



REPUBLIC OF KENYA



**Obwoge & another v Momwamu & 6 others (Land Case  
E028 of 2024) [2025] KEELC 4840 (KLR) (26 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4840 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS  
LAND CASE E028 OF 2024  
MN MWANYALE, J  
JUNE 26, 2025**

**BETWEEN**

**JOHN OBWOGE ..... 1<sup>ST</sup> APPLICANT**

**MAOBA NYAKIBO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**OMAIKO MOMWAMU ..... 1<sup>ST</sup> RESPONDENT**

**JULIUS MAINA MWANGI ..... 2<sup>ND</sup> RESPONDENT**

**OS TRADERS LTD ..... 3<sup>RD</sup> RESPONDENT**

**OSCAR KIPCHUMBA KIPYATICH SUTER ..... 4<sup>TH</sup> RESPONDENT**

**ANNE NAISIAE OLOLNGOJINE ..... 5<sup>TH</sup> RESPONDENT**

**METRINE CHEPKOROR KIBIATICH ..... 6<sup>TH</sup> RESPONDENT**

**THE DISTRICT LAND REGISTRAR TRANSMARA WEST, EAST AND  
SOUTH ..... 7<sup>TH</sup> RESPONDENT**

**RULING**

1. *Vide* the Application dated 30.09.2024 the Applicants, John Obwoge and Maoba Nyakibo sought orders against the Respondents as follows; -
  - i. Spent.
  - ii. That this Honourable court be pleased to grant an inhibitory order inhibiting the Defendants/ Respondents herein from transferring to a third party parcel of land known as Transmara/ Moyoi/2545 and Transmara/ Moyoi/2546 or in any way dealing with the said parcels of land in manner intended to have the same disposed of to a third party, initially pending the hearing and



determination of the instant application and thereafter pending the hearing and determination of the suit filed herein.

- iii. That this Honourable court be pleased to issue a temporary injunction restraining the Defendants/Respondents from developing or building houses on the said parcel of land known as Transmara/Moyoi/2545 and Transmara/Moyoi/2546 or in any manner improving the said parcels of land with a view to dispose of the same to a third party, initially, pending the hearing and determination of the instant application and thereafter pending the hearing and determination of the suit filed herein.
2. The Application is premised on the following grounds; -
- i. The Plaintiff/Applicants and the 1<sup>st</sup> Defendant herein had purchased plot No. 8 Moyoi Adjudication Section from One John Pantalala Torenkei (now deceased) and his wife Grace Nakirunkera.
  - ii. Thereafter they took possession and occupation of the same but deserted the same upon the tribal clashes in the 1990s and when the title was eventually processed, it was registered in the name of the 1<sup>st</sup> Defendant/Respondent to hold trust for them and on his behalf.
  - iii. That each of the Plaintiff and 1<sup>st</sup> Defendant was entitled to 8.24 Ha Hectares of Transmara/Moyoi/230 upon its subdivision.
  - iv. The Plaintiff learnt that the 1<sup>st</sup> Defendant/Respondent had subdivided the parcel into Transmara/Moyoi/2545 and Transmara/Moyoi/2546 and transferred the same to 2<sup>nd</sup> Defendant, and they placed a caution on the parcels which cautions were removed without Notice to them and the same were transferred to the 3<sup>rd</sup> Defendants, in blatant and clear breach of the Trust that had been bestowed on the 1<sup>st</sup> Defendant.
  - v. That there is likelihood of the suit property being transferred to 3<sup>rd</sup> parties hence the application.
3. The Application is further supported by the affidavit of John Obwoye, who reiterates the grounds in support of the application, and has annexed a copy of the Agreement for sale between themselves and One John Pantalala Toronkei a copy of the title deed issued and members contribution; copy of green card dated 14<sup>th</sup> July 2020 showing cautions placed on both parcels, copy of certificates of official search dated 16<sup>th</sup> July 2024, in respect of the parcels.
4. The Application is opposed vide a Notice of preliminary objection dated 11.10.2024, filed by the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants, as well as a Notice of Preliminary Objection by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/ Respondents.
5. The Notices Preliminary Objection filed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on one hand and 3<sup>rd</sup> to 6<sup>th</sup> Defendants were considered by the court and vide the Ruling dated 19<sup>th</sup> February 2025, the same were struck out for not been pure points of law, as the same required ascertainment of facts, but the court indicated that the issues of law raised herein to wit, the suit of the suit contravening section 7 of the Limitations of Actions Act and Section 82 of the Law of Succession Act were to be considered as part of Grounds of Opposition to the application.
6. Thus, leave was granted to the Respondents to file Replying affidavits to the application, the 1<sup>st</sup> Defendant/Respondent filed a Replying Affidavit in which he deposed.



