

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC (OS) NO. E035 OF 2025

JOANINA KATHURE1ST
PLAINTIFF

SOLOMON KABERIA2ND PLAINTIFF

FELIX THURANIRA LIMIRI3RD PLAINTIFF

LABAN MWIKA4TH PLAINTIFF

VERSUS

NELLY MWATHWANA MURIUKI [sued as the legal administrator of the
estate of MUTIGA M’KABWA – DECEASED
DEFENDANT

RULING

1. Before me is the Notice of Motion Application dated **28th October 2025** brought pursuant to the provisions of [sic] **Order 42, Rules 1 & 2 of the Civil Procedure Rules 2010; Section 68 of the Land Registration Act, 2012;** and all enabling provisions of the law and wherein the applicants have sought various reliefs.
2. The reliefs sought at the foot of the Application, which essentially ought to have been brought pursuant to the provisions of **Order 40, Rules 1 & 2 of the Civil Procedure Rules** [and not Order 42 of the Civil Procedure Rules] are as hereunder;
 - (i) *That the application be certified urgent in the first instance.*

- (ii) *That honourable court do an order for inhibition against Tigania/Tea-Scheme-Kirima/49 pending hearing and determination of the application and/or until further orders.*
- (iii) *That honourable court do issue an order of temporary injunction against the defendant from evicting, trespassing and or dealing with the subdivision and/or altering with the ownership and boundaries of the suit land L.R Tigania/Tea Scheme/Kirima/49 pending hearing and determination of the application.*
- (iv) *That honourable court do issue an order of temporary injunction against the defendant from evicting, trespassing and/or dealing with the subdivision and/or altering the ownership and boundaries of the suit land L.R Tigania/Tea- Scheme/Kirima/49 pending hearing and determination of the suit.*
- (v) *That costs to be borne by the defendant/respondent.*

3. The instant application is premised on various grounds which have been enumerated in the body thereof. In particular, it has been contended that the defendant who is the legal representative of the estate of Mutiga M’Kabwa [deceased] has since completed succession and same is now in the process of sub-dividing the suit property.

4. Furthermore, the subject application is supported by two [2] sets of affidavits, *namely*; the supporting affidavit sworn on 28th October 2025 and a supplementary affidavit sworn on 20th November 2025; and wherein the applicants have contended that same have been in occupation of the suit property for more than 12 years; and have thus acquired adverse rights to and over the Suit Property.

5. Additionally, the 1st applicant, who is the deponent of the supporting affidavit, has contended that same entered upon and commenced to reside on the suit property during the lifetime of the deceased. Moreover, it has been averred that the 2nd, 3rd and 4th applicants were born and brought up on the suit property.
6. The deponent has thereafter averred that the applicants, including herself, have continued to use the parcel of land, albeit with [sic] the consent and knowledge and without interruption of the deceased when the deceased was still alive. In addition, the deponent has also posited that their occupation on the suit property was also with the knowledge of the defendant, who is the legal administratrix [Representative] of the estate of the deceased.
7. The respondent filed a replying affidavit sworn on 11th November 2025; and to which the respondent has annexed assorted documents, including an objection to the issuance of a grant of letters of administration in respect of the estate of Mutiga M’Kabwa; a copy of the certificate of confirmation of grant issued *vide* Tigania CMC Succession Cause No. E019 of 2022, and an order directing the sub-division of the suit property in accordance with the certificate of confirmation of grant.
8. Furthermore, the respondent has averred that the 1st applicant is the wife of one Peter Limiri Mutiga, who is a son of Mutiga M’Kabwa, deceased. In addition, the deponent has averred that the husband of the 1st applicant is indeed her biological brother and that the husband of the 1st applicant is a beneficiary of the estate of Mutiga M’Kabwa [deceased].

