



Ogola v Awendo & 2 others (Enviromental and Land Originating Summons E037 of 2025) [2025] KEELC 6745 (KLR) (6 October 2025) (Ruling)

Neutral citation: [2025] KEELC 6745 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E037 OF 2025**

FO NYAGAKA, J

OCTOBER 6, 2025

IN THE MATTER OF THE LIMITATIONS OF ACTIONS ACT, CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION PURSUANT TO SECTION 38 OF THE LIMITATIONS OF ACTIONS ACT AND ORDER 37 RULE 7 AND 14 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF LAND PARCEL NUMBERS KANYAMWA/KAYAMBO/KWAMO 5889, 5890 AND 5892 ALL ARISING FROM LAND PARCEL NUMBER KANYAMWA/KAYAMBO/KWAMO/26

BETWEEN

CALEB OTIENO OGOLA PLAINTIFF

AND

CHARLES RAGWANG AWENDO 1ST DEFENDANT

ISAACK OCHOLA OBANDA 2ND DEFENDANT

BILL CLINTON OCHIENG OYOKO 3RD DEFENDANT

RULING

(On Whether to Grant an Injunction at the Interlocutory Stage)

The Application

1. The Plaintiff /Applicant filed a Notice of Motion Application dated 20th June 2025 under Certificate of Urgency pursuant to sections 1A, 1B and 3B of the Civil Procedure Act; Orders 37, 40 and 51 of the



Civil Procedure Rules 2010; and Articles 40, 48 and 50 of the Constitution of Kenya, 2010. He seeks orders that:

- a. ...Spent
 - b. ...Spent.
 - c. Upon hearing this application inter-partes, interim orders of injunction do issue, forbidding, barring and prohibiting the respondents either by themselves, any of their agents, assigns, and representatives from threatening and interfering with the plaintiff/applicant's peaceful possession of a portion of land parcel numbers Kanyamwa/kayambo/kwamo/5889, 5890 AND 5892 which portions the applicant has openly and continuously occupied and used exclusively for a period of 20 years now, until such a time as the main suit is heard and determined on merits.
 - d. Upon hearing of the application inter-partes, orders be made for status quo ante to be maintained until such time as the main suit is heard and determined
 - e. Costs of this application be provided.
2. The Applicant maintains that he has been in occupation of the suit property, being a 3-acre portion of land no. Kanyamwa/kayambo/kwamo/26, since the year 2000 up to date. He states that the land in question belonged to Joseph Awendo Okungu alias Awendo Okungu, the Plaintiff's father who is now deceased. He avers further that land parcel no. Kanyamwa/Kayambo/Kwamo/26 was later subdivided, giving rise to land parcels number Kanyamwa/Kayambo/Kwamo/ 5889, 5890 and 5892.
 3. Further to the above, he maintains that he bought a portion of land measuring 3 acres from Kanyamwa/ Kayambo/Kwamo/26 in the year 2000 and that the 1st Defendant as well as his entire family are all aware of this fact. However, efforts to obtain a title deed for the said portion proved futile as the family did not cooperate when he sought to obtain the Land Control Board consent for purposes of processing the title.
 4. The plaintiff avers that he has been in open, continuous uninterrupted occupation of the suit property for a period of 25 years and the defendants did not take any action to have him vacate the suit property for all this time. He adds that the 3 acres he now claims cut across the three Respondents' land of whom the 2nd and 3rd Respondents are buyers, who purchased their parcels knowing well that the plaintiff/ applicant was in occupation but nevertheless went ahead and purchased it without conducting due diligence.
 5. The Applicant also stated that his mother is buried on the suit property and the 1st defendant and his family did not resist the said internment of his mother on the suit property.
 6. The Applicant avers that, on 18th October, 2024, the 1st Respondent demolished his skeleton structure on the suit property. He averred that he reported this incident at Ndhiwa Police Station and also to Ndhiwa Sub-County Works Office. He maintained that the if that the Respondents are not restrained as a matter of urgency, he stands to suffer irreparable loss that cannot be sufficiently remedied by way of damages.
 7. The application is supported by the Applicant's affidavit. The affidavit largely replicates the contents of the application. This court need not rehash the contents thereof. But notably, the Applicant depones that he has been in continuous, open and uninterrupted occupation of the suit property since the year 2000. He also depones that he bought the 3 acres in the year 2005, moved into the property and



