession. I guess Mr. Nyambati can still have opportunity to expound his argument at a later stage with the appropriate authorities gathered. For now, I will hold that a case for adverse possession is maintainable despite the change of title.



17. On the principles in *Giella v Cassman Brown*, I would think that there is a prima facie case established by the applicant as it would appear that the deceased whom the applicant represents, is the one who was in possession prior to her death on 19 August 2020. There is no evidence that the respondent has ever taken possession. I am persuaded that there would be irreparable loss suffered if the order of injunction is not given. Even if I am to consider the balance of convenience, it tilts in favour of the applicant as he is the one in possession.
18. I will therefore allow the application for injunction. The respondent is hereby restrained from interfering with the possession of the applicant of the suit land until this case is determined. The respondent is also barred from selling, charging, leasing, or in any other way entering into any dealings over the suit land. In addition there is issued an order of prohibition, prohibiting any registration of any disposition in the register of the suit land until this case is heard and determined.
19. The costs of the application will be costs in the cause.
20. Orders accordingly.

**DATED AND DELIVERED THIS 10<sup>TH</sup> DAY OF JUNE 2025**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

Delivered in the presence of :

Mr. Gichaba for the applicant

Mr. Nyambati for the respondent

Court Assistant – Michael Oyuko

