

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
KAKAMEGA
ELCOS NO. E013 OF 2025

ASMIN NJEREMAN ESHIKUMO AMIS1ST
APPLICANT

THOMAS LUTTA MACHWANDA.....2ND
APPLICANT

-VERSUS-

GABRIEL SAKWA NYAPOLA.....1ST
RESPONDENT

ZACHARY WESONGA NYABOLA.....2ND
RESPONDENT

RULING

Introduction

1. Before court is a Notice of Motion application dated 30th April 2025 filed by the applicant seeking the following orders:

a) Spent.

b) Spent.

c) Spent.

d) That an inhibition and or prohibitory order be issued against the suit title Nos E. Wanga/Lubinu/6296 to protect and preserve it pending the hearing and determination of this suit.

e) That a temporary order of injunction be issued against all the respondents and or through their agents, relatives, employees and or servants, from selling or offering for sale, alienating, transferring, laying claim to, trespassing onto, utilizing, developing, carrying out any works on, uprooting or damaging the applicants' crops thereon and or interfering with the applicants' peaceful occupation, use and possession of the suit parcel of land Nos. E/Wanga/Lubinu/6296 whose boundaries are clearly delineated pending the hearing and determination of this suit.

f) That in the alternative, the status quo prevailing on the suit parcel of land No. E/Wanga/ Lubinu/6296 be maintained pending hearing and determination of this suit.

g) Costs of this application be in the cause.

2. The application is predicated on the supporting affidavit of the applicants sworn on 30th April 2025.

The applicants' case is that vide agreement dated 23rd December 1975, the late ASMAN ESHIKUMO SAKWA, the 1st applicant's husband purchased parcel No. E/ Wanga/ Lubinu/837 from the late Nyapola Mbatu the respondents' father, whereof he paid full consideration. That the purchaser's family took exclusive possession, occupation and use of the said land from 1976 to 6th January 2004 when they sold a portion of the land to the 2nd applicant and handed him vacant possession. That from 2004 to date, the 2nd applicant continues to be in possession of the suit property where he has planted crops including nappier grass.

3. That notwithstanding the foregoing, the respondents carried out succession of the state of the late Nyapola Mbatu and subdivided parcel No. E/ Wanga/ Lubinu/837 to create titles including parcel No. 3879 which was further subdivided into several parcels including parcel No. 5797 which was later subdivided to create parcel No. 6296, in a bid to defeat the applicants' claim.

4. That having purchased and exclusively occupied the suit property since 1976, they have acquired the same by adverse possession. That the respondents have been trespassing on the suit property and uprooting their crops so as to defeat their claim. That they were apprehensive that the respondents may subdivide the suit property or eject them therefrom. They attached agreements dated 23/12/1975 and 6/1/2004 and green cards.

5. The respondents filed a replying affidavit dated 12th May 2025. They stated that the applicants have never occupied the suit property.

6. That the agreement dated 23/12/1975 purportedly signed by Nyabola Mbatia is a forgery as the owner of National identity card number 5130747 is one Michael Malala Wainingu son of John Wainingu and Juliana Wanga born on 01/10/1959.

7. That the applicants purport to claim land measuring 36 feet by 15.5 feet yet the suit property measures 100 feet by 50 feet which is 0.05 hectares. That the

entire parcel is occupied by the respondents. That they cannot be restrained to use a parcel that is bigger than what is sought. That the applicants have not provided evidence of occupation or crops on the suit property and intend to use the orders of this court to stay on the suit property. They attached a photograph.

8. In a rejoinder, Asmin Njeremani Eshikumo Amis filed a supplementary affidavit dated 9th June 2015. She stated that the agreement produced was genuine and was made before a village elder and other witnesses. That Asman Eshikumo Sakwa put up a permanent residential house and poshomill on the suit property. That the 1st respondent sued her son in Mumias SPMC NO. 172 OF 2015 seeking injunction, and that in his own affidavit admitted that Ismail Sakwa had a house and a permanent toilet on the suit property. That case No. 172 of 2015 was dismissed for want of prosecution on 27/11/2017 and that they continued in occupation of the suit property. That the respondents then filed Mumias SPMELC Case No. 37 of 2023

whereof the court ordered the County surveyor and Land Registrar to determine which party occupies which portion. That prior to the report the respondents cut down their nappier grass. That they withdrew the suit for want of jurisdiction.

