

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. E019 OF 2024 (OS)

ANJELO KINOTI MUTHAMIAPLAINTIFF

VERSUS

MONICA KINYA KINOTI [sued as the legal representative of the estate of
GITONGA SILAS KINOTI alias SILAS KINOTI M'ITONGA alias KINOTI
ELIJAH alias SILAS KINOTI ELIJAH M'ITONGA – DECEASED
.....DEFENDANT

RULING

1. The subject ruling touches on and concerns two [2] applications, *namely*;
the application dated the **2nd July 2025**; filed by the plaintiff; and the
application dated **9th July 2025**; the latter which has been filed by the
defendant. The application dated the **2nd July 2025**; seeks the following
reliefs;

- (i) *That the application be certified urgent and be heard Ex-parte in the first instance.*
- (ii) *That pending inter-parties hearing of the application, a temporary injunction be issued, restraining the defendant/respondent, her family members, representatives, servants, agents and or anybody else acting at her behest from evicting the plaintiff/applicant and his family from the portion of land occupied by the plaintiff/applicant measuring 3 acres out of L.R No. Nyaki/Giaki/1073.*

- (iii) *That alternatively, pending inter partes hearing of the application, an order be issued, maintaining and preserving the presently existing status quo on the ground, in respect of the portion of land occupied by the plaintiff/applicant measuring 3 acres out of L.R No. Nyaki/Giaki/1073.*

- (iv) *That pending hearing and determination of the suit or until further orders of the court, a temporary injunction be issued, restraining the defendant/respondent, her family members, representatives, servants, agents or anybody else acting at her behest, from evicting the plaintiff/applicant and his family from the portion of land occupied by the plaintiff/applicant, measuring 3 acres out of the L.R No. Nyaki/Giaki/1073.*

- (v) *That alternatively, pending hearing and determination of the suit or until further orders of the court, an order be issued maintaining and preserving the presently existing status quo on the ground, in respect of the portion of land occupied by the plaintiff/applicant, measuring 3 acres out of L.R No. Nyaki/Giaki/1073.*

- (vi) *That costs of this application be provided for.*

2. The subject application is premised on the various grounds which have been highlighted in the body thereof. In particular, the applicant contends that same has remained in occupation and possession of a portion measuring 3 acres out of the suit property for more than 14 years. Furthermore, the plaintiff has also contended that even though the court

of appeal rendered a judgment against himself and decreed eviction on the 10th December 2010; the defendant failed to execute the decree and hence the decree under reference is now statute-barred. In addition, it has been contended that arising from the failure to execute the decree, the plaintiff has since accrued adverse possessory rights to and in respect of the designated portion of the suit property.

3. The subject application is supported by the affidavit of Anjelo Kinoti Muthamia [the plaintiff] sworn on 2nd July 2025; and the supplementary affidavit sworn on 13th August 2025; to which the deponent has annexed assorted documents including a copy of the judgment of the court of appeal; copy of photographs showing occupation and a copy of the affidavit of the defendant sworn on 5th September 2001.
4. The defendant herein filed a replying affidavit sworn on 31st October 2024 [by Isaya Mwenda Mwarania – learned counsel] and wherein it has been contended that the originating summons beforehand is misconceived and constitutes an abuse of the due process of the court. Furthermore, the defendant filed a replying affidavit to the amended originating summons, sworn on 9th July 2025. In addition, the defendant has also filed a notice of preliminary objection and an application to strike out the originating summons.
5. The 2nd application is the application dated 9th July 2025; and wherein the defendant has sought the following reliefs;
 - (a) *This application be certified urgent and the same be heard in priority to the one by the plaintiff dated 2/7/2025.*

(b) The entire suit herein be struck out with costs for being res judicata to the ruling in Meru ELCC No. 129 of 1994 (O.S) dated 20/2/2025 and the judgment and orders of the court of appeal in Nyeri court of appeal C.A No. 48 of 2005 dated 10.12.2010.

(c) The entire suit be struck out with costs as it may embarrass this Honourable court by putting it on a collision course with the court of appeal and is otherwise an abuse of the due process of the court.

