Monga (Suing on Behalf of the Family of Samson Matinde) v Masero (Environment and Land Case 034 of 2025) [2025] KEELC 7750 (KLR) (12 November 2025) (Ruling)

Neutral citation: [2025] KEELC 7750 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ENVIRONMENT AND LAND CASE 034 OF 2025

FO NYAGAKA, J

NOVEMBER 12, 2025

IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSIN PURSUANT TO SEECTION 38 OF THE LIMITATIONS OF ACTIONS ACT, CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF LR NO. BUKIRA/BISABWOKA/847

BETWEEN

JOSEPH MATINDE MONGA (SUING ON BEHALF OF THE FAMILY OF SAMSON MATINDE) ..... APPLICANT

AND

ANASTACIA GATI MASERO ..... RESPONDENT

RULING

(On whether the applicant should be granted a temporary injunction at the interlocutory stage)

The Application

1. The applicant herein filed a Notice of Motion application dated 11th August 2025 seeking orders that:

    a. ...spent

    b. ...spent

    c. That this honourable court be pleased to issue an order inhibiting the registration of any transfer, lease, charge or any other instrument whatsoever in respect of land parcel no. BUKIRA BWISABOSA/847 measuring approximately 2.8 hectares situated in Mogori county pending the hearing and determination of this suit.

d. That this honourable court be pleased to issue a temporary injunction against the respondent and/or his agents from trespassing, building, fencing, excavating, cultivating, demolishing, chopping off/damaging the sprouting crops, evicting and/or erecting structures on LR BUKIRA BWOSABOSA/487 measuring approximately 2.8 hectares until this suit is heard and determined.

e. That costs of the application be in the cause.

2. The application was premised on grounds set out on the face of the application as well as the affidavit of Joseph Matinde Monga, the Applicant herein. Briefly, the applicant maintained that his family has been in continuous occupation a of the suit property for a period exceeding twelve (12) years and that during this period, the applicant has been cultivating on the suit property. Moreover, the applicant stated that the Respondent has never taken any steps to assert her proprietary interests over the said land.

3. The applicant stated that there is a risk of the land being disposed of to his family's detriment. He prays for preservatory orders of inhibition and injunction. He maintained that if the orders are not granted, his suit would be rendered nugatory. The orders, he stated, are meant to preserve the suit property pending the hearing and determination of the suit.

4. The Affidavit in support of the application reiterated the grounds on the application save to add that the deponent, Joseph Matinde Monga, who is the applicant, added that he was born and raised on the suit land. He annexed a copy of a survey report in support of this allegation.

The Response

5. The Respondent filed a replying affidavit sworn on 5th September, 2025. She maintained that the application neither lays sufficient nor legal basis for grant of the orders sought.

6. He deponed further that the application was vexatious, hopeless and merely calculated to prevent the Respondent from exercising her proprietary rights as the legitimate owner of the land. Further, she maintained that the application was inept, frivolous, mischievous and lacking in merit, incompetent and brought in bad faith for purposes of endorsing an illegality.

7. Further to the aforestated, the applicant deponed that the applicant has not been in enjoyment, possession and use of the suit property for a period exceeding twelve years as stated in the application.

8. Moreover, the Respondent maintained that the applicant is only seeking protection from this court after she made reports to Kehancha Police Station regarding the applicant's acts of encroaching onto her land. She also stated that the instant application was triggered by the fact that she took steps to enforce her proprietary rights over the suit property by filing ELC 039 of 2025 against the applicant and his family members.

9. It was the Respondent's further averment that her efforts to have the suit land surveyed were thwarted by the applicant's acts of threatening and chasing the surveyor she had contracted to carry out a survey exercise aimed at demarcating the boundaries between the Respondent's and the applicant's land.

10. Lastly, the Respondent deponed that the applicant has never had any peaceful occupation of the suit land as alleged in the application.

11. He also characterized the nature of the dispute between the parties as one involving a boundary dispute rather than a claim for adverse possession.