9. On the other hand, the respondent has averred that the 2nd, 3rd & 4th respondents are the sons of the 1st applicant with Peter Limiri, who is a beneficiary of the estate of the deceased. Moreover, it has been posited that the suit property is part of the estate of the deceased and same was the subject of succession proceedings *vide* Tigania CMC Succession Cause No. E019 of 2022 and wherein a certificate of confirmation of grant has since been issued.
10. The instant application came up for hearing on 12th November 2025, whereupon learned counsel for the applicants sought time to file a further affidavit. Given the nature of the application; and the fact that same was filed under Certificate of Urgency; the court proceeded to and issued directions *inter alia* the filing of a further affidavit by the applicants; the filing of written submissions by the applicants; and the filing of written submissions by the respondents. Notably, the parties proceeded to and complied with the directions of the court.
11. Briefly, learned counsel for the applicants filed written submissions dated 20th November 2025 and wherein same has adopted the grounds contained in the body of the application; reiterated the contents of the supporting affidavit and the further affidavit; and thereafter highlighted two key issues. The issues highlighted by learned counsel for the applicants are namely, whether the applicants have established a *prima facie* case or otherwise and whether the applicants shall be disposed to suffer irreparable loss in the event the orders sought are not granted.
12. Regarding the first issue, learned counsel for the applicants has submitted that the applicants have established and proved a *prima facie* case on the basis of having been in occupation and possession of the suit property for

a duration of over 20 years. Moreover, learned counsel has posited that the occupation and possession of the suit property by the applicants has been continuous, uninterrupted and thus hostile to the rights of the deceased and by extension the defendant herein.

13. Learned counsel for the applicants has equally submitted that in an endeavor to discern whether or not a prima facie case has been established, the court is not required to undertake/conduct a mini-trial. On the contrary, it has been contended that the court needs to take a superficial look on the averments and thereafter make a finding on the existence of a prima facie case.

14. Secondly, learned counsel for the applicants has submitted that the applicants shall be disposed to suffer irreparable loss if the orders sought are not granted. In particular, it has been submitted that in the absence of the orders sought, the defendant/respondent shall proceed to levy eviction as against the applicant[s]. According to counsel, the threatened or imminent eviction [if not averted] shall subject the applicants to loss; harm and injury which is not compensable in monetary terms.

15. Flowing from the foregoing, learned counsel for the applicants has therefore invited the court to find and hold that the application is meritorious. To this end, the court has been implored to grant the reliefs sought and thereby preserve the crux of the suit pending the plenary hearing.

16. The respondent filed written submissions dated 24th November 2025; and wherein same has adopted and reiterated the contents of the replying affidavit and the annexures thereto. In addition, learned counsel has highlighted two key issues, namely; whether the applicants have established a prima facie case with probability of success or otherwise; and whether the applicants shall be disposed to suffer irreparable loss, if the orders sought are not granted.

17. As pertains to the question of prima facie case, learned counsel for the respondent has submitted that the applicants herein have neither demonstrated nor proven that their occupation of the suit property or any portion thereof has been adverse/hostile to the rights and interests of the deceased or at all. Moreover, learned counsel for the respondent has submitted that the 1st applicant is the 2nd wife of the respondent's brother, *namely*; Peter Limiri Mutiga. In this regard, it has been posited that the 1st applicant's entry onto and occupation of the suit property flows from the beneficial rights of her husband.

18. Additionally, it has been submitted that the 2nd, 3rd and 4th applicants [who are sons of the 1st applicant] have equally been on the land on the basis of being children of Peter Limiri Mutiga. In this regard, learned counsel for the respondent has doubted the proof of a prima facie case with probability of success.

19. Other than the foregoing, learned counsel for the respondent has also submitted that the suit property, which forms part of the estate of Mutiga M'Kabwa- deceased, was the subject of succession proceedings *vide* Tigania CM Succ. Cause No. E019 of 2022 and wherein a certificate of

confirmation of grant has since been issued. In addition, it has been submitted that Peter Limiri through whom the applicants herein claim or derive beneficial claims from, was given his share of the estate of the deceased. To this end, it has been submitted that the subject suit is a disguised attempt to defeat or circumvent the orders issued *vide* the succession cause.

