

REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT AT KISUMU

ELC (OS) CASE NO.E040 OF 2025

JOSEPH ONYANGO OCHIENG APPLICANT

VERSUS

BARNABAS SIMBO1ST RESPONDENT

JOHN PAUL OCHIENG2ND RESPONDENT

R U L I N G

The application before court for determination is the Notice of Motion dated 18th July, 2025 expressed to be brought pursuant to the provisions of Order 40 Rule 1(a) of the Civil Procedure Rules and section 63(e) of the Civil Procedure Act. The application seeks for an order of temporary injunction to issue restraining the Defendants from evicting the Applicant, cultivating, selling, transferring disposing of, dealing and/or interfering whatsoever with part of the suit property known as KISUMU/KANYAKWAR “A”/1942 a sub-division of KISUMU/KANYAKWAR “A”/824 occupied by the Applicant pending the hearing and determination of the suit. The application was supported by the averments in the Supporting Affidavit sworn by the Applicant on 16th July, 2025 and the annextures.

The application was opposed vide the averments in the Replying Affidavit of the 1st Defendant sworn on 2nd October, 2025 and 2nd Defendant sworn on 15th August, 2025.

The application was heard by way of oral submissions.

The substantive relief sought is an order of temporary injunction. The grounds for grant of temporary injunction as stated in the case of Giella vs Cassman Brown Co. Ltd (1973) 358 are that the applicant must demonstrate a *prima facie* case with a probability of success, an interlocutory injunction will not normally be granted unless the Applicant would suffer irreparable injury which would not adequately be compensated in damages and that when the court is in doubt, it will decide the application on a balance of convenience.

The Applicant's case is that he bought part of the suit land before it was sub-division sometimes in 2008 when the land was known as KISUMU/KANYAKWAR "A"/824 now sub-divided to give rise to KISUMU/KANYAKWAR "A"/1942. That he immediately took possession and built his business premises known as "Obunga Water & Sanitation Office" thereon.

That he continued running the said business on the premises until July, 2025 when he was served with a demand letter by the

Advocates of the 2nd Defendant accusing him of encroachment. That he then found out that the 1st Defendant had sold the entire land to the 2nd Defendant. That the 2nd Defendant was in the process of evicting him out of the portion of the suit land and had already blocked him from accessing the land.

That todate, the Applicant has been in occupation of his portion of the suit land for 17 years continuously, openly and without any interruption. That the Applicant has since commenced a suit for adverse possession. That the applicant is bound to suffer irreparable loss as his business is domiciled on the suit parcel.

It was submitted on behalf of the applicant that the applicant has an interest in the suit land and that if he is evicted from the land, he will suffer irreparable loss and that the Originating Summons for adverse possession will be rendered nugatory.

The Defendant's response as contained in the Replying Affidavit was that the 1st Defendant has never entered into a land sale agreement with the Plaintiff and that the Plaintiff's entry and possession of the portion of the suit land was with his (1st Defendant's permission).

That the Applicant only started to exercise rights that were adverse to his interest on the said portion of land sometime in the year

2021 after the 1st Defendant informed the applicant of his intention to dispose of the suit property. That the 1st Defendant sold and transferred the suit land to the 2nd Defendant on the understanding that the Plaintiff would vacate the portion in dispute.

That the 2nd Defendant is the absolute registered proprietor of the suit land with effect from 19th June, 2024. That the 2nd Defendant took possession of the land upon purchase, erected a fence around it and issued notices to tenants thereon on change of ownership. That the 2nd Defendant is a purchaser for value without any notice of prior transactions or interests.

That the Applicant has failed to demonstrate a *prima facie* case with a probability of success against the 2nd Defendant.

It was submitted on behalf of the Defendants that the sale between the Plaintiff and the 1st Defendant has been denied by the 1st Defendant as a work of forgery. That the Plaintiff does not stay on the suit land but only runs a business thereon which is a commercial interest that can be adequately compensated by way of damages if the case of the Plaintiff succeeds. That the Applicant has not surmounted the grounds in Giella -vs- Casman Brown so as to have the orders sought.

I have considered the application and all the material placed before court in support thereof. I have considered the Replying Affidavit and the submissions made.

It is not disputed that the Applicant is in occupation of the suit land. While he claims to have entered the land as a purchaser of the portion of the suit land that he claims, the 1st Respondent claims that the Applicant entered and occupied the same with his (1st Defendant's) consent which was based on a gentleman's agreement and owing to the friendship they had at the time.

The suit is based on the doctrine of Adverse possession for which the foundation is the applicant's occupation of the land. Unless the defendants are restrained from terminating the occupation, the applicant's claim if any, based on adverse possession will be negatively impacted and or rendered nugatory. The issues of how the Plaintiff entered the suit land and took possession, the manner and duration of occupation are matters to be interrogated and proved in the hearing.

The purpose of an order of temporary injunction as provided for in Order 40 Rule 1 is to safeguard the suit property from being wasted, damaged or alienated pending the determination of the suit or further orders of the court.

I find that the Applicant who is in occupation of the portion of the suit land has demonstrated sufficient grounds for issuance of the orders sought.

The application has merit and is hereby allowed in the terms that: -

1) A temporary order of injunction is hereby issued restraining the Defendants, their servants and/or agents jointly and severally from evicting the applicants, cultivating, selling, transferring, disposing of, dealing and/or interfering whatsoever with part of the suit property known as KISUMU/KANYAKWAR "A"/1942 a subdivision of KISUMU/KANYAKWAR "A"/824 occupied by the applicant pending the hearing and determination of the suit.

2) Each party to bear own costs of the application.

Orders accordingly.

Ruling read and signed at Kisumu and delivered virtually this 4th day of December, 2025.

E. ASATI

JUDGE.

In the presence of:

Maureen: Court Assistant.

Akinyi for the Applicant.

No appearance for the Respondents.