12. He annexed copies of two (2) Occurrence Book (OB) records from Kehancha Police Station dated 3/07/2023 and 29/04/2025, a demand letter addressed to the applicant dated 30/01/2023 and demanding the applicant vacates the suit property, as well as a letter from the area Chief dated 19/08/2025 explaining the circumstances under which a surveyor hired by the Respondent was prevented by the applicant from surveying the suit property.

The partys' submissions

13. The application was canvassed by way of written submissions. The applicant filed his dated 19th August 2025. He framed two issues for determination by this court, that is: whether the application was merited and whether he was entitled to the orders he had sought in his application.

14. The Applicant relied on Giella v Cassman brown [1973] E.A 358 and Nguruman Limited v Jan Bonde Nielsen CA no.77 of 2012 [2014] eKLR to submit that an applicant seeking injunctive relief must establish a prima facie case, demonstrate that he will suffer irreparable injury if the orders sought are not granted and if the court is in doubt concerning the first two elements, show that the balance of convenience tilts in his favor.

15. As to whether the applicant had established a prima facie case, reliance was placed on Mrao Limited v First American Bank of Kenya Limited [2003] eKLR in which a prima facie case was defined. he submitted that he, together with his family have been in continuous occupation and cultivation of the suit property for a period exceeding twelve years. As such, he argued that he had established the root cause of his legal rights to the suit property, thereby establishing a prima facie case.

16. Concerning the issue of irreparable harm, the applicant cited the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR where the court held that irreparable harm means loss that cannot be remedied by way of damages.

17. The applicant submitted that allowing the respondent to enter the suit property would not only interfere with his beneficial interests but also affect the substratum of the suit. As such, he prayed that the status quo be maintained

18. The applicant equally submitted that the balance of convenience tilts in favour of preserving the status quo and that, failure to grant the orders sought would occasion the applicant great injustice. He also argued that the respondent would not suffer any injustice should the prayers sought in the application be granted.

19. As to whether the applicant should be granted the prayers sought in the application, the applicant submitted that respondent had not provided any evidence to counter his assertions. He concluded that, it would only be fair and equitable that the prayers sought in his application be granted.

20. The respondent on her part filed submissions dated 26th September 2025. She submitted that the applicant and his family members were trespassers on her land, being the suit property herein. Further, the applicant submitted that the instant application was meant to evade eviction on the part of the applicant and his family since the respondent had instituted a suit against them besides reporting their actions to the police.

21. The respondent relied on the case of Giella v Cassman Brown (supra) to highlight the test that the applicant's application must meet. She also relied on Nguruman Limited v Jon Bonde Nielson (supra) to argue that proof of a prima facie case is not sufficient; the court must also consider whether the applicant would suffer irreparable loss if the prayers sought are not granted. Equally, the respondent also submitted that where a prima facie case is not established, there is no need to consider the other

two elements of the test established in Giella v Cassman Brown (supra) and restated in Nguruman Limited v Jan Bonde Nielson (supra).

22. As to whether the applicant has established a prima facie case, the respondent submitted that neither the applicant nor his family has been in continuous occupation and use of the suit property for a period of twelve years as alleged in the application. She emphasized that the applicant's trespass has been on and off as the applicant and his family would leave whenever the respondent took legal steps to affirm her rights over the suit property.

23. Further, the respondent submitted that the applicant's use of the suit land has never been peaceful, but was rather wrought with violence.

24. On the second limb of the test established in Giella v Cassman Brown (supra), the respondent argued that the applicant had not demonstrated any irreparable harm that he would suffer should the prayers he seeks not be granted. In any event, the respondent submitted that her family is not desirous of disposing any the suit property either as a whole or a portion thereof.

25. Lastly, the respondent submitted that the mere fact of having a suit relating to a parcel of land does not automatically enjoin a court to grant injunctive orders. Rather, injunctions are granted under special circumstances and the applicant's application does not present such a situation.

Analysis and Determination

26. This court having considered the application, the law and submissions of the parties herein, is of the humble view that the following issues lie for determination:

    a. Whether the applicant has satisfied the principles for the grant of a temporary injunction

    b. Who to bear the costs of the application.