20. *In a nutshell*, learned counsel for the respondent has submitted that the applicants have neither proved nor established a prima facie case with probability of success.

21. Regarding the question of whether the applicants shall be disposed to suffer irreparable loss, it has been contended that the applicants have neither shown nor substantiated the nature of loss that same shall suffer if the order of temporary injunction is not issued. In particular, it has been submitted that the applicants have been using their designated portion of the suit property while the respondent and her sisters have been using their designated portions, which were bequeathed unto them [daughters] by the deceased

22. Simply put, learned counsel for the Respondent has posited that the applicants are only entitled to the four [4] acres which were designated to Peter Limiri by the deceased and which has been vindicated *vide* the certificate of confirmation of grant.

23. In view of the foregoing, learned counsel for the respondent has submitted that the applicants have neither met nor satisfied the requisite

conditions to warrant the grant of the orders of temporary injunction or inhibition.

24. In this regard, the court has been invited to dismiss the application with costs to the respondent.

25. Having reviewed the application, the supporting affidavit, the replying affidavit and upon consideration of the written submissions filed by/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 applicants have established/met the requisite conditions underpinning the grant of an order of temporary injunction or otherwise; and what reliefs [if at all] ought to be granted.

26. Regarding the first issue, it is worthy to recall and reiterate that any applicant, the applicants beforehand not excepted, who is desirous to procure an order of temporary injunction is obliged to establish two critical conditions, *namely*; proof of the existence of a prima facie case with probability of success and demonstration of a likelihood to suffer irreparable loss, unless the orders sought are granted. Suffice it to underscore that the court is also bestowed with discretion to invoke and deploy the balance of convenience, where necessary. Nevertheless, it is instructive to posit that the conditions that underpin the grant of an order of temporary injunction are sequential and hence any applicant is called upon to surmount the conditions sequentially or step by step.

27. It is also imperative to highlight that where an applicant does not surmount the first hurdle, *namely*; proof of a prima facie case with probability of success, then the court is not obligated to venture forward

and interrogate whether or not there is a likelihood to suffer irreparable loss. This was the holding of the court of appeal in the case of **Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86.**

28. With the foregoing in mind, I am now well disposed to address the question whether the applicants have proved/established a prima facie case or otherwise. To start with, what constitutes a prima facie case was expounded 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).**

29. The court expounded on the ingredients [elements] 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.

30. My understanding of the excerpt above is to the effect that a prima facie case must be a genuine and arguable case. The aspect of genuineness highlights the need for the case to be bona-fide in nature and one which is not being propagated for collateral purposes. Moreover, the case must espouse arguable factual and legal issues on the face of it. Additionally, the case must not be inspired by mala-fides and ulterior motives. The case must also not constitute an abuse of the due process of the court.

31. Have the applicants demonstrated a prima facie case? The respondent filed an elaborate and comprehensive replying affidavit and wherein the respondent averred that the 1st applicant is the wife of Peter Limiri Mutiga. In addition, the respondent posited that Peter Limiri Mutiga is her brother. Additionally, it was posited that the 1st applicant entered onto the suit property by virtue of being the wife of the respondent's brother and in this regard, the 1st applicant's occupation and possession of the designated portion of the suit property is derived from the beneficial rights accruing to Peter Limiri.

32. Moreover, the respondent also explained that the 2nd, 3rd and 4th applicants are the sons of the 1st applicant and thus the children of Peter Limiri Mutiga. Moreover, it is common ground that the 2nd to 4th applicants were born on the suit property. Nevertheless, it is not lost on me that the occupation of the named Applicants on the suit property is underpinned by the fact that their father and mother reside or resided on the suit property. Without venturing to interrogate the details attendant to the 2nd and 4th respondents' occupation, it is common knowledge that the occupation is predicated on the basis of their father [Peter Limiri] being a son of the deceased.

