



Ariga (Suing through its Executrix Emily Mayukuba Juma) v Luyegu (Environment & Land Case E023 of 2024) [2025] KEELC 4638 (KLR) (18 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4638 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE E023 OF 2024**

**A NYUKURI, J
JUNE 18, 2025**

BETWEEN

ESTATE OF ENG BARNABBAS GABUNA ARIGA (SUING THROUGH ITS EXECUTRIX EMILY MAYUKUBA JUMA) PLAINTIFF

AND

EUNICE ASENSA LUYEGU DEFENDANT

RULING

1. Before court is a notice of motion dated 25th October 2024 filed by the plaintiff seeking the following orders:
 - a. Spent
 - b. Spent
 - c. THAT pending the hearing and determination of the main suit filed herewith, the Court be pleased to issue interim orders of injunction restraining the Defendant/Respondent, her heirs, representatives, agents, assigns, or any other persons acting under her authority or on her behalf, from evicting, demolishing, alienation, charging, dealing, disposing, entering, trespassing, erecting any building, structure or pulling down any structure whatsoever or in any way threatening with entry and/or interfering with the Plaintiff/Applicant's and the estate's tenants' peaceful and quiet possession, enjoyment and occupation of all that parcel of land known as L.R. Butso/Indangalasia/6XX6.
 - d. Spent
 - e. That pending the hearing and determination of the main suit herewith, the court be pleased to issue interim orders of injunction restraining the defendant/respondent, her heirs, representatives, agents, assigns, or any other persons acting under her authority or



on her behalf, and or anybody whatsoever, whatsoever from interfering, and or tempering, changing the land registry particulars of all that parcel of land known as L.R Butsotso/Indangalasia/6XX6.

- f. THAT in the alternative and without prejudice to any other prayer the current status quo, obtaining as at 25th October 2024 be preserved.
 - g. THAT the court be pleased to issue any other and or further orders and or directions it may deem fit and just to issue.
 - h. THAT the Defendant/Respondents do pay costs of this Application.
2. The application is premised on the supporting affidavit sworn by the applicant. The applicant's case is that he is in full and exclusive possession of LR No. Butsotso/Indangalasia/6XX6 measuring 0.4 Hectares (suit property) and that he has developed the same with developments worth over Kshs, 48,000,000/- and that the use, occupation and possession were done openly and without hinderance from the defendant. Further, that the defendant, has without justification, caused damage to the suit property by demolishing the structures, buildings, windows, and toilets, and that she has disconnected electricity and water.
 3. It was further her averment that the defendant was threatening to take over the plaintiff's premises. That the suit property which is parcel No. 6XX6 was a subdivision of Butsotso/Indangalasia/8X7 and was to be registered in the name of the late Barnaba Gabune Ariga, since parcel No. 6XX5 was to be registered in the name of the defendant's daughter one Ramona Kemunto Magotsi. That the defendant in her own name and title has no right over parcel No. 8X7 or the subsequent subdivisions thereof. She stated that the plaintiff was entitled to the suit property by reason of purchase and in the alternative, adverse possession as the deceased's estate has been in use and possession thereof since 2002 and developed the same. That the defendant has illegally transferred the land to herself.
 4. The application was opposed. Eunice Asena Luyegu swore a replying affidavit dated 6th December, 2024. She stated that the applicant was already evicted from the premises together with all her tenants vide Kakamega Chief Magistrates Court Misc. Application No. E061 of 2024. She stated that there was an appeal, being High Court Appeal E152 of 2024, but that the same was struck out for want of jurisdiction. That the applicant returned to the lower court and filed another application. She argued that the court cannot injunct what has already happened as allowing the application would be tantamount to giving final injunction orders.
 5. The respondent also stated that the applicant had not demonstrated a prima facie case as she was not sure whether she was asserting her right as a purchaser or as an adverse possessor. She maintained that she was the registered owner of the suit property and that the suit property was gifted to her late husband Wycliffe Atika Magosti by his grandmother Joyce Ramona Magotsi in 1996 and that upon carrying out succession proceedings in Kakamega High Court Succession Cause No. 12 of 2000, the land was transmitted to her daughter then to her. That she subdivided parcel No. 8X7 into two portions being Nos. 6XX5 and 6XX6 so as to develop the land grabbed by the applicant. She maintained that both parcels are in her name and that the issue of how herself and her daughter registered the land is a non-issue.
 6. She further averred that her daughter was nine years when her father died and was still a minor during the succession process but is now an adult. She contended that the applicant ought to have raised her husband's claim in the succession cause, and that therefore she has no claim. She stated that the applicant has not disclosed from whom she bought the land. She insisted that if the applicant purchased the land from her husband, she ought to have been an objector in the succession case.