(d) The costs of this application and those of the entire suit be awarded to the defendant.

6. The subject application is anchored on the grounds that are contained in the body thereof. In particular, it has been contended that the plaintiff herein filed a previous suit, namely; Meru ELC 129 of 1994 (OS) which was heard and determined by the court. Furthermore, it has been averred that the defendant herein appealed the decision of the court *vide* Nyeri court of appeal civil appeal No. 48 of 2005. In addition, it has been contended that the court of appeal overturned the decision of this court [differently constituted] culminating into a judgment and decree rendered on the 10th December 2010.

7. Additionally, it has been contended that following the delivery of the judgment of the court of appeal, the plaintiff herein was granted 3 months with effect from 10th December 2010 to vacate the suit property and in default same be evicted. Nevertheless, it has been posited that despite the judgment of the court of appeal, the plaintiff failed to vacate and thus the defendant applied for execution *vide* application for execution dated the 13th November, 2022; but paid for on 21st November 2022.

8. Furthermore, it has been posited that the application for execution was duly allowed. However, the plaintiff herein filed an application seeking to set aside the eviction warrants, contending that the judgment of the court of appeal and, by extension, the eviction warrants were statute-barred in terms of **section 4 (4) of the Limitations of Actions Act, cap 22, Laws of Kenya**.
9. The application by the defendant is supported by the affidavit of Monica Kinya Kinoti [the deponent] sworn on 9th July 2025; and to which the deponent has annexed various documents. The annexures at the foot of the supporting affidavit include a copy of the decree arising from the judgment of the court of appeal; a copy of the warrant of eviction; a copy of the application dated 23rd October 2024; a copy of the replying affidavit and more importantly, a copy of the ruling of Hon. Justice Yano – Judge dated 20th February 2025.
10. The subject application came up for hearing on 23rd July 2025, whereupon the advocate for the parties covenanted to canvass and dispose of the two applications contemporaneously. Furthermore, the parties also agreed to file and exchange written submissions. To this end, the court gave directions pertaining to the filing and exchange of the written submissions. Moreover, the court also circumscribed the timelines for the filing of the submissions.
11. The plaintiff filed written submissions dated 13th August 2025; and wherein same has highlighted six [6] key issues for consideration and

determination by the court. Firstly, learned counsel for the plaintiff has submitted that the plaintiff herein has established and demonstrated that same has been in occupation and possession of the portion measuring 3 acres out of the suit property for a duration of more than 14 years. Moreover, it has been submitted that even though the court of appeal issued a judgment dated 10th December 2010 and whereby the said court granted the plaintiff three months to vacate and in default, to be evicted, the defendant failed to execute the decree. To this end, it has been posited that the judgment and the decree of the court of appeal became statute-barred upon lapse of 12 years.

12. To the extent that the plaintiff has been in occupation and possession of the suit property or the designated portion thereof for more than 12 years, it has been submitted that the plaintiff has therefore established a prima facie case with probability of success. In this regard, learned counsel for the plaintiff has referenced the decision in the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 others (2003) eKLR.**

13. Secondly, learned counsel for the plaintiff has submitted that the plaintiff shall be disposed to suffer irreparable loss; harm; and damage in the event that same is evicted from the designated portion of the suit property. In particular, it has been submitted that the threats of eviction are real in terms of ground 1 of the application filed by the defendant. In this regard, learned counsel has invited the court to find and hold that the threatened and imminent eviction shall no doubt subject the plaintiff to irreparable loss.

