



REPUBLIC OF KENYA



**Kimba v Kageni (Environment and Land Case E021 of 2025)
[2025] KEELC 6227 (KLR) (22 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6227 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND CASE E021 OF 2025
JO MBOYA, J
SEPTEMBER 22, 2025**

BETWEEN

NAFTALI M'MBIRO KIMBA PLAINTIFF

AND

ANN KAGENI DEFENDANT

RULING

1. What is before me is the Notice of Motion Application dated 7th August 2025; brought pursuant to provisions of Order 40 Rules 1, 3 & 4 of the Civil Procedure Rules and the inherent provisions of the law; and wherein the Applicant has sought the following reliefs:
 - i. This Application be certified urgent and be heard Ex-parte in the first instance.
 - ii. An interim temporary order of injunction be issued restraining the defendant either by herself, her agents, employees and/or servants or otherwise whomsoever from subdividing, transferring, offering for sale, letting, building, developing or in any manner whatsoever from parting with the suit property being LR No. Nyambene/Antubetwe/Njoune/1879 pending the hearing of this application.
 - iii. An Interim Temporary order of injunction be issued restraining the defendant either by herself, her agents, employees and/or servants or otherwise whomsoever from subdividing, transferring, offering for sale, letting, building, developing or in any manner whatsoever from parting with the suit property being L.R No. Nyambene/Antubetwe-Njoune/1879 pending the hearing and determination of this suit.
 - iv. Costs of this Application be provided for.
2. The instant application is premised on the grounds which have been highlighted in the body thereof. In addition, the application is supported by the affidavit of the applicant, sworn on even date; and to



which the applicant has annexed various documents including a copy of the extract of title; certificate of death of John Mutirimu Kimba and copy of the grant of letters of administration issued to and in favour of the respondent.

3. The respondent duly entered an appearance and filed a replying affidavit sworn on 18th September 2025. The respondent has disputed the claims by and on behalf of the applicant. Furthermore, the respondent has posited that the suit beforehand is not only premature but incompetent in so far as the suit has been filed against her, albeit in her personal capacity and not as the legal administratrix of the estate of the deceased.
4. The subject application came up for hearing on 22nd September 2025, whereupon the advocates for the parties covenanted to canvass and dispose of the application by way of oral submissions. Suffice it to state that the submissions by the parties are on record.
5. Briefly, Learned counsel for the applicant adopted the grounds contained at the foot of the application and also reiterated the averments in the body of the supporting affidavit. In addition, learned counsel also highlighted the various annexures attached to the application.
6. Moreover, learned counsel highlighted three [3] key issues, namely: the applicant has established a prima facie case with probability of success; the applicant is bound to suffer irreparable harm/injury unless the orders sought are granted; and the balance of convenience tilts in favour of the applicant.
7. Regarding the first issue, learned counsel for the applicant has submitted that the applicant has been residing on and or occupying the suit property for more thirty (30) years. In this regard, it was submitted that the duration of occupation exceeds the statutory 12-year period in terms of section 7 of the *Limitation of Actions Act*. Additionally, counsel submitted that the occupation was open and uninterrupted; and in this regard, the applicant has acquired adverse possessory rights to and in respect of the suit property.
8. On the other hand, learned counsel for the applicant has also submitted that the applicant had also filed/lodged objection proceedings against the deceased during his lifetime. However, it was submitted that the objection proceedings before the district land adjudication officer abated because of the death of the deceased. Nevertheless, counsel posited that the objection proceedings that were lodged before the land adjudication officer touched on and concerned a claim of ownership of the suit property. In particular, it was contended that the objection proceedings related to the fraudulent adjudication of the suit property in the name of the deceased.
9. Turning to the second issue, learned counsel for the applicant has contended that the applicant has been in occupation of the suit property for more than thirty (30) years. Moreover, it was submitted that the applicant has also undertaken extensive developments on the suit property. To this end, learned counsel for the Applicant submitted that in the event the orders sought are not granted then the applicant shall be disposed to suffer irreparable harm, injury; and or loss.
10. Thirdly, learned counsel for the applicant has invited the court to deploy and invoke the balance of convenience and to find that the balance of convenience tilts in favour of the applicants. In this regard, it has been submitted that the longevity of the occupation of the suit property by the applicant demands that the status quo obtaining be preserved pending the hearing and determination of the suit.
11. Premised on the foregoing, learned counsel for the applicant has invited the court to find and hold that the application beforehand is merited and ought to be granted.
12. Learned counsel for the respondent adopted the contents of the replying affidavit sworn on 18th September 2025; and thereafter highlighted three [3] key issues. Firstly, learned counsel for the



