

plaintiffs' late father Idris Mohamed Musa, purchased Plot No. 829/I/MN, which is adjacent to the suit property from Mrs. Swafiya Mohammed Noor. It was further contended that when he took possession of Plot No. 829/I/MN, he also took possession of the suit property which was enclosed within the existing boundary wall.

3. The plaintiffs claim to have continuously and exclusively occupied the suit property for over 32 years until the defendant interfered with it by destroying parts of the boundary wall. The plaintiffs are apprehensive that the defendant has commenced preparations for construction on the suit property. The court was urged to restrain the defendant from further trespassing onto the suit property. The plaintiffs claimed that they would suffer irreparable loss that cannot be adequately compensated by an award of damages. It was further argued that the balance of convenience lay in the plaintiff's favour.

B. DEFENDANT'S RESPONSE

4. The defendant filed a replying affidavit sworn by Rajesh Hirji Halai on 15.10.2024 in opposition to the application. He contended that he was the registered proprietor of the suit

property, following a transfer from Ramilaben Hirji Halai, who had it transmitted to him from Hirji Ramji Halai his late father. He further contended that his late father purchased the suit property in a public auction pursuant to a court order in Mombasa SRMCC No. 1863 of 2013 on 17.01.2014 and became the registered owner on 19.02.2014 pursuant to a vesting order. He argued that the suit was incompetent since the limitation period of 12 years had not lapsed since his late father became the registered owner of the suit property. In addition, the defendant maintained that he is in possession of the suit property and had secured it with a perimeter wall.

C. DIRECTIONS ON SUBMISSIONS

5. When the application was listed for *inter-partes* hearing, it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows the plaintiffs filed their submissions dated 19.11.2025 while the defendant filed his submissions dated 22.12.2025.

D. ISSUES FOR DETERMINATION

6. The court perused the application, the response thereto and the material on record as well as the submissions made by counsel. The court is of the view that the following key issues arise for determination herein:

- a. *Whether the plaintiffs have made out a case for the grant of the interim injunction sought*
- b. *Who shall bear the costs of the application*

E. ANALYSIS AND DETERMINATION

- a. *Whether the plaintiffs have made out a case for the grant of the interim injunction sought*

7. The court has considered the material and submissions on record on this issue. The principles for the grant of an injunction were set out in the case of **Giella vs Cassman Brown & Co Ltd (1973) EA 358** as follows:

- a. *First, the applicant must demonstrate a prima facie case with a probability of success at the trial.*
- b. *Second, an injunction will not be normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages.*
- c. *Third, if the court is in doubt on the second principle it shall determine the matter on a balance of convenience.*

8. The material on record shows that Hirji Ramji Halai was vested with Plot No. 830/I/MN on 19.02.2014 following a public action held on 17.01.2014 pursuant to warrants of attachment and sale passed in Mombasa SRMCC 1863 of 2013. It is the defendant's case that Hirji Ramji Halai transmitted the suit property to Ramilaben Hirji Halai, who then transferred it to him on 29 December 2022. The defendant insisted that he was in possession of the suit land and had secured it with a perimeter wall.
9. The plaintiffs, on the other hand, maintained that their late father bought Plot No. 829/I/MN and took possession of it, including a section of the suit property which was enclosed within the existing boundary wall. In **Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125** it was held,

"In civil cases, a prima facie case 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable

case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

10. In considering whether the plaintiffs have a prima facie case, the court takes caution not to be seen to make a final finding based on the material before it, in view of the fact that the main suit is still pending before it. The plaintiffs have insisted they are in physical occupation of the suit land by virtue of it being adjacent to Plot No. 829/I/MN. Further, they claim that there is a boundary wall within the suit land, which the defendant has since destroyed and is in the process of commencing construction. Despite the said allegations, there is no evidence attached to the application that supports this claim.

11. It is the finding of this court that the plaintiffs have failed to demonstrate a prima facie case with a probability of success. As presented by the plaintiffs, there is no existence of bona fide question as to the existence of the plaintiffs' rights insofar as the suit land is concerned. While discussing the three pillars

upon which an order of injunction is granted, the **Court of Appeal in Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] KECA 606 (KLR)** held,

“It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially....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...”

12. This court finds that the plaintiffs have failed to prove that they have a right to be protected by an order of temporary injunction pending the hearing and determination of the suit. As held in **Nguruman Limited (supra)**, the plaintiffs must show *“a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”* Without establishing a prima facie case, the court will not consider

whether irreparable injury and balance of convenience have been demonstrated, and the application must fail.

b. Who shall bear the costs of the application

13. Although the costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded the costs of an action unless the court, for good reason, directs otherwise. In the case of *Giella vs Cassman Brown & Co Ltd (supra)*, it was held that the appropriate order to make in an application for injunction is for costs to be in the cause where the order is granted. However, where the application is dismissed, costs should be awarded against the applicant. The court finds no good reason to depart from the general rule. As a result, costs shall be awarded to the defendant.

F. CONCLUSION AND DISPOSAL ORDER

14. The upshot of the foregoing is that the court finds no merit in the plaintiff's application for interim orders. As a consequence, the court makes the following orders for disposal thereof:

a. The chamber summons dated 22.08.2025 is hereby dismissed.

b. Costs shall be borne by the plaintiffs.

Ruling dated and signed at Mombasa and delivered virtually via Microsoft Teams on this 29th day of January 2026.

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Y. M. ANGIMA

JUDGE

In the presence of:

Gillian - Court assistant

Mr. Rotich for the plaintiffs

Mr. Omollo for the defendant