14. To buttress the foregoing submissions, learned counsel for the plaintiff has cited and referenced the decision in the case of **Thomas Mungiria and 9 others vs Joseph Mutuma & 4 others (2012) eKLR.**
15. Turning to the third issue, learned counsel for the plaintiff has submitted that the balance of convenience tilts in favour of the plaintiff. For good measure, it has been submitted that the plaintiff has remained in occupation of the designated portion of the suit property for more than 12 years and hence it is imperative that the status quo be maintained pending the hearing and determination of the subject suit.
16. Next is the issue that the decree arising from the decision of the court of appeal has since lapsed and is now extinguished on the basis of the provisions of section 4 (4) of the Limitations of actions act. It has been contended that the defendant ought to have executed the impugned decree within the statutory timelines but same failed to do so. In this regard, it has been submitted that the decree under reference is therefore null and void.
17. The next issue that has been highlighted by learned counsel for the plaintiff touches on and concerns the purpose of an interlocutory/temporary injunction. To this end, it has been submitted that an order of temporary injunction is intended to preserve and conserve the status of the matter in dispute pending the hearing and determination of the dispute. For coherence, it has been submitted that an order of temporary injunction operates to avert the dissipation of the substratum of the suit *pendente lite* [during the pendency of the suit].

18. In support of the foregoing submissions, learned counsel for the plaintiff has referenced *inter alia* the decision in the case of **Mohammed Ndoge vs Mohamed Golo Ndogo & others (2015) eKLR; Hutchings Biemer Ltd vs Barclays Bank of Kenya Ltd & 2 others (2006) eKLR; and M'Ikiara M'Rinkanya & another vs Gilbert Kabeere M'Mbijiwe (2007) eKLR** respectively.

19. Finally learned counsel for the plaintiff has submitted that the subject suit is not prohibited and or barred by the doctrine of res judicata. For good measure, it has been submitted that the suit herein relates to and concerns the claim for adverse possession arising post the delivery of the judgment of the court of appeal and not otherwise. Moreover, it has been submitted that the question of occupation, possession and use of the designated portion of the suit property after the delivery of the judgment by the court of appeal has never been adjudicated upon. In this regard, it has been posited that the contention by the defendant that the suit is barred by the doctrine of res judicata is premised on a misapprehension of the doctrine in question.

20. In support of the foregoing submissions, learned counsel for the plaintiff has referenced the decision in the case of **Kibundi vs Mukobwa & another (1993) eKLR and Gichung'o & another vs Kiiru (2025) KECA,** respectively.

21. Flowing from the foregoing, learned counsel for the plaintiff has invited the court to find and hold that the application for injunction is

meritorious. In particular, it has been contended that the plaintiff has met the statutory threshold for the grant of orders of temporary injunction. On the contrary, it has been submitted that the application by the defendant is misconceived and legally untenable.

22. The defendant filed written submissions dated 31st August 2025; and wherein same has reiterated the grounds enumerated in the body thereof; adopted the contents of the supporting affidavit, and highlighted the contents of the annexures attached thereto. In addition, learned counsel for the defendant has highlighted three [3] key issues.

23. Firstly, learned counsel for the defendant has submitted that the originating summons beforehand and the subject application are prohibited by the doctrine of res judicata and by extension section 7 of the Civil Procedure Act Cap 21, Laws of Kenya. In particular, it has been submitted that the issue as to whether the decree arising from the judgment of the court of appeal is statute-barred or otherwise had been canvassed and determined by a court of concurrent jurisdiction. To this end, learned counsel for the defendant has cited and referenced the decision of Justice Yano delivered on 20th February 2025.

24. Furthermore, learned counsel for the defendant has submitted that the plaintiff herein is seeking to invite this court to sit on appeal on the decision of a court of concurrent jurisdiction and to hold that the decree of the court of appeal is statute-barred, despite the findings of Hon. Justice Yano at the foot of the ruling under reference.

25. Secondly, it has been submitted that the originating summons beforehand and the attendant application constitute an abuse of the due process of the court in so far as the plaintiff herein had raised similar issues and questions *vide* an application in respect of the previous suit. In addition, it has been submitted that the issues of limitations of actions were addressed by a court of concurrent jurisdiction and thereafter the plaintiff filed a notice of appeal. However, it has been posited that instead of following up on the notice of appeal, the plaintiff has now chosen to file the subject suit with the intention to circumvent the notice of appeal.

26. Be that as it may, it has been contended that the filing of the subject suit on the face of the ruling of Hon. Justice Yano and the subsistence of a notice of appeal by the plaintiff constitutes an abuse of the due process of the court.