respondent has submitted that the suit beforehand is incompetent in so far as same has been mounted against the respondent in her personal capacity. Nevertheless, it was submitted that the respondent herein is a legal representative of the deceased and thus same could only be sued on the basis of her representative capacity.

13. Secondly, learned counsel for the respondent has submitted that the applicant herein had filed/lodged objection proceedings before the district land adjudication officer [DLASO] pertaining to and concerning the suit property. In addition, it was submitted that vide the objection proceedings, the applicant was claiming to be the lawful owner of the suit property. Moreover, it was also pointed out that the applicant was contending that the suit property was illegally and fraudulently registered in the name of the deceased.
14. Thirdly, it has been submitted that the applicant's occupation of the suit property has never been peaceful. To this end, learned counsel for the respondent has submitted that there have been various legal proceedings between the applicant and his deceased brother [namely the deceased]. To this end, learned counsel submitted that the applicant has therefore failed to establish and or demonstrate the requisite ingredients underpinning the claim for adverse possession; and by extension, failed to demonstrate the existence of a prima facie case.
15. Flowing from the foregoing, learned counsel for the respondent has invited the court to find and hold that the applicant has neither established nor satisfied the conditions to warrant the grant of the orders of temporary injunction either as sought or at all.
16. Learned counsel for the applicant responded to the issues raised by the respondent and confirmed that indeed the applicant had filed objection proceedings before the district land adjudication officer. Furthermore, learned counsel for the applicant conceded that the objection proceedings challenged the adjudication and registration of the suit property in the name of the deceased. For good measure, counsel posited that the applicant does not concede/admit the legality of the title held by the deceased and by extension the respondent herein.
17. Secondly, learned counsel for the applicant also confirmed that the suit herein ought to have been filed against the respondent in her representative capacity and not in her personal capacity. Nevertheless, counsel submitted that the applicant has referenced the capacity of the respondent in the supporting affidavit. Further and in any event, it was submitted that the issue of capacity of the respondent can only be gone into during the substantive hearing and not at this stage of the application.
18. Having reviewed the application; the response thereto and upon taking into consideration the oral submissions canvassed on behalf of the parties, I come to the conclusion that the determination of the subject application turns on two [2] key issues, namely; whether the applicant has demonstrated and established a prima facie case with probability of success; and whether the applicant shall be disposed to suffer irreparable loss; if at all.
19. Regarding the first issue, it is imperative to reiterate that the applicant herein is enjoined to establish and demonstrate the existence of a prima facie case with probability of success. Notably, proof and or demonstration of a prima facie case constitutes the first step that must be surmounted by an applicant seeking an order of temporary injunction.
20. What constitutes a prima facie case has been addressed in various court proceedings. In the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others (Civil Appeal 39 of 2002) [2003] KECA*



175 (KLR) (7 March 2003) (Judgment), the Court of Appeal expounded on the ingredients of a prima facie case in the manner following;

A prima facie case in a civil application included but was not confined to a genuine and arguable case. It was a case which, on the material presented to the court, a tribunal properly directing itself would conclude that there existed a right which had apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