27. The court proceeds to determine these issues in sequence, starting with the first and main one, which is whether the applicant has satisfied the principles for grant of a temporary injunction. It uses the simple legal tool of systematic analysis of the matter. The tool is founded on the principal of finding the issue first, then the law or legal provisions or rules and then applying the legal rules to the facts of the case before making a conclusion. In short, it is abbreviated as Issue, Rule, Application, and Conclusion (IRAC).

28. Thus, the Issue in this matter is that the plaintiff is apprehensive that the defendant who is the registered owner of the land but is not in occupation, according to him, is likely to dispose it off and is doing acts which are prejudicial to him hence warranting the grant of orders of inhibition and injunction. It is contested.

29. The Rule on the grant of orders of temporary injunction, since those of inhibition have been granted earlier, is Order 40 Rule 1 of the Civil Procedure Rules, 2010. It provides as hereunder:

> 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.

30. This provision has been considered severally in innumerable cases in our legal system. A classical one is the Giella v Cassman Brown [1973] EA 358, which the court established that party seeking an injunctive relief should fulfil three conditions. These are that;

    a. The applicant must establish his case at the prima facie level;

    b. The applicants should demonstrate that he stands to suffer irreparable harm/injury, which cannot be remedied by way of damages; and

    c. If the court is in doubt concerning the above two stated conditions, the balance of convenience should tilt in favor of the applicant.

31. The above stated conditions should be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially (see Re Estate of Magdalena Kabon Sawe (Deceased) (Succession Cause E034 of 2023) [2024] KEHC 9228 (KLR)). Failure of the applicant to succeed in one which precedes the other(s) automatically makes the application to fail or not succeed.

32. Thus, a prima facie case as in civil cases was defined by the Court of Appeal in Mrao Limited v the First American Bank of Kenya & 2 others [2003] KLR 125, (at paragraph 17) 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".

33. Applying the law to the facts of this case yields the following analysis. I have carefully analyzed the applicant's application, supporting affidavit and the annexure thereto together with the submissions as well the response, annexures and the submissions filed by the respondent.

34. The applicant seeks injunctive orders against the respondent. In particular, he prays that this court bars any registration of a transfer, lease, charge, or any other instrument pertaining to the suit property pending the hearing and determination of the suit. He also prays that the respondent be barred from trespassing, building, fencing, excavating, cultivating, demolishing, chopping off/damaging the sprouting crops, evicting and/ or erecting structures over the suit property pending the hearing and determination of the suit property.

35. The applicant filed a survey report dated 25th June 2025, which was prepared by Elite Survey. The survey report concludes that the applicant and his family have resided on the suit land since birth.

36. The Respondent, on the other hand, provided evidence of her attempts to evict the applicant for her land they do not start at the time of the suit. This evidence includes two OB records one taken in 2023 and another one in 2025. She also deponed that these acts of encroachment started immediately before she made the reports on trespass by the plaintiff onto her land, that is in 2021, and she sought the help of the police but in vain. She also provided a demand letter addressed to the applicant asking him to leave the suit property. Moreover, she provided a letter from the Area Chief detailing how the applicant herein frustrated the Respondent's efforts to have the boundary of the suit land and the adjoining applicant's land demarcated. Finally, the Respondent stated that she had filed a suit, being ELC no. E039 of 2025 seeking eviction orders against the applicant. Thus, this suit, she argued, is what triggered the instant application.

37. In my final humble consideration, whereas the applicant seeks orders against the Respondent, particularly barring registration of transfer, lease, charge or any other documents, the applicant has not demonstrated any efforts by the Respondent to transfer, lease or charge the land. However, the court granted the order of inhibition to be registered on land parcel no. BUKIRA BWISABOSA/847, inhibiting the registration of any transfer, lease, charge or any other instrument whatsoever in respect of the said parcel pending the hearing and determination of this Originating Summons.

38. Moreover, the applicant has not, equally, demonstrated that the respondent is attempting to build, fence cultivate or otherwise deal with the property as alleged by the applicant. The only action that the Respondent has attempted to effect is an eviction. Further, the eviction resulted from recent on and off encroachments by the Applicant onto the defendant's alleged parcel of land. I note that eviction is a lawful process of which the Respondent has followed due procedure in her attempt to evict the applicant and his family from her property. And the same follows the recent occupation of her land by the applicant and his resistance on the establishment of the boundary.