27. Thirdly, it has been submitted that the plaintiff herein is computing the 12-year duration from the date of the delivery of the judgment of the court of appeal, namely, 10th December 2010, without taking into account the fact that the plaintiff was given 3 months to vacate and hand over vacant possession. Furthermore, it has been submitted that the 3 months within which the plaintiff was to vacate the suit property lapsed and or terminated on or about 10th March 2011 and hence the statutory 12-year period could only be reckoned from the said date.

28. Moreover, it has been submitted that before the 12-year period could lapse, the defendant herein filed an application for execution dated 13th November 2022, but which was received in court on 21st November 2022. To this end, it has been submitted that the application for execution or better still, the execution process was commenced before the lapse of the statutory 12-year period.

29. Additionally, it has been submitted that where an action or proceedings [including execution proceedings] are lodged within the statutory timeline, it is immaterial how much time it takes before the court hears and determines the action. Nevertheless, it has been posited that what matters is that execution proceedings were lodged and commenced long before the lapse of 12 years. In this regard, it has been contended that the execution proceedings were taken well before the 12-year period lapsed and hence the originating summons beforehand is premature and misconceived.

30. Flowing from the foregoing submissions, it has been submitted that the plaintiff has neither established nor demonstrated the existence of a prima facie case with probability of success. On the contrary, it has been submitted that the originating summons has been mounted long before the statutory period as accrued.

31. In view of the foregoing, learned counsel for the defendant has therefore invited the court to find and hold that the amended originating summons and the application dated 2nd July 2025 are legally untenable. To this end, the court has been implored to strike out the suit; the application and to award costs to the defendant.

32. Having reviewed the amended originating summons, the notice of motion application dated 2nd July 2025; and the application dated 9th July 2025; I come to the conclusion that the determination of the subject matter turns on three [3] key issues *namely*; whether the subject suit is barred and

prohibited by the doctrine of res judicata or otherwise; whether the subject suit constitutes an abuse of the due process of the court; and whether the plaintiff has established/demonstrated a basis for the grant of orders of temporary injunction or otherwise.

33.Regarding the first issue, it is imperative to recall and reiterate that the defendant herein took out an application for execution of the decree of the court of appeal rendered on 10th December 2010. The application for execution was filed in court on 21st of November 2022 and thereafter same was acted upon, culminating into the issuance of warrants of eviction. [See annexure MKK “3” attached to the replying affidavit sworn on 9th July 2025].

34.Following the issuance of the warrants of eviction, the plaintiff herein filed an application dated 23rd October 2024 and wherein same contended that the warrants of eviction which had been issued by the court were illegal and void. In particular, the plaintiff contended that the judgment of the court of appeal rendered on 10th December 2010 and the consequential decree arising therefrom were statute-barred.

35.To the extent that the judgment of the court of appeal and the decree arising therefrom were statute-barred, it was contended that no warrants of eviction could issue. Moreover, the plaintiff contended that the judgment in question had lapsed and thus stood extinguished in the eyes of the law.

36. The application by the plaintiff dated 23rd October 2024; was heard and disposed of *vide* ruling rendered on 20th February 2025, wherein the learned judge [Yano J] found and held that the execution proceedings had been commenced timeously and before the lapse of the statutory 12 years. In particular, the learned judge held that the 12-year period had not lapsed by the time execution was applied for.

37. The ruling of the learned judge delivered on 20th February 2025 aggrieved the plaintiff and thus provoked a notice of appeal. The notice of appeal is dated 6th March 2025. [see annexure “MKK 7” attached to the replying affidavit of the defendant].

38. What is common ground is that the plaintiff herein had argued the question of limitations of actions and, in particular, whether the 12-year period had lapsed before the commencement of the execution proceedings. The question under reference was thereafter adjudicated upon by Hon. Justice Yano – Judge. For good measure, the learned Judge found and held that the 12-year period had not lapsed by the time execution was commenced/applied for.