- i. That the Applicants had no capacity to bring suit on behalf of the deceased Estates, having annexed no authority from their families nor Grants of Letters of administrations to act for the deceased Estates.
  - ii. That he was the sole registered owner of Transmara/Moyoi/230, annexing a copy of a green card thereof and that he subdivided and sold the resultant parcels to 2<sup>nd</sup> Defendant who also sold to the 3<sup>rd</sup> Defendant.
  - iii. The Transmara/Moyoi/230 was not part of Moyoi Adjudication section Plot No. 8.
  - iv. That the Applicants were never in occupation of the suit parcel and did not defend themselves before the Land Registrar who removed the caution.
7. Equally the 4<sup>th</sup> Respondent, filed a Replying affidavit deponed on 3<sup>rd</sup> March 2025, in which h opposed the application, by deposing that:
- i. The 3<sup>rd</sup> to 6<sup>th</sup> Defendants were strangers to the issue of Trust as the creation of Trust between the Plaintiff and 1<sup>st</sup> Defendant was not substantiated.
  - ii. The Respondent deponed that Transmara/Moyoi/230 and Plot 8 Moyoi Adjudication Section were not related to each other in view of the variance in acreage.
  - iii. That the Plaintiffs were never proprietors of Transmara/Moyoi/230 and that the Land Registrar had powers to remove the cautions under Section 73(2) and 3 of [Land Registration Act](#).
  - iv. That the suit property initially belonged to Julius Maina Mwangi and the 3<sup>rd</sup> to 6<sup>th</sup> Defendants regularly bought the said parcels after conducting due diligence, hence acquired good title having no knowledge or notice of any fraud or fraudulent dealings, hence they are entitled to the suit properties, their title thereto being absolute or indefeasible.
  - v. That there is no connection of Plot No. 8 Moyoi/Adjudication Section with Transmara/Moyoi/230.
  - vi. That the threshold to grant inhibiting orders under Section 68 has not been met, as Plaintiff had no arguable case.
8. Pursuant to leave granted the Applicant filed a supplementary affidavit; in which he deposed that
- i. The Estates of the deceased families herein, had taken out letters of administration and that the Plaintiffs would be proceeding with their own suit as the other families had capacity to initiate their own proceedings.
  - ii. That the cause of action arose on 13<sup>th</sup> August 2015, when the 1<sup>st</sup> Defendant/Respondent subdivided a parcel of land initially known as Plot No 8 Moyoi Adjudication Section and it was later registered as Transmara/Moyoi/230.
9. The court directed the application to proceed by way of written submissions and it gave leave to the parties to file supplementary submissions having already considered the initial submissions whilst dealing with the Notices of Preliminary Objections culminating in the Ruling delivered on 19<sup>th</sup> February 2025.
10. The court has considered the submissions, of the parties, and analysed the application, the affidavits and the law and frames the following as issues for determination



- i. Whether or not the suit is competent in view of
  - a. Issue of the suit herein being time barred under Section 7 of the *Limitation of Action Act*.
  - b. In view of lack of capacity of Plaintiff to institute suit against the Estate of the deceased in contravention of Section 82 of the *Law of Succession Act*?
- ii. Whether the Application is merited and under this issue, the court shall consider whether the application for injunction and the inhibitory orders is merited?
- iii. What reliefs ought to issue?
- iv. Who bears the costs of the application?

### **Analysis and Determination**

11. On issued number 1, it is the Applicant's position that the cause of action arose on 13<sup>th</sup> August 2015 when the suit property, Transmara/Moyoi/230 was subdivided into two parcels and hence the suit is not time barred.
12. On their part the 1<sup>st</sup> Respondent deponed that he was sole registered owner of Transmara/Moyoi/230 was exhibited as O.M 1 in the Replying affidavit of the 1<sup>st</sup> Defendant/Respondent. The green card was opened on 02.03.2001, and the 1<sup>st</sup> Defendant/Respondent registered on the same date.
13. Impliedly the 1<sup>st</sup> Defendant/Respondent, takes the said date on the green card to be the date when the cause of action accrued to the plaintiffs and hence his contention that the same is time barred.
14. Indeed, the cause of action herein first accrued to the plaintiffs when the suit property was registered in the name of the 1<sup>st</sup> Defendant on 02.03.2001 and under Section 7 of the *Limitation of Action Act*, the suit would be time barred after 12 years.
15. In the present suit, the Plaintiffs/Applicants has pleaded Trust at paragraph 10 and particularized breach of Trust at paragraph 16 Plaintiff averring that the 1<sup>st</sup> Defendant was to be registered to hold the suit property in Trust for them hence the suit herein, would be a suit by beneficiaries to recovery land under a Trust, and it falls under the exception provided under Section 20(1) of the *Limitation of Action Act* which provides.
 