7. She maintained that the applicant had no known enforceable legal right to enforce over the suit property because her husband with impunity grabbed the suit property from a grieving young widow with a nine-year old daughter on the basis of abuse of raw power over Kakamega County Council by virtue of being the council's employee. She asserted that the applicant unlawfully obtained construction permits to construct a commercial building on land not registered in his name. She attached the ruling in Kakamega CMC Misc. E061 of 2024; Notice of Motion in High Court Civil Appeal No. E152 of 2024; Title Deed and official search and confirmed grant.
8. The application was disposed by way of written submissions. On record are submissions by the applicant dated 17th December, 2024 and the respondent's submissions dated 15th December, 2024 and supplementary submissions dated 29th January, 2025; all of which this court has duly considered.

Analysis and determination.

9. The court has carefully considered the application, response thereto, annexures in support of each party's case as well as submissions. In my view, two issues arise for the court's determination, namely;
 - a. Whether this suit is res judicata in view of the ruling in Kakamega CMC Misc. Application No. E061 of 2021 of 6th September, 2024.
 - b. Whether the applicant has met the threshold for grant of temporary injunction and inhibition in regard to the suit property.
10. The doctrine of res judicata bars a court from trying a suit or an issue which was directly and substantially in issue between the same parties or their privies in a former suit, where a competent court has determined such matter or issue with finality.
11. Section 7 of the *Civil Procedure Act* provides for res judicata as follows;

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation.(4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.
12. Therefore, the elements of res judicata are as follows;



- a. There is a judgment or order in a former suit which is final.
 - b. The judgment or order in the former suit was on merit.
 - c. The judgment or order was rendered by a competent court with jurisdiction.
 - d. The issues, the parties, the subject matter and cause of action in the former suit are identical to those in the current suit.
13. In the case of *The Independent Electrical and Boundaries Commission v. Maina Kiai & 5 Others* [2017] eKLR the Court of Appeal reiterated the elements of res judicata as follows;
For the bare of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied as they are rendered not in disjunctive but conjunctive terms;
- a. The suit or issue was directly and substantially in issue in the former suit.
 - b. That the former suit was between the same parties or parties under whom they or any of them claim.
 - c. Those parties were litigating under the same title.
 - d. The issue was heard and finally determined in the former suit.
 - e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the issue in which the issue is raised.
14. In the above case, the Court of Appeal went on to state the purpose of the doctrine of res judicata as follows;
- The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by multiplicity of suits and for a, to obtain at last outcomes favourable to themselves. Without it there would be no end to litigation, and the judicial process would be rendered noisome nuisance and brought to disrepute or calumny. The foundations of res judicata this rest in the public interest for swift, sure and certain justice.
15. The defence of res judicata applies in circumstances where a party fails to raise an issue in a matter where he or she ought to have raised such issue in the former suit, so that such party is not allowed to file a fresh suit on an issue which he or she failed to raise in the former suit by mistake or negligence or otherwise. In the case of *Hinderson v. Henderson* [1843] 3 Hare 100 at page 115, cited with approval by the Supreme Court of Kenya in the case of *John Florence Maritime Services Limited & Another v. Cabinet Secretary Transport & Infrastructure & 3 Others (Petition 17 of 2015)* [2021] KESC 39 KLR (CIV) (6 August 2021) Judgment it was held as follows;
- Where a given matter becomes the subject of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident omitted part of their case. The plea of res judicata applies except in special cases, not only to points upon the court was actually required by



the parties to form an opinion and pronounce judgment, but to every point which property belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time....

16. On whether the parties in the former suit are the same as in this suit, it is clear from the order dated 6th September 2024 made vide Kakamega MCCCmisc Case No. E61 of 2024 that the parties in the former suit are the same as those in the instant suit. The issues in the former suit were whether the applicant herein was owner of the suit property and whether he had acquired the same by purchase and or by way of adverse possession. Those are the same issues raised in the instant case. In determining the former suit, the court held that it had no jurisdiction to determine the issue of ownership of land or order transfer of title vide a miscellaneous application, and that the orders sought are a preserve of the ELC.
17. As the court in the former suit did not determine the issues of the applicant's ownership based on purchase and adverse possession, stating that it had no jurisdiction, it is clear that the issue of ownership of the suit property which is the substantive issue herein was not determined with finality or on merit by a competent court. For those reasons, I find and hold that this suit is not *res judicata*.
18. Regarding grant of interlocutory injunction, Order 40 Rule 1 of the Civil Procedure Rules grants this court the jurisdiction to grant orders of temporary injunction where an applicant demonstrates that the disputed property is at risk of being wasted, damaged, alienated, wrongly sold in execution of a decree or the defendant threatens or intends to remove or dispose it in circumstances that would create the probability of the plaintiff being obstructed or delayed in execution of a decree that may ultimately be passed in his or her favour.
19. Conditions for grant of temporary injunction are well settled. An applicant for temporary injunction must establish a *prima facie* case with chances of success; demonstrate that he or she stands to suffer irreparable injury that may not be compensated in damages and where the court is in doubt, it shall decide the application on a balance of convenience (See *Giella v. Cassman Brown* [1973] EA 358.)
20. In the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* [*CA No.77 of 2012*](#) (2014) eKLR the Court of Appeal held that;