33. Can the occupation of the 2nd to 4th applicants be deemed to be adverse [hostile] to the rights of the deceased, who was certainly their grandfather? My answer to the question is in the negative.

34. On the other hand, there is no gainsaying that the respondent has been sued in her representative capacity and thus the contention beforehand is whether the said applicants can claim adverse possession as against the respondent. Similarly, I am afraid that there is no scintilla of evidence to underpin or anchor this proposition of adverse possession.

35. Furthermore, there is the issue that the suit property was the subject of succession proceedings *vide* Tigania CM Succession cause No. E019 of 2022 and wherein a certificate of confirmation has since been issued. Instructively, the certificate of confirmation of grant shows that the suit property has been distributed to the beneficiaries of the estate of the deceased including the respondent and Peter Limiri [the husband of the 1st applicant] and the father of the 2nd to 4th applicants.

36. To the extent that the suit property has already been distributed by the probate and administration court [which position has not been challenged by the applicants], what becomes apparent is that the subject suit is a disguised attempt to circumvent or defeat the orders that were issued by the succession court.

37. In my humble view, a claimant seeking adverse possession must espouse and demonstrate certain elementary ingredients/elements. The ingredients that underpin adverse possession were expounded by the Court of Appeal in the case of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] KECA 942 (KLR)*, where the court stated thus;

36. For a claim founded on adverse possession to succeed, the person in possession must have been a peaceful and

uninterrupted user of the land. Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are important factors in a claim for adverse possession.

37. In this appeal, the appellant had the burden to prove not mere possession of the suit property, but possession that was nec vi, nec clam, nec precario. (See Kimani Ruchine -v- Swift, Rutherfords Co. Ltd. [1980] KLR 1500 and Karnataka Board of Wakf -v- Government of India & Others [2004] 10 SCC 779).

38. In this appeal, the learned judge held that the appellant's occupation of the suit property was interrupted in 1992 when he filed suit before the Bungoma Principal Magistrate's Court.

39. In Wambugu -v- Njuguna, (1983) KLR 173, this Court held that adverse possession contemplates two concepts: possession and discontinuance of possession. It was further held that the proper way of assessing proof of adverse possession is whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.

40. A person who claims adverse possession must inter alia show:

(a) on what date he came into possession.

(b) what was the nature of his possession?

(c) whether the fact of his possession was known to the other party.

(d) for how long his possession has continued and

(e) that the possession was open and undisturbed for the requisite 12 years.

38. I have reviewed the originating summons and the notice of motion application beforehand and I must say that on a prima facie basis, I am unable to discern any genuine and arguable claim for adverse possession. In this regard, I am afraid that the applicants have not established and proven a prima facie case with probability of success, which is a key and integral ingredient on the pathway to obtaining an order of temporary injunction.

39. Whereas proof of irreparable Loss is the cornerstone to the grant of an Order of Temporary Injunction, proof/ establishment of prima facies case constitutes the key to opening the Gate/ door of justice in an endeavour to actualize an Order of Temporary Injunction. Instructively, the door must be opened beforehand.

40. Moreover, I am alive to the contents of paragraph 6 of the supporting affidavit sworn on 28th October 2025, wherein the 1st applicant stated thus;

“We have continued to use the parcel with the consent and knowledge without interruption of the deceased when he was still

alive and sic the legal administratix had knowledge of our occupation.

[Emphasis supplied].

41. There is no gainsaying that the 1st applicant [who is the mother of the rest of the applicants] is confirming that their occupation, possession and use of the suit property was on the basis of consent. It is old learning that consent, permission, and license negate the crux of what constitutes adverse possession. In particular, the maxim *nec vi, nec clam, nec pricario* presupposes occupation without force, without consent and for an uninterrupted duration. [See the decision in **Mbira –V- Gachuhi (2002)1 EALR 137**].