21. Has the applicant established a prima facie case on the question of adverse possession or otherwise? To start with, the applicant herein has contended that the suit property was mysteriously adjudicated and registered in the name of the deceased. Furthermore, the applicant has contended that by the time the suit property was being adjudicated and registered in the name of the deceased, the deceased had already passed on/died.
22. To this end, it suffices to take cognizance of paragraphs 3 & 4 of the supporting affidavit.
23. Same states as hereunder;
 - (3) The suit property, namely title number Nyambene/Antubetwe-Njoune/1879, which I have had possession and actual occupation for a period of 30 years, was mysteriously registered in the deceased's name.
 - (4) Interestingly, the deceased was registered as the owner of the property on the 9th December 1997, after the deceased had already died on 16th February 1994.
24. What I hear the applicant to be saying is to the effect that the suit property was illegally, irregularly and fraudulently adjudicated and registered in the name of the deceased. For good measure, the applicant does not concede the fact that the suit property lawfully belongs to the estate of the deceased.
25. I beg to state that where an applicant seeks to procure title on the basis of the doctrine of adverse possession, such an applicant is enjoined to acknowledge and concede the legality of the title of the registered owner. It is only then that the adverse possessor/claimant can thereafter propagate a claim based on adverse possession. However, in respect of the instant case, the applicant contends that the title in the name of the deceased was procured vide fraud; and same challenges the legality thereof.
26. To my mind, the factual deposition by the applicant herein do not prima facie demonstrate the requisite ingredients that underpin a claim for adverse possession. [See the holding in the case of Haro Yonda Juaje –v- Sadaka Dzenge Mbauro & Kenya Commercial Bank (2014) eKLR; Catherine Koriko & 3 others v Evaline Rosa [2020] KECA 534 (KLR)].
27. Other than the fact that the applicant has not acknowledged the title of the deceased, it is also evident that the Applicant had filed objection proceedings before the district land adjudication officer and wherein same [applicant] claimed to be the lawful owner of the property. Pertinently, the applicant is also staking a claim to be the lawful and beneficial owner of the suit property.
28. I beg to highlight that the applicant cannot propagate a claim for ownership of the suit property, on one hand; while at the same time claiming adverse possession. The two claims are antithetical and mutually exclusive. [See Richard Wefwafwa Songoi vs Bernard Munyifwa Songoi (2020) eKLR paragraph 42, 43 & 44 thereof].
29. Flowing from the foregoing, I am not convinced that the applicant herein has established on a prima facie basis the ingredients underpinning a claim for adverse possession. Instructively, the applicant was



enjoined to demonstrate the said ingredients as a prelude to partaking of a proclamation that a prima facie case has been established.

30. Turning to the second issue, the applicant has also contended that same is disposed to suffer irreparable loss unless the orders sought are granted. However, despite the submissions by the applicant, there is no evidence to underpin the contention that irreparable loss; injury; or damage[s] is likely to arise and or accrue. Instructively, the applicant has not mentioned irreparable loss in the body of the entire affidavit. In any event, it is not lost on me that irreparable loss must not only be deponed to but must be substantiated. In the absence of averments pertaining to irreparable loss, the submissions by the applicant cannot be relied upon. Moreover, such submissions made in the absence of deposition[s] are made in vacuum.
31. Be that as it may, having found and held that the applicant did not establish and or demonstrate the existence of a prima facie with probability of success, I am not called upon to belabor the question/issue of irreparable loss.
32. Simply put, the conditions for the grant of an order of temporary injunction are to be surmounted sequentially. In this regard, where an applicant does not prove prima facie case then the court has no business progressing the matter further. [See *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] KECA 606 (KLR); and *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86.]
33. Arising from the foregoing discussion, I come to the conclusion that the applicant herein has neither met nor established the requisite ingredients to warrant the grant of the orders of temporary injunction, either in the manner sought or at all.

Final Disposition:

34. Flowing from the analysis in the body of the ruling, it is apparent that the application beforehand is not only premature and misconceived, but same is also legally untenable.
35. To this end, the application courts dismissal.
36. In the upshot, the final orders that commend themselves to the court are as hereunder;
 - i. The Application dated 7th August 2025; be and is hereby dismissed.
 - ii. Costs of the Application be and are hereby awarded to the Respondents.
37. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 22ND DAY OF SEPTEMBER 2025.

OGUTTU MBOYA, FCI Arb; CPM [MTI-EA].

JUDGE

In the presence of:

C/A: Hussein

Mr. Jesse Mwiti for the Applicant

Mr. Muthamia for the Respondent