- begun cultivating maize, beans and other crops. He annexed to the Affidavit are several photographs demonstrating what he considers his evidence of occupation of the suit property.
8. Further, the Applicant depones that the 1st Respondent took out letters of administration for his father's estate vide Ndhiwa Succession Cause no. 20 of 2017 and transmitted the property to himself, and a dependent named Rose Auma, as well as the 2nd and 3rd Respondents. He depones that the 1st Respondent, despite acknowledging in the application for confirmation of grant that his father's estate ought to have ceded 3 acres to the plaintiff/applicant, the 1st respondent decided to sideline the plaintiff/applicant and subdivided the estate himself and the aforesaid persons. He annexed the Summons for Confirmation of Grant as well as the accompanying Supporting Affidavit indicating that he was due to get 3 acres from the Estate. He also annexed the confirmed Grant of Letters of Administration which showed that he was not among the persons scheduled to benefit from the said estate.
 9. The plaintiff also annexed two letters, one dated 15th August 2013 written by the Chief, Lower Kayande Location and signed by the himself as well as the 1st Respondent. The effect of the letter was to acknowledge that the Applicant had bought an acre parcel of land from the 1st Respondent's deceased brother in the year 2005 and the 1st respondent acknowledged this transaction and promised to help the plaintiff/applicant get the title to the same. The second letter is dated 23rd November 2016 and is written in Dholuo language. This requires a transcript of the same into the language of the Court.
 10. Besides the foregoing, the Applicant also annexed photos showing his deceased mother's grave on the suit property as well as an Occurrence Book (O.B) dated 18th December 2024. Besides, he also annexed an assessment report from Ndhiwa sub-county works office dated 8th November, 2024 detailing the destruction of his skeleton house, which loss is estimated at Kshs. 35,000/=.
 11. I must also add that at the inter partes hearing of the application, since the parties contested the occupation of the suit land vehemently, this court summoned the Area Chief, one Cyprian Obonyo, in charge of the area wherein the suit land was situate. He testified orally, upon being affirmed, that he had visited the suit land with his village elders. He added that the dispute arose on the year 2013.
 12. At the time the Defendants acknowledged that they had sold the suit land to Caleb (claimant) but they alleged that the size the sold was smaller than that which he occupied or claimed. By the time they went, the Plaintiff was using certain portions of the land. He had planted trees on it and they had grown big enough to split firewood.
 13. He added that when the dispute arose recently, just before the suit, he sent the village elders to the suit land. When they got there, they found that it was Mr. Ragwang who was now using the land. He added that it means that after the Plaintiff harvested maize crops from its last season, the said Ragwang moved onto the land and started using it. He added that all along, it was Caleb who had been using the land.
 14. On cross examination by the 1st Defendant he repeated that it was the Plaintiff who had been using the land all along. He could not tell if the 1st Defendant had filed for Succession proceedings. He acknowledged that from February 2022 was when the 1st Defendant was using the land.
 15. He added that when the Plaintiff went to complain in his office that the 1st Defendant had started using the land was when he, the Chief, summoned the parties to his office. He testified that the respondents only moved into the suit property in July 2025.



The Response

16. All the Defendants/Respondents filed Replying Affidavit indicated as having been sworn by themselves on 15th July, 2024 yet it related to the application herein filed in the year 2025. They deponed that the Applicant's land borders their land, and each of them were entitled to their parcel of land by virtue of ownership. Moreover, they denied that land parcel number Kanyamwa/Kayambo/Kwamo/2531 which they maintain the Applicant claims ownership of was not curved out of land parcel Kanyamwa/Kayambo/Kwamo/26.
17. The defendants/respondents maintain that the Applicant had his own parcel of land, being Kanyama/Kayambo/Kwamo/2531, whose ownership was not contested by them. They also deponed that the Chief's letter referred to by the Applicant in his supporting affidavit indicated that the plaintiff bought an acre parcel of land as opposed to the 3 acres he now claimed.
18. Equally, the Respondents deponed that the fact of the Applicant's mother being buried on the suit property was a non-issue to them as she was buried on land parcel registration number Kanyamwa/Kayambo/Kwamo/ 2531 which belongs to the Applicant.
19. The Respondents maintained that there had never been a dispute between themselves relating to the land control board consent as alleged by the plaintiff/applicant. They also deponed that the suit land had never been left vacant as the same is registered in the name of Joseph Awendo Okungu and maintained that the Applicant's allegations had not been corroborated by any other witness statements.