39. It is instructive to underscore that the ruling and decision by Hon. Justice Yano remain[s] standing to date, *save* for the notice of appeal dated 6th March 2025. Nevertheless, the plaintiff has now approached this court contending that same remained in occupation of the designated portion of the suit property for more than 12 years post the delivery of the judgment of the court of appeal. In addition, the plaintiff seeks to have the court

declare that the decree of the court of appeal lapsed/extinguished and hence his occupation is adverse/ hostile to the rights of the defendant.

40.I beg to underscore and reiterate that the critical question that colors the subject proceedings is whether or not the decree of the court of appeal rendered on 10th December 2010 had lapsed by the time the execution proceedings were commenced; and whether the applicant has thereby accrued adverse possessory rights arising from the non – execution of the decree.

41.To my mind, the subject suit raises the same issues that were placed before Hon. Justice Yano and which underpin the ruling rendered on 20th February 2025. Instructively, what the plaintiff is seeking to do is to re-clothe, re-baptize and re-invent the same issues and thereby bring in same before this court in an endeavor to procure an order/relief, which was declined by Hon. Justice Yano. Notably, the plaintiff is being disingenuous and making the same arguments as the ones that were highlighted in the body of the ruling under reference. Such kind of endeavor is barred by the doctrine of res judicata. [See Section 7 of the civil procedure act cap 21 laws of Kenya.

42.The subject matter brings to mind the observation by the Court of Appeal in the case of ***Kahoro & 2 others (Suing on their Behalf and on Behalf of Members of Twendane Company Limited) v Kanyamwi Trading Company Limited [2025] KECA 941 (KLR)*** where the Court stated thus:

In the contemporary world, one animal known for changing its colour to camouflage with its surrounding environment is the

chameleon. It will be green in the morning, brown in the afternoon and yellow in the evening, depending on where its majestic walk has taken it. In the legal world, it is known that parties may attempt to approach the court in different shades, while remaining the same parties. To prevent this mischievous way of litigation, the doctrine of res judicata was developed to bar parties from bringing a litigious action once a final determination has been made on the merits of a similar previous suit.

43. Additionally, issues and or matters which have been heard and disposed of up to the court of appeal have to be allowed to rest, unless there exist special, exceptional, and peculiar circumstances to warrant re-visitation to a court of law. In this respect, the plaintiff could only revisit the seat of justice if and only if the execution of the decree had not been undertaken within the statutory 12-year period. However, evidence abound that the execution proceedings were commenced well before the lapse of the 12 years. Moreover, the question under reference has since been spoken to by a Court of concurrent jurisdiction.

44. In the circumstances, this is a matter where the plaintiff must be told in no uncertain terms that same has reached the end of the road. Suffice it to underscore that the doctrine of res judicata, which highlights finality to litigation, is relevant and applicable to the instant matter. I so hold.

45. Before concluding on this issue, it is imperative to reference the decision of the Court of Appeal in the case of **William Koross v. Hezekiah Kiptoo Komen & 4 Others [2015] eKLR**, it was stated;

“The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all-too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go. Speaking for the bench on the principles that underlie res judicata, Y.V. Chandrachud J in the Indian Supreme Court case of Lal Chand v Radha Kishan, AIR 1977 SC 789 stated, and we agree;

“The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.”

46. Turning to the second issue, *namely*; whether the subject suit constitutes an abuse of the due process of the court, it is important to recall and reiterate that the plaintiff is seeking to have this court declare that the decree of the court of appeal was rendered extinguished by operation of the law; and that by extension the plaintiff has been in occupation of the suit property for a duration of more than 12 years post the delivery of the judgment of the court of appeal. However, it is not lost on me that the question as to whether the decree was rendered statute-barred was addressed by a court of concurrent jurisdiction.

47. Moreover, the suit beforehand seeks to have the court render a declaration that computation of time for reckoning adverse possession commence from 10th December 2010 and that by the time the suit was being filed, the statutory 12-year period had lapsed. Nevertheless, there is no gainsaying that there is a ruling of this court [differently constituted] holding that execution was commenced before the lapse of the time.