42. In the absence of a prima facie case with a probability of success, I am afraid that the applicants herein cannot partake of or benefit from an order of temporary injunction. I beg to reiterate and repeat that proof of a prima facie case with probability of success is the gateway, [if not the key], to allow an applicant to pursue the grant of an order of temporary injunction. Without the key to open the door of the court, the issue of irreparable loss [if at all], becomes irrelevant and inconsequential.

43. Put differently, the moment a court of law comes to the conclusion that the Applicant has not proven or established a prima facie case, which is the first hurdle [legal stair case], the court is obliged to terminate the ruling and to dismiss the application. [See **Nguruman Ltd vs Jan Bonde Nielsen (2014) eKLR**].

44. Turning to the second issue, I beg to state that the applicants had sought orders of temporary injunction and an order of inhibition. The grant of an order of inhibition is dependent on proof or demonstration of some known rights and or interests under the law. Instructively, an applicant can only partake of an order of inhibition if same can prove some semblance of legal or equitable rights and not otherwise.

45. In respect of the instant matter, I am afraid that the applicants have not proven on a prima facie basis any legal or equitable rights [if at all] that same hold in respect of the suit property. Moreover, it is not lost on me that in matters pertaining to succession, the wife and children of a beneficiary of the estate [if any] can only stake a claim to the estate after the death of the Principal beneficiary under whom same claim.

46. *Put differently*, in matters pertaining to the estate of the deceased herein, the 1st applicant [as wife of Peter Limiri] and the rest of the applicants as sons of Peter Limiri, can only come into the picture after the departure of the principal beneficiary. During the lifetime of the principal beneficiary, the beneficial rights of the wife and children remain *inchoate*.

47. From the foregoing, I am at pains to discern what legal or equitable rights that the applicants may want to espouse to underpin an order of inhibition. In any event, my reading of section 68 of the Land Registration Act 2012 drives me to the conclusion that the grant of an order of inhibition is discretionary and equitable. In this regard, a court of law must interrogate the *bona-fides* of the parties and their claims before exercising equitable discretion one way or the other.

48. Finally, it is not lost to me that the succession court has already issued a certificate of confirmation of grant distributing the suit property, which is part of the estate of the deceased. The certificate of confirmation of grant arose from a consent executed and entered into by the beneficiaries of the deceased, including Peter Limiri Mutiga, who is the husband of the first applicant. The said certificate of confirmation of grant has neither been challenged nor impugned. In this regard, there is no gainsaying that the certificate of confirmation of grant needs to be implemented.

49. Can an order of inhibition be issued to defeat the implementation of a lawful court order? To my mind, a lawful court order is a command which must be implemented and enforced until and unless same has been stayed, varied and or set aside. That is not the case.

50. Consequently, and in the premises, I hold the humble view that the applicants have equally failed to establish a legal basis to warrant the invocation and deployment of the discretionary powers of this court in terms of Section 68 of the Land Registration Act, [2012].

FINAL DISPOSITION.

51. Flowing from the analysis, highlighted in the body of the ruling, it must have become apparent that the applicants have neither proven nor demonstrated a basis to warrant the grant of the orders of temporary injunction or inhibition. Pertinently, such orders do not issue on the basis of sympathy, empathy or for the mere asking.

52. In the end, and for the reasons adverted to; the final orders that commend themselves to the court are as hereunder;

- (i) **The Application dated 28th October 2025 be and is hereby dismissed.**
- (ii) **Costs of the Application be and are hereby awarded to the Respondents.**

53. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MERU THIS 27TH DAY OF
NOVEMBER 2025**

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

JUDGE

In the presence of:

Hussein - Court Assistant

Mr. Joshua Mwiti for the Plaintiffs/Applicants

Ms. Muna for the Defendant/Respondent