Issues, Analysis and Determination

20. The issues that arise for determination in this application are:
 - a. Whether the plaintiff/applicant's application is merited; and
 - b. Who should bear the costs of the application
21. I have carefully analyzed the application, the supporting affidavit and the annexures thereto as well as the Replying Affidavit. As to whether the application has merit, this court will be guided by the law governing injunctions as provided in both the statute and precedents.
22. First, the Replying Affidavit was indicated to have been sworn on 15th July 2024 but it addressed the issues of the instant application which was dated 20th June 2025. This Court regards the date as an error which it excuses, as provided for under Article 159(2)(d) of *the Constitution*, 2010.
23. Turning to the prayers sought herein, concerning injunctions, Section 40 of the Civil Procedure Rules, 2010 provides as hereunder:
 - 40 (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 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.

24. In *Giella v Cassman Brown & Co Limited* [1973] E.A 358, the Court of Appeal established the conditions that an applicant must meet for an interlocutory injunction to be granted. These conditions which are sequential hurdles that must be passed one after the other are:
- a. The applicant must establish a prima facie case with a possibility of success;
 - b. An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages; and
 - c. If the court is in doubt, it will decide the application on the balance of convenience.
25. Suffice to note that the legal position that the three must be proved sequentially was restated in *Re Estate of Magdalena Kabon Sawe (Deceased) (Succession Cause E034 of 2023)* [2024] KEHC 9228 (KLR).
26. As to what constitutes a prima facie case, the Court of Appeal in *Mrao Limited v the First American Bank of Kenya & 2 others* [2003] KLR 125, the Court of appeal defined a prima facie case in the following terms:
- “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”.
27. In the above cited decision of *Mrao Limited v The First American Bank of Kenya & 2 others* (supra), the Court also established that:
- In civil cases, a prima facie case 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”
28. Further, in *Nguruman Limited v Jan Bonde Nielsen*, Civil Appeal no. 77 of 2012, the Court of Appeal also added that:
- The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means



no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed (emphasis added).

29. In the instant matter, the Applicant's claim is one of adverse possession. He maintains that he has been on the suit property for a period extending beyond the statutorily mandated 12 years and had been in open, peaceful and continuous occupation of the said land. He has annexed photographs of what he states to be farming on the said land. He has also annexed two letters, one of which the court was able to understand, and whose effect was to explain that there was once a contract of sale/purchase of an acre of land between the plaintiff/applicant and the 1st defendant /respondent's brother, which the latter acknowledges.
30. A perusal of the applicant's supporting affidavit also shows that the 1st defendant /respondent in his Summons for Confirmation of Grant indicated that the plaintiff/applicant was due to receive 3 acres of land from his deceased father's estate. He also annexed photos of his mother's grave as well as an assessment report of the damage he maintained was occasioned by the 1st defendant/respondent on his skeleton structure erected on the suit property.
31. The defendants/respondents denied the Applicant's allegations. They maintained that each party had a distinct parcel of land by virtue of ownership. They stated that the applicant, had his parcel of land, being Kanyamwa/Kayambo/Kwamo/2531, whose ownership is not contested by the Respondents. Lastly, the Respondents denied the alleged occupation of the suit property by the Applicant and stated that the said land has never been left vacant as it is registered in the name of Joseph Okungu.
32. Furthermore, the area Chief, one Cyprian Obonyo confirmed that all along, until recently, it was the Plaintiff who occupied and used the suit and for cultivation besides growing trees. After the harvest of the maize crop that was planted by the Plaintiff was when the 1st Defendant began using the land, upon which it was reported to the old to. The witness added that in 2013 there arose a dispute over the subject matter and it was resolved.
33. This Court has carefully evaluated the evidence of the parties, their arguments by way of submissions. Indeed, there is evidence, regarding occupation and use of the land, that it was the Plaintiff who had been in occupation all along since 2013. The 1st Defendant only moved onto the land recently, with the intention of dispossessing the Plaintiff. Moreover, when the Area Chief testified before this court, he stated that the Applicant was the one who had been on the suit property since 2013 when the dispute concerning the land was presented before him. He told this court that the plaintiff had remained in the suit property since 2013 to date and that the defendants only moved into the disputed parcel in July 2025. This being a claim on adverse possession, I consider this period as being sufficient to sustain such a claim, if indeed the same is proved during the hearing of the suit. This leads this Court to conclude that the plaintiff/applicant has proved a prima facie case.
34. In addition to the foregoing, I note that the Applicant has presented evidence, which on the face of it points to a case with a probability of success. More particularly, I am persuaded that the schedule of distribution presented by the 1st Respondent when applying for confirmation of grant to his father's estate, and indicating that the Applicant was due to receive 3 acres of land suffices to demonstrate the applicant may have a claim against the Respondents over the same land. Equally, the assessment report on the damage alleged to have been caused by the 1st defendant/respondent points to a possible dispute over ownership, which is denied by the respondents. In any event, the Applicant need not be subjected to a full trial at this stage, he only needs to demonstrate that he has a claim, which may succeed if subjected to a full trial.