39. Suffice to say that the fact that the survey report produced by the applicant concludes that "the family members of our clients (the applicant herein) are believed to have resided on this plot since birth", which is nothing but mere inadmissible hearsay given that the said surveyor's services were employed by the Applicant to prepare a survey report. It was his duty to give a report on the survey but he ought to have acted independently and not to lean to one side, the plaintiff's, by endeavoring to obtain inadmissible hearsay and include it in the report, as he did.

40. Other than what this court can deduce as biased surveying and reporting of the suit land designed to influence the mind of the court to favour the applicant, the surveyor had both no business and special knowledge and information that would lead him to draw such a conclusion. Despite this erroneous finding of the surveyor therefore, it is not clear how the surveyor determined that applicant and his family have lived on the suit property since birth. Moreover, whose birth is he referring to? One that occurred during his survey exercise? This is survey conclusion is absurd! The period of the said 'birth" is also not indicated.

41. Throughout the application and the supporting affidavit, the applicant casually maintained that he, together with his family have farmed on the suit property for a period of exceeding 12 years. There was no evidence to that effect. He did not even demonstrate when he entered the suit land. This court is not convinced as much. Instead, it leaves the court to infer that indeed he entered the land about the time the Respondent complained about his encroachment onto her land.

42. For the applicant to succeed in his application, he must appear to have to have lived on and /or utilized the suit property at the time of the application. There is no prima facie case established by the applicant. The evidence of occupation and use of the land for whatever period would then be tested in the full hearing of a case of this nature (Originating Summons) as to whether the period has been at least 12 years of peaceful open use and non interruption from the Respondent. I say 'appear', because the question of whether or not the statutory period has been attained is a matter to be determined at the hearing of the suit.

43. In Tonui v Wekesa & 5 others (Environment & Land Case 23 of 2018) [2025] KEELC 1326 (KLR) the court held as hereunder:

> However, as concerns the instant matter, what is discernable is that the Applicant seems to have been in occupation and possession of the suit property for more than the requisite 12-year period. For good measure, I say "appears" because at this juncture this court is not called upon to arrive at a substantive and precipitate finding of fact or law.

> Suffice it to point out that the determination of whether or not Adverse Possession shall have been proved to the requisite standard, namely, on a balance of probabilities, shall have to await the plenary hearing.

44. From the depositions of the applicant, it is not discernible when the alleged occupation and cultivation of the suit land begun. While the respondent does not dispute the applicant's current occupation and cultivation of her land, she alleges that such occupation is recent and has never been continuous and peaceful as evidenced by the police reports, demand letter and suit instituted by the respondent against the applicant.

45. On the basis of the foregoing, I find and hold that the applicant has not established a prima facie case.

46. Having found that the applicant has not established a prima facie case, I will not proceed to analyze whether the other two limbs of the test established in Giella v Cassman Brown (supra) have been met. In Nguruman limited v Jan Bonde Nielson (supra) the Court of Appeal held that:

> If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap frogging" by the applicant to injunction directly without crossing the other hurdles in between.

47. This court therefore finds that the prima facie case having not been established, there is no need to consider whether the applicant will suffer irreparable harm which cannot be compensated by way of damages. It goes without saying that there is also no need to consider the balance of convenience since it is clear there is none to do so for.

c. Who to bear the costs of the application

48. It is trite that costs follow events, although the same are awarded at the discretion of the court. Section 27 of the *Civil Procedure Act* is instructive on this matter. The Applicant having not succeeded in this application shall bear its costs.

49. This suit is to be mentioned on 17th December 2025 to confirm compliance with Order 11 of the Civil Procedure Rules. Trial bundles should be filed and exchanged within the next twenty-one (21) days.

50. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM THE 12TH DAY OF NOVEMBER, 2025.

HON. DR. IUR NYAGAKA,

JUDGE

In the presence of,

Court Assistant: Ms. Lola

M. Owino advocate for Abisai & Co. Advocates for the Applicant

Achola advocate for Kerario Marwa & Co. Advocates the Respondent.