“None of the periods of limitations prescribed by this Act apply to an action by a beneficiary under a Trust, which is an action.

  - a. In respect of fraud or fraudulent breach of Trust to which the Trustee was a party or privy or
  - b. To recover from the trustee, trust property or the proceeds thereof in the possession of the Trustee or previously received by the trustee and converted to his use”.
16. In view of the said provisions of the law, the suit is evidently not time barred. In arriving at the said finding, I'm guided by the Court of Appeal decision in Kabogo v Gitau Civil Appeal No. 82/2019 (2025) KECA 193 KLR where at paragraph 32, the court observed inter alia “having pleaded and particularized trust, pursuant to section 20 (1) of the *limitation of Actions Act*, the issue ought to have gone to full hearing since section 4 of the same Act became inoperative and irrelevant.....”



17. Similarly, herein since 7 of the *limitation of Actions Act*, is inoperative in view of the pleadings at paragraph 10 and 16 of the Plaint. The court thus finds the suit is not time barred.
18. On the issue of the suit having contravened section 82 of the *Law of succession Act*.
19. The Plaintiffs brought the suit on their own behalf and on behalf of the Estates of 7 deceased person.
20. The Applicants did not exhibit letters of administrators in respect of the said Estates. This contravened section 82 of the *law of succession Act*, which vests to the personal representatives only, the powers to institute suits on behalf of deceased persons, the Applicants have conceded having no such power in the supplementary affidavit and accordingly only the suit they have filed for their own benefit was competent the suit filed on behalf of the deceased Estate cannot stand.
21. Thus, in answer to issue No.1 the court finds that the suit is not time barred but that only the Plaintiff's personal suit is competent the suits filed on behalf of the other Estates without Grant of letters of Representation will not survive and are struck out, the plaintiff will have to amend the Plaint to reflect this position.
22. On issue No.2 whether the Application is merited, and as indicated in the preceding paragraphs, the court shall examine whether the Applicant met threshold for issue of an injunction.
23. The grant of a temporary injunction is guided by the well-known principles settled by *Giella v Cassman Brown* which principles are;
 

“Firstly, an Applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer imperable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”
24. Has the plaintiff established a prima facie? A prima facie was defined in the *Mrao facie Limited v First American Bank Limited* as follows
 

“which on the material presented by the court a tribunal properly directing itself will conclude that there exists a right which is apparently been infringed by the opposite party so as to call for an explanation or rebuttal from the later....’ The court later in the said decision stated as follows “.....a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of success of the Applicants case upon trial. That is clearly a standard which is higher than an arguable case....”
25. Whereas the Applicants did indicate that they jointly with the 1<sup>st</sup> Defendant buy Moyoi Adjudication Plot No.8 which was later converted to Transmara/Moyoi/230 upon registration, the Respondents in response submitted that there was no connection between the two parcels, as the two parcels deferred in acreage. It was upon the Applicant who had been granted leave to file a supplementary affidavit to establish the connection between the two parcels, so as to enable the court make a finding as to whether there is a right that has been infringed, albeit at the interlocutory stage. Having failed to prove connection of the two parcels the court is at this stage of the proceedings not satisfied that the Applicant has established a prima facie case with probability of success.



26. Having not established a prima facie case, the court is not obligated to look into the other two principles in *Giella v Cassman Brown* as was held in Kenya Commercial Finance Limited Afraha Stadium.

“..... if primafacie case is not established then irreparable injury and balance of convenience need no consideration...”

27. Consequently, the court finds that the application is not merited in answers to issue number 2.

28. On reliefs, in order to preserve the suit property, under practice direction number 28K issued *vide* Gazette Notice No. 5178/2014, the court is empowered to issue orders for maintenance of status quo; and accordingly an order hereby issues for maintenance of status quo on the ground, to mean that the person in occupation to remain in occupation and to cultivate but not to undertake construction of new buildings thereon, and a *status quo* order on the register of register of Transmara/Moyoi/2545 and Transmara/Moyoi/2546 so as to maintain the ownership to the current registered owners pending hearing and determination of the suit is hereby issued.

29. Costs of the application are in the cause.

**DATED AT KILGORIS THIS 26<sup>TH</sup> DAY OF JUNE, 2025.**

**HON. M.N MWANYALE**

**JUDGE**

In the presence of

CA – Emmanuel/Sylvia/Sandra

Mr. Ranha for the 7<sup>th</sup> Defendant

Mr. Edeyo h/b for Mr. Anjichi for 3<sup>rd</sup> to 6<sup>th</sup> Respondents

N/A for the Applicants