“in an interlocutory injunction application the applicant has to satisfy the triple requirements to a, establishes his case only at a *prima facie* level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, allay any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.
21. In the instant case, the applicant's case is that she is in possession of the suit property which she claims to be declared owner thereof by virtue of purchase and or under the doctrine of adverse possession. The fact that the applicant has buildings on the suit property and has been there for a while is conceded to by the respondent who alleged that the applicant unlawfully got his building plans approved by the council when the respondent was the registered proprietor thereof. A claim for adverse possession is based on continuous possession as of right for a period of 12 years. While the period of occupation by the applicant will be interrogated at the trial, the fact that the applicant has been in occupation of the suit property for a while and continues to be in possession is sufficient demonstration of an arguable



case on the part of the applicant. I am therefore satisfied that the applicant has established a prima facie case with chances of success.

22. The applicant states that the value of the suit property is about Kshs. 48 Million. The applicant's claim based on purchase and adverse possession raise an arguable case which should be given a chance to be ventilated without being rendered nugatory. I am therefore satisfied that if the injunction is not granted, the applicant may suffer damages that may not be compensated by an award of damages. Regarding the balance of convenience, while the respondent is the registered proprietor, the applicant has undeniably been on the suit property for some time. As indicated above, the specific period shall be known at the trial. In these circumstances, in my view that the scale tilts in favour of granting an injunction. Therefore, I am satisfied that the applicant has demonstrated that she deserves grant of temporary injunction.
23. In prayer (e) of the instant application, the applicant sought orders that the particulars of the title of the suit property at the lands office should not be interfered with pending the hearing of this matter. While the applicant was verbose, what I understand her to be saying is that no dealings in respect of the title of the suit property should be registered till this matter is determined. An order for such purpose is referred to as an inhibition order under section 68 of the *Land Registration Act*.
24. Section 68 of the *Land Registration Act* grants the court power to inhibit registered dealings on title and provides as follows;



Power of the court to inhibit registered dealings

(1)	The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.
(2)	A copy of the inhibition under the seal of the court, with particulars of the land, lease or charge affected, shall be sent to the Registrar, who shall register it in the



	appropriate register.	
(3)	An inhibition shall not bind or affect the land, lease or charge until it has been registered.	
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25. Therefore, inhibition orders are interlocutory orders where the court may inhibit registration of dealings on a title for a specific period of time or until the occurrence of a particular event or until grant of a further order. Where it is necessary to maintain the status of a title in the interests of justice, an inhibition order may issue.
26. In the instant case, it is not in dispute that the respondent is the registered proprietor of the suit property. The applicant has made a claim over the suit property and has established a prima facie case. She has also demonstrated that she had buildings worth Kshs. 48 Million on the suit property. It is only fair and just that the substratum of the suit is maintained pending determination of the suit. In the premises, I am satisfied that the applicant deserves orders of inhibitory order.
27. The upshot is that the application dated 25th October 2025 is merited and the same is hereby allowed as follows;
- a. That pending the hearing and determination of the main suit filed herewith, the Court is hereby issues interim orders of injunction restraining the Defendant/Respondent, her heirs, representatives, agents, assigns, or any other persons acting under her authority or



on her behalf, from evicting, demolishing, alienation, charging, dealing, disposing, entering, trespassing, erecting any building, structure or pulling down any structure whatsoever or in any way threatening with entry and/or interfering with the Plaintiff/Applicant's and the estate's tenants' peaceful and quiet possession, enjoyment and occupation of all that parcel of land known as L.R. Butso/Indangalasia/6XX6.

- a. An order of inhibition is hereby issued inhibiting the registration of any dealings whatsoever in regard to title for parcel No. Butso/Indangalasia/6XX6 pending hearing and determination of this suit.
- b. The costs of the application shall be in the cause.

25. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 18TH DAY OF JUNE, 2025

A. NYUKURI

JUDGE

In the presence of;

Ms. Waweru for the plaintiff/applicant

Ms Mburu and Mr. Malala for the defendant/respondent

Court Assistant: M. Nguyai