48. The kind of declaration that is being sought by the plaintiff herein, despite the ruling of this court [differently constituted], is tantamount to an invitation to this court to sit on an appeal on the decision of a concurrent court. To my mind, the subtle, albeit dis-ingenious invitation by the plaintiff is one that is likely to occasion absurdity. Moreover, the invitation under reference is bound to bring anarchy to the corridors of justice. Suffice it to state that the corridors of justice must not be turned to the theatre of injustice.

49. I also hasten to state that the plaintiff herein seems to be playing lottery with the due process of the court. I say this because the plaintiff had raised the question of limitation of actions and the decree being statute-barred before a court of concurrent jurisdiction; and when his objections were dismissed, same filed a notice of appeal.

50. Nevertheless, despite being aware of the decision of a court of concurrent jurisdiction, the plaintiff by sidewind is now before me seeking to upstage the valid ruling of the court. Pertinently, this court is not clothed with the statutory jurisdiction to set aside a valid decision of a court of concurrent jurisdiction. **[See the decision of the Supreme Court in the case of**

Kenya Hotel Properties Limited versus Attorney General [2022]KESC]. However, that is certainly the disingenuous approach that has been taken by the plaintiff. Such kind of endeavor constitutes an abuse of the due process of the court.

51. What constitutes abuse of the due process of Court was expounded in the case of **Rutongot Farm Ltd v Kenya Forest Service & 3 others (Petition 2 of 2016) [2018] KESC 27 (KLR) (19 September 2018) (Ruling)** where the apex court stated as hereunder;

“ The concept of “abuse of the process of the Court” bears no fixed meaning, but has to do with the motives behind the guilty party’s actions, and with a perceived attempt to manoeuvre the Court’s jurisdiction in a manner incompatible with the goals of justice. The bottom line in a case of abuse of Court process is that, it “appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak to be beyond redemption””

Beyond that threshold, lies an unlimited range of conduct by a party that may more clearly point to an instance of abuse of Court process.”

52. In the case of **Cove Investments Limited v Rono & 2 others (Civil Appeal (Application) E051 of 2025) [2025] KECA 1089 (KLR) (20 June 2025) (Ruling)**, the Court of Appeal expounded on the concept of abuse of the due process of the court.

53. The court stated as hereunder;

This Court cannot condone flagrant conduct which displays total disregard of the rules of fair play in the administration of justice nor can this court tolerate brazen disobedience of court orders. A litigant who has transferred the suit property without the knowledge of his opponent and without the permission of the court and continues to participate in the proceedings for years, on the false premise that the property belongs to him, as has happened in this case, cannot be said to be acting in good faith. Litigation is neither a game of chess where parties outsmart each other by dexterity of purpose nor is it a forum where a party lulls his opponent into a false sense of security that he is still seriously litigating the matter when he knows that his case has transmuted as a result of his own actions. Conversely, litigation is a game where all the parties place their cards on the table openly and leave it to the court to determine the dispute in accordance with the evidence before it and the law. Having secretly transferred the subject land in breach of the doctrine of lis pendens, and contrary to a court order, the 1st and 2nd respondents are basically perpetuating abuse of court process, which is a valid ground for this Court to strike out this appeal. They know that whatever decision the Court arrives at, it will not adversely affect them, yet they still intend to keep the Court busy on what, according to them, is wild goose chase.

54. Turning to the final issue, namely; whether the plaintiff has established/demonstrated a basis for the grant of a temporary injunction. To start with it behooves a claimant seeking an order of temporary injunction to establish the existence of a prima facie case. What constitutes a prima facie case was expounded in the case of **Mrao Ltd vs**

First American Bank of Kenya & another (2003) eKLR. Similarly, the meaning of prima facie case was revisited in the case of **Nguruman Ltd vs Jan Bonde Nielsen and another (2014) eKLR.**

55. Suffice it to underscore that a claimant is called upon to establish a genuine and arguable case, showing that his/her rights have been infringed upon and thus a basis exists to call upon the offender to respond. Before the offender can be called upon, it is incumbent for the claimant to demonstrate that what is before the court is a genuine, arguable and probable case. Absent proof of a genuine arguable and probable case, a claimant cannot be allowed to walk the journey towards obtaining an order of temporary injunction.

