



**Mukui v Githuthwa (Environment and Land Case 98B of 2022)  
[2025] KEELC 6123 (KLR) (18 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6123 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND CASE 98B OF 2022  
JM ONYANGO, J  
SEPTEMBER 18, 2025**

**BETWEEN**

**ZIPPORAH WACEKE MUKUI ..... PLAINTIFF**

**AND**

**DANIEL KIMATA GITHUTHWA ..... DEFENDANT**

**RULING**

1. By a Notice of Motion dated 27<sup>th</sup> November 2024, the Defendant/Applicant filed an application seeking an order of temporary injunction to restrain the Plaintiff/ Respondent, her servants, agents or anybody claiming through her from cutting down trees, keeping animals or poultry, constructing or undertaking crops husbandry and/or in any way interfering with the Defendant's use of the land parcel number Ndaragua/Karatu/2421 pending the hearing and determination of the main suit.
2. The application is premised on the grounds set out on the face of the Notice of Motion and the Supporting affidavit of Daniel Kimata Githuthwa, the Defendant/ Applicant herein sworn on 27<sup>th</sup> November 2024.
3. In the said affidavit the Applicant avers that the Respondent has filed a claim for adverse possession over the suit property which the Applicant has opposed on the ground that by the time the plaintiff filed this suit, the person under whom she claims the suit property had been evicted. That in an attempt to assert her unlawful possession of the suit property, the Respondent has been cutting down trees and burning charcoal in wanton destruction of the suit property. He has annexed a copy of the title deed of the suit property in his name, photographs depicting the trees and house on the suit property and a copy of a decree in Gatundu RM Civil Suit No. 12 of 2011 Daniel Kimata Githuthwa v James Nderu Mworira.
4. The application is opposed by the plaintiff through her Replying affidavit sworn on 28<sup>th</sup> February 2025 in which she deposes that she has been living on the suit property since 1974. She deposes that she was



married to one Christopher Mukui Mworio with whom she got 9 children. Then she lived on the suit property with her husband and children and when her husband died in 1996, he was buried on the suit property.

5. She further deposes that she has been carrying on subsistence farming and keeping poultry and livestock on the suit property for more than 45 years and wonders how she has destroyed the land. She adds that she has no intention of constructing any new structures as she already has a house. She denies that she has burnt any charcoal and states that the charcoal was burnt by the Applicant's agents whom he sent to the suit property.
6. With regard to the decree attached to the Applicant's supporting affidavit, she states that James Nderu Mworio- Deceased who was sued by the Applicant was her brother-in-law and she does not claim the suit property through him.
7. She depones that the application is an abuse of the court process and it ought to be dismissed with costs.
8. The application was canvassed through written submissions.

### **Analysis And Determination**

9. The authority of this Court to grant a temporary injunction finds its statutory footing in Order 40(1) of the Civil Procedure Rules which provides as follows:

[Order 40. rule 1] Cases in which temporary injunction may be granted.

1. Where in any suit it is proved by affidavit or otherwise—
  - a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or y g wrongfully sold in execution of a decree;
  - or
  - b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.
10. This provision serves as a protective mechanism, designed to preserve the status quo and safeguard the subject matter of the suit from irreparable harm while the judicial process runs its course.
11. The principles governing the grant of temporary injunctions are now firmly entrenched in our jurisprudence. A party seeking such relief must satisfy a threefold test, as laid down in the case of *Giella v Cassman Brown & Co. Ltd* [1973] E.A. 358.
12. The Applicant must, firstly, establish a prima facie case with a probability of success. Secondly, it must be shown that if the injunction is not granted, the Applicant stands to suffer irreparable harm; harm that cannot be adequately remedied by an award of damages. Thirdly, where the Court is left in doubt,



it must determine the matter on a consideration of the balance of convenience, weighing which party stands to suffer greater prejudice from the grant or refusal of the orders sought.

13. Further in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, the court reiterated that: -

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.

14. In order to determine whether the Plaintiff is entitled to an order of temporary injunction I must determine whether he has satisfied the three conditions mentioned above. I will start with the question as to whether the Applicant has established a prima facie case with a probability of success. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR the Court of Appeal defined a prima facie case in the following terms:

“So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

15. In the present case, it is not in dispute that the Defendant/Applicant is the registered owner of the suit property. However, the Plaintiff/Respondent claims that she has been in open, peaceful and continuous possession of the suit property since 1974 and that she has therefore acquired prescriptive rights thereto by virtue of adverse possession. At this juncture, the court is not required to determine the question as to whether the Respondent is entitled to the suit property by way of adverse possession as this can only be determined after a full hearing. The gist of the Applicant’s application is that the suit property is in danger of being wasted, damaged or alienated.

16. In her Replying Affidavit, the Respondent has stated that she has been in occupation of the suit property since 1974 and she has been keeping livestock and poultry and carrying on subsistence farming for all these years. She has denied any intention of constructing new structures as she says she already has a roof over her head and at the age of 74 years she has no need for additional houses. She has also denied cutting down trees and burning charcoal.

17. In the circumstances, I am not persuaded that the Applicant has proved that the Respondent intends to damage, alienate or waste the suit property and to that extent he has failed to prove that he has a prima facie case.

18. I will now proceed to determine whether the Applicant has demonstrated that he will suffer irreparable harm which cannot be compensated by way of damages. There is nothing in the Applicant’s affidavit to suggest that he is likely to suffer irreparable loss if the order of temporary injunction is not granted.



19. Since the applicant has failed to meet the two conditions for the grant of an injunction, there is no need to consider the balance of convenience but even if I was to consider circumstances of the case, the balance of convenience tilts in favour of the Respondent who claims to have been in occupation of the suit property since 1974.
20. Consequently, the application lacks merit and it is hereby dismissed. The costs of the application shall be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 18TH DAY OF SEPTEMBER 2025.**

**J. M ONYANGO**

**JUDGE**

In the presence of:

Mr Kireu Benjamin for Mr. Muturi Njoroge for the Applicant

Mr Wachira for Mr Kanyi for the Plaintiff/Respondent

Court Assistant: Hinga

