

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**  
**ELC APPEAL NO. 7 OF 2023**

**JACKSON**

**KYALO .....APPELLANT**

**-VERSUS-**

**FRANCIS MULINGE KIITI (Suing as the administrator of the estate of BENSON KIITI KAMBA).....RESPONDENT**

*(Being an appeal from the ruling of Hon. P. N. Gesora Chief Magistrate delivered on 14<sup>th</sup> September, 2023 Makueni MC ELC Case No. E011 of 2023)*

**JUDGMENT**

**Introduction**

1. The Applicant filed an appeal to this court in which he raised the following grounds:

- 1) That the learned magistrate erred in law and in fact in failing to acknowledge that the Appellant had explained how he got into the suit parcel of land.
- 2) That the learned magistrate erred in law and in fact by issuing temporary orders that have effect of evicting the Appellant from the suit parcel of land.
- 3) That the learned magistrate erred in law and in fact by failing to take into consideration the substantial investment made by the Appellant and his congregants on the suit property.
- 4) That the learned magistrate erred in law and in fact by issuing temporary orders that have the effect of restraining the Appellant and his congregants from worshipping at the Jesus recreation center.
- 5) That the learned magistrate erred in law and in fact by failing to take cognizance of the fact that the Respondent instituted the suit in clear disregard of the provisions of Order 31 Rule 1 of the Civil Procedure Rules.

- 6) That the learned magistrate erred in law and in fact by failing to appreciate that the Appellant has been in occupation of the suit parcel of land for more than 15 years.
- 7) That the learned magistrate erred in law and in fact by failing to appreciate and consider the evidence adduced by the Appellant.
- 8) That the learned magistrate erred in law and in fact by failing to properly analyze the evidence and exhibits tendered by the parties thus arriving at the wrong decision.

### **Background**

2. The Respondent had filed a suit against the Appellant in which he sought the following reliefs:
  - a. A permanent order of injunction restraining the Defendant, his agents, employees and/or servants or any other person acting under his authority from trespassing on that parcel of land known as Makueni/Unoa/448.
  - b. An order of eviction of the Defendant and/or his agents and/or employees and/or servants or any other person acting under his authority from the whole of the parcel of land known as Makueni/Unoa/448.
  - c. An order do issue compelling the Defendant to demolish all structures erected on all that parcel of land known as Makueni/Unoa/448 within thirty (30) days from the date of judgment failure to which the Plaintiff be at liberty to demolish the same and the OCS Makueni police station to provide security.
  - d. General damages for trespass and mesne profits.
  - e. Costs and interest of the suit.
  - f. Any other and/or further relief that this court may deem fit to grant.

3. The Respondent contemporaneously filed a notice of motion dated 14<sup>th</sup> April, 2023 in which he sought injunctive orders restraining the Appellant from interfering with LR No. Makueni/Unoa/448. This application was placed before the trial magistrate who certified it urgent and fixed it for inter partes hearing on 10<sup>th</sup> May, 2023.
4. On 10<sup>th</sup> June, 2023, the counsel for the parties indicated that they wished to file written submissions. The matter was scheduled for mention on 8<sup>th</sup> June, 2023 for further orders. It would appear that the trial magistrate was not sitting on that date. A representative of the Respondent took a mention date at the registry which was set on 29<sup>th</sup> June, 2023. In the meantime the Respondent had filed submissions in respect of notice of motion dated 14<sup>th</sup> April, 2023 on 8<sup>th</sup> June, 2023.
5. On 19<sup>th</sup> June, 2023, the Respondent filed another notice of motion dated 16<sup>th</sup> June, 2023 seeking same injunctive orders as in the notice of motion dated 14<sup>th</sup> April, 2023 but this time there was an additional prayer for the court to make a site visit to the suit property. The trial magistrate certified the application urgent and granted interim injunction and set inter partes hearing for 29<sup>th</sup> June, 2023.
6. On 29<sup>th</sup> June 2023, the advocate for the parties agreed to file written submissions. After submissions were filed, the trial magistrate delivered a ruling which is the subject of this appeal.

### **Parties Submissions**

7. The parties were directed to dispose of the appeal by way of written submissions. The Appellant filed his submissions dated 12<sup>th</sup> September, 2025. The Respondent filed submissions dated 8<sup>th</sup> August, 2025.

### **Appellant's submissions**

8. The Appellant submitted that if the trial magistrate's ruling was allowed to stand, it would cause great injustice to the Appellant who has built a church

on the disputed portion of the suit property. He submitted that he will suffer substantial loss. He relied on the case of **Tropical Commodities Suppliers Limited and others –vs- International Credit Bank Ltd (In liquidation) (2003) UGH 80** where it was held as follows:

**“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal”.**

9. The Appellant contends that he has dug a borehole within the suit property which benefits the local community and that if the injunction was let to stand, it will amount to an eviction which will leave the congregants without a place of worship.