56. Has the plaintiff placed before the court material to warrant a finding that there exists a prima facie case with probability of success? To start with, there is a decision of this court [differently constituted] that execution of the decree of the court of appeal was commenced before the lapse of the 12-year period. The import of the said decision is to the effect that by the time the suit herein was being filed in 2024, the running of time for purposes of adverse possession stood interrupted *vide* the execution proceedings.

57. Suffice to highlight that the lodgment of execution proceedings or, better still, recovery proceedings, has the effect of terminating [interrupting time] for computation of the duration for adverse possession]. [See the decision in the case of **Mwangi Githu v Livingstone Ndeete [1980] KECA 35 (KLR)**; See also **Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another [2015] KECA 728 (KLR)**].

58.To my mind, by the time the plaintiff was filing the subject suit, the time for computing adverse possession stood interrupted vide the execution proceedings. In the premises, it is difficult to apprehend the basis upon which the plaintiff contends that same has been in occupation of the designated portion of the suit property for an uninterrupted duration of 14 years with effect from 10th December 2010; and thus acquired adverse possessory rights over the designated portion of the suit property.

59.On the contrary, evidence abound that the plaintiff's occupation and possession stood interrupted *vide* the execution proceedings and hence by the time of filing of the adverse possession claim, the plaintiff had not attained the statutory threshold. Notably, the originating summons was filed prematurely.

60.Flowing from the foregoing, I am afraid that the plaintiff has not established the existence of a prima facie case. Absent proof of a prima facie case, this court is not called upon to venture forward and interrogate the concept/condition irreparable loss. Instructively, the conditions underpinning the grant of an order of temporary injunction are sequential. To this end, a claimant must surmount the first hurdle before venturing to the next.

61.Where the claimant fails the first hurdle, the court is obligated to terminate the application for temporary injunction and dismiss same. [See the holding of the Court of Appeal in the case of ***Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] EA 86***].

62. From the foregoing, I must have said enough to demonstrate that the amended originating summons and the application by the plaintiff are clearly an abuse of the due process of the court. Moreover, the suit beforehand constitutes a lottery and same must be frowned upon by a court of law.

63. Finally, I am alive to the decision of the court of appeal in **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] KECA 3 (KLR)**, where the court highlighted that striking out of a suit should be a last resort. In addition, it was highlighted that a court of law should invoke the summary procedure of striking out of a suit only in clear circumstances; and where the suit is hopelessly and irredeemably bad. I beg to state that the subject suit fits within the parameters of what is hopelessly and irredeemably bad.

64. Suffice it to state that the suit beforehand cannot be redeemed by any amount of amendments. Same therefore, lends itself to striking out.

FINAL DISPOSITION.

65. Following the analysis captured in the body of the ruling, it is crystal clear that the suit by the plaintiff is a suitable candidate for striking out. To this end, I find no difficulty in returning a verdict that the suit is irredeemably bad.

66. In the upshot, and for the reason[s] alluded to; the final orders of the court are as hereunder;

- (i) The Plaintiff's application dated 2nd July 2025, be and is hereby **dismissed**.
- (ii) The Defendant's application dated 9th July 2025 be and is hereby **allowed**.
- (iii) The Plaintiff's suit *vide* amended originating summons dated 2nd July 2025 be and is hereby **struck out**.
- (iv) Costs of the two [2] applications and the suit be and are hereby **awarded to the Defendant**.
- (v) The Costs in terms of clause (iv) hereof shall be agreed upon and in default be taxed in the conventional manner.
- (vi) The orders for the maintenance of the status quo hitherto granted in respect of the instant matter and thereafter extended on 23rd September 2025; be and are hereby **discharged**.

67.It is so ordered.

**DATED, SIGNED AND DELIVERED AT MERU THIS 16TH DAY OF
OCTOBER 2025**

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

In the presence of:

Hussein - Court Assistant

Mr. Carlpeters Mbaabu for the Plaintiff

Mr. Mwarania for the Defendant