35. Concerning the issue of irreparable loss that cannot be remedied by way of damages I am guided by the authority of *Panari Enterprises vs Lijoodi & 2 Others (2014) eKLR*, where the Court held that:

Land is unique and no one parcel can be equated in value to another. Though the value of the suit property can be ascertained, it would not be right to say that the Plaintiff can be compensated in damages. I hold the view that damages are not always a suitable remedy where the Plaintiff has established a clear legal right...

36. The instant claim relates to the acquisition of land by way of adverse possession. The Applicant, as found above, has been in occupation, subject to proof whether it was continuous, open and quiet. If disposed there is a likelihood that he may not recover much even if he may use the land later, given that an occupier may do on the land more acts than mere occupation which may change the character of the suit land. Should the Applicant be successful in his suit, Thus, this court is of the view that damages may not be an appropriate remedy, especially given also the sentimental value the applicant may have developed over the suit property.

37. As to the question of balance of convenience, I am persuaded by the decision of the court in *Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR* where the court established that:

The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed...

38. The Applicant maintained that he had been on the suit property for over 20 years. Unlike the respondents, he has annexed evidence of his economic activities as well as other developments on the said property. Moreover, the Area Chief confirmed that the party who had been in occupation all along had gone early this year to complain about the sudden occupation by the 1st Defendant. It is my considered view that, if the injunction is not granted, the plaintiff/ applicant stands to lose more than the defendants/respondents.

39. Accordingly, I find that the application is merited. I hereby allow it in terms of prayers 3 and 4 to the effect that is hereby issued an injunction forbidding, barring and prohibiting the Respondents either by themselves, any of their agents, assigns, and representatives from threatening and interfering with the plaintiff's peaceful possession of a portion of land parcel numbers Kanyamwa/kayambo/kwamo/5889, 5890 and 5892 pending the hearing and determination of the suit inter partes.

40. The injunction issued herein shall last twelve months and may be extended on an application being made, for reasons to be given by the Applicant.

41. As to who should bear the costs of this application, the general rule is that costs follow event. Section 27 of the [*Civil Procedure Act*](#) provides that:

27. Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:



Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

42. Accordingly, the defendants shall bear the costs of this application. This matter shall be mentioned on 26th November, 2025 to confirm compliance with Order 11 of the Civil Procedure Rules, 2010. The parties are given only thirty (30) days to file trial bundles and exchange.

43. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM THIS 6TH DAY OF OCTOBER 2025.

HON. DR. IUR NYAGAKA

JUDGE

In the presence of

Court Assistant: Ms. Fiona Mutiva

Mr. Ngani Advocate for Quinter Adoyo for the Plaintiff (online)

No Advocate for the Defendants.

Plaintiff present in Court

1st Defendant/Respondent present in Court