10. The Appellant further states that he has acquired the suit property through adverse possession having occupied the same for over 15 years. He relied on Black’s Law Dictionary which defines adverse possession as follows:

**“the enjoyment of real property with a claim of right when that enjoyment is opposed to another person’s claim and in continuous hostile, open or notorious”.**

11. The Appellant also relied on the case of **Wambugu –vs- Njuguna (1983) KLR 17-2, Ramco Investments Ltd –vs- Uni-Drive in – Theatre Ltd (2014) eKLR** and **Mbira –Vs- Gachui (2002) 1 EALR 137** which all deal with adverse possession.

### **Respondent’s Submissions**

12. The Respondent submitted that the trial magistrate exercised his discretion judiciously in granting the injunctive orders. The Respondent submitted that he had met all the conditions set out in the case of **Giella –vs- Cassman Brown & Co. Ltd (1973) EA 358**.

13. The Respondent also relied on the case of **Mrao Ltd –vs- First American Bank of Kenya Limited (2003) eKLR** where a prima facie case was defined as follows:

**“...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 legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.**

### **Analysis and Determination**

14. The duty of a first appellate court was set out in the famous case of **Selle –vs- Associated Motor Boat Co. Ltd** and has subsequently been re-stated in various court of appeal decisions. In the case of **Abok James Odera t/a A. J. Odera & Associates –vs- John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR**, the duty of a first appellate court was stated as follows:

**“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, reassess and re-analyze the extracts on record and then determine whether the conclusions reached by the learned judge are to stand or not and give reasons either way”.**

15. I have carefully gone through the record of appeal which does not contain the plaint filed in the lower court. That notwithstanding, the only issue for determination in this appeal is whether the Respondent has met the threshold for grant of a temporary injunction.

16. The Respondent was bound to establish the condition set out in the case of **Giella-vs- Cassman Brow & Co. Ltd (1973) EA 358** that is that he had a prima facie case with probability of success, that he will suffer loss which will not be compensated in damages and if the court was to be in doubt, it would decide the application on a balance of convenience.

17. It was the Respondent's contention in the lower court that the Appellant had put up a temporary church on part of the suit property without any colour of right. The Respondent had asked the Appellant to move out in vain. When the Respondent filed a suit against the Appellant, the Appellant went on with putting up permanent structures without waiting for the decision of the suit filed against him.
18. In response to the Respondent's application, the Appellant merely stated that he was not putting up a permanent building. He stated that he was putting up a perimeter fence to prevent water and rodents accessing the church compound. He stated that rodents were destroying church equipment and that is why he was putting up a permanent wall around the church compound.
19. Though the trial magistrate in the impugned ruling stated that the Appellant had not stated on how he came to be on the suit property, a look at the Appellant's replying affidavit in opposition to the Defendant's application dated 14<sup>th</sup> April, 2023 had explained the basis on which he was on the suit property. This replying affidavit was annexed as an exhibit in the notice of motion on dated 16<sup>th</sup> June, 2023.
20. The Appellant had not filed any defence to the Respondent's claim. In the application which resulted in the impugned ruling, the Respondent annexed photographs which showed construction of a permanent structure which was going on. This construction was going on after the filing of the suit by the Respondent. In the application dated 14<sup>th</sup> April, 2023 the Respondent had annexed photographs showing a building coming up within the iron sheet structure being used as church. This is what prompted the Respondent to file the second application in which he sought injunctive orders to stop the ongoing construction and this is why he asked the court to visit the site though this appears not to have been done.
21. The Respondent had demonstrated that he was one of the administrators of the estate of his late father Benson Kiiti Kamba who is the registered owner

of LR No. Makueni/Unoa/448 where the church of the Appellant is claiming a portion measuring 150ft x 100ft.

22.The Respondent further demonstrated that there was an ongoing construction of a permanent structure on part of the suit property. Whereas the Appellant did not comment on the ongoing construction, he stated that what he was doing was constructing a perimeter fence to prevent rodents from accessing the church premises.

23.The Appellant had merely stated that the plot where his church is built was gifted to him by the brother to the Respondent who was one of the administrators of the estate of the registered owner. This being the case, the Respondent had demonstrated a prima facie case with probability of success.

24.The permanent structures which are being put up by the Appellant are changing the character of the suit property. The appellant appeared to be intent on proceeding with the construction. The purpose of an injunction is to preserve a property which is subject of the suit. The fact that the Appellant will compensate the Respondent is not a ground for denying injunctive orders.

25.The Respondent is the one legally to protect the estate of his late father. The property belongs to the estate until the alleged rights of the Appellant are determined. The balance of conviniency therefore tilts in favour of the Respondent.

**Disposition**

26.Despite the fact that the trial magistrate erroneously observed in his ruling that the Appellant had not stated how he came to be on the suit property, I find that the injunction given was proper. I therefore find that this appeal lacks merit. The same is dismissed with costs to the Respondent. Consequently, the stay orders granted by this court on 5<sup>th</sup> June, 2024 are discharged.

.....

**HON. E. O. OBAGA**

**JUDGE**

**JUDGMENT DATED, SIGNED AND DELVIERED VIA MICROSOFT  
TEAMS THIS 1<sup>ST</sup> DAY OF DECEMBER, 2025.**

In the absence of parties who were aware of date of delivery of judgment.

Court assistant – Steve Musyoki

ORIGINAL