

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
KAKAMEGA
ELC CASE NO. E001 OF 2025 (OS)

NICHOLAS CHIKAMAI WANAMI.....
.....PLAINTIFF

VERSUS

MOSES LUSWETI MATAYO
.....DEFENDANT

RULING

Introduction

1. This ruling is in respect to the notice of motion dated 14th November 2025 filed by the plaintiff seeking temporary injunction to restrain the defendant by himself, his agents, sons and relatives and or representatives from dealing with land reference No. North Kabras/Kivaywa/465 pending hearing and determination of this suit. Further that the OCS Matete Police Station be mandated to execute this order. He also sought costs.
2. The application is predicated on the grounds on its face as well as the supporting affidavit filed by the applicant. The applicant's case is that he purchased the suit

property in 2003, constructed a home thereon worth over Kshs. 5, 000, 000/= where he resides but that the respondent through his sons, agents and relatives have been cutting down trees on his compound and tilling the suit property. That in 2020 he sued the respondent vide Butali ELC Case No. 18 of 2020 and due to jurisdiction decided to transfer it to this court. That the defendant has been bringing scouts on the land with intention to sell it.

3. The application was opposed by way of notice of preliminary objection dated 26th November 2025. The respondent stated that the suit was *res judicata* and an abuse of the court process as the applicant's case filed in Butali SPMCELC NO. 18 OF 2020 was dismissed for want of jurisdiction. That the suit is misconceived as the respondent is the sole registered proprietor of the suit property. That the suit is fatally defective for want of mandatory Land Control Board consent. That the suit is defective for want of spousal consent in respect of the parties' land sale agreement and that the originating summons does not disclose a reasonable cause of action.

4. The court has considered the application and response.

Two issues arise for the court's determination; namely whether the preliminary objection is merited and whether the applicant deserves an order of temporary injunction.

5. A preliminary objection is a pure point of law raised on the basis that the facts relied upon are not in dispute. It must be specific on the law and not be vague.

6. A preliminary objection was described in the case of **Mukisa Biscuits Limited vs West End Distributors [1969] E.A 696** as follows;

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

7. Similarly, in the case of **Hassan Ali Joho, & Another v Suleiman Said Shabal & 2 Others SCK Petition No.**

10 of 2013 [2014] e KLR the Supreme court of Kenya held as follows;

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.”

8. The preliminary objection raised in this matter is that this suit is *res judicata* and contrary to section 7 of the Civil Procedure Act.
9. Section 7 of the Civil Procedure Act bars a court from trying a suit or issue between the same parties which has with finality and on merit been determined by a competent court. To prove *res judicata*, an applicant must present evidence of pleadings of a former suit between the same parties or their privies and a decision by a competent court on merits on the said pleadings. In this case, the respondent stated that Butali SPMC ELC Case No. 18 of 2020 was dismissed for want of jurisdiction by the lower court. That means that the issue of adverse possession was not determined on merit by a competent

court. That being the case, I find and hold that this suit is not *res judicata*.

10. The respondent also raised the issue that he is registered proprietor of the suit property, hence the applicant's entry thereon was unlawful and the sale agreement lacked the blessing of consent from the Land Control Board and spousal consent. It is trite that in a claim for adverse possession, the claimant should demonstrate open, non-permissive entry, and exclusive possession as of right of the disputed land for uninterrupted period of 12 years. Spousal consent and Land Control Board consent are not elements to prove adverse possession and cannot be the basis for this court striking out this suit. Therefore, I find and hold that the preliminary objection dated 26th November 2025 lacks merit and the same is hereby dismissed.

11. On the prayer for injunction, the power of this court to grant temporary injunction is provided for in Order 40 Rule 1 of the Civil Procedure Rules as follows;

“Cases in which temporary injunction may be granted [Order 40, rule 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.”

12. Principles for grant of temporary injunction are well settled. The applicant must demonstrate prima facie case, irreparable loss and show that the balance of convenience tilts in favour of granting an injunction. (See **Giella v Cassman Brown [1973] EA 358**)

13. In the instant matter, the applicant argues that he has been on the suit property since 2003. That averment is not denied by way of replying affidavit. From the pleadings attached to the applicant's affidavit supporting the Originating Summons, which is a defence and counterclaim by the respondent, it is clear that the applicant is the one in possession of the suit property, hence the respondent sought his eviction. The fact that there was a land sale agreement between the parties is not controverted. The respondent's argument is that no consent of the Land Control Board was granted in respect of the agreement. Therefore, the fact that parties have engaged since 2003, remains undisputed. In the premises, I am satisfied that the plaintiff has demonstrated a *prima facie* case with chances of success.

14. On the question of irreparable loss, the applicant argued that he had put up a home worth 5, 000, 000/= and has been on the suit property since 2003 and therefore if the land is sold, he stands to suffer irreparable loss. I am therefore satisfied that the applicant has demonstrated an irreparable injury. The

respondent has confirmed having sold the suit property to the applicant and that no consent of the Land Control Board was granted. In those circumstances, the balance of convenience tilts in favour of grant of the orders sought.

15. In the premises, I find and hold that the notice of motion dated 14th November 2025 is merited and the same is hereby allowed as follows;

a) That pending hearing and determination of this suit, a temporary injunction is hereby issued restraining the defendant by himself, his agents, sons and relatives and or representatives from interfering, trespassing into, and or any other form of dealing with land parcel No. North Kabras/Kivaywa/465.

b) The OCS Matete Police Station is hereby mandated to execute this order.

c) The applicant is awarded the costs of the application.

16. It is so ordered

**DATED, SIGNED AND DELIVERED AT KAKAMEGA
IN OPEN COURT/VIRTUALLY THROUGH**

**MICROSOFT TEAMS VIDEO CONFERENCING
PLATFORM THIS 28TH DAY OF NOVEMBER 2025**

**A. NYUKURI
JUDGE**

In the presence of;

Mr. Ombito for the plaintiff/Applicant

No appearance for the defendant/respondent

Court Assistant: Delphine