9. Parties were directed to file submissions in regard to the application. On record are the applicant's submissions dated 15th March 2025 which the court has duly considered.

Analysis and determination

10. The court has carefully considered the application, the response thereto as well as submissions and authorities cited. In my considered view, the issues that arise for this court's determination are:-

a) Whether the applicant deserves orders of inhibition.

b) Whether the applicant has met the conditions for grant of temporary injunction, and

c) Whether orders of status quo should issue in the alternative.

11. Section 68 of the Land Registration Act grants this court the power to make an order of inhibition as follows;

“The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.”

12. An order of inhibition is in the nature of a temporary injunction as it restrains the registration of dealings on a title for a period of time. Besides, in so far as orders of status quo limit parties from using the suit property, the same are also in the nature of a temporary injunction.

13. Order 40 Rule 1 of the Civil Procedure Rules grants this court the jurisdiction to grant temporary injunction where the applicant demonstrates that the subject matter of the suit is at risk of waste, damage, alienation, disposal or sale in execution of a decree; and that if an injunction is not granted, there would likely be a delay or obstruction in the execution of

any decree that may eventually be passed in favour of the plaintiff. To obtain a temporary injunction, it is trite that an applicant ought to demonstrate a *prima facie case* with chances of success; imminent irreparable loss that may not be atoned in damages and where the court is in doubt, it ought to decide the matter on a balance of convenience. (**See Giella v Cassman Brown [1973] EA 158**).

14. Principles for grant of temporary injunctions were also stated in the case of **American Cyanamid Co vs. Ethicon Limited 1975 AAER 504**, where the court enumerated elements to be satisfied before grant of a temporary injunction as follows;

- a) There must be a serious/fair issue to be tried;**
- b) Damages shall not be an adequate remedy**
- c) The balance of convenience lies in favour of granting or refusing the application.**

15.A *prima facie* case was described in the case of **Mrao Ltd v First American Bank of Kenya and 2 Others (2003) KLR** as follows;

“A *prima facie* case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

16.The concept of irreparable injury seeks to protect the *prima facie* case established by the applicant from being rendered nugatory, therefore a *prima facie* case must first be established before the demonstration of an irreparable injury. To demonstrate irreparable injury, an applicant must show that the injury likely to be suffered cannot be adequately compensated by costs. In the case of **Pius Kipchirchir Kogo Vs. Frank Kimeli Tenai [2018] e KLR**, the court sated as follows;

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

17. In the case of **Pius Kipchirchir Kogo v Frank Kimeli Tenai** (supra), the court held that for the balance of convenience to tilt in favour of the applicant, they must demonstrate that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction, will be greater than that which is likely to arise from granting it.

18. In the instant case, the respondents are the registered proprietors of the suit property. Title is protected under sections 24, 25 and 26 of the Land Registration Act which provide as follows;

“Interest conferred by registration.

24. Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. Rights of a proprietor.

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26. Certificate of title to be held as conclusive evidence of proprietorship.

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

19. Therefore, a registered proprietor of land has absolute and indefeasible rights over their land, which rights cannot be suspended without lawful justification.

20. Registered land is subject to overriding interests, that may not be noted in the register. Section 28 (h) and (j) of the Land Registration Act provides for overriding interests to include rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription and any other rights provided under any written law.

21. Therefore, prescriptive rights created under the Limitation of Actions Act including claims of adverse possession are overriding interests which registered land is subject to. Hence an applicant seeking to obtain an order of inhibition and or injunction in regard to land registered in the name of another person on grounds that they have a claim of adverse possession over the suit property, must first demonstrate a prima facie case of adverse possession with chances of success.

22. In the instant case, the applicants stated that the suit property was originally registered in the name of the late Nyapola Mbatu who sold "a portion" to Asman Eshikumo Sakwa who later sold "the said portion" to Thomas Lutta Machwanda in 2004. This therefore means that the estate of Asman Eshikumjo Sakwa has no known legal or equitable interest in the suit property, as what is alleged to have been purchased was sold to the 2nd applicant.

23. Adverse possession claims are anchored on exclusive possession by a trespasser and or the trespasser's dispossession of the suit property from the true owner for a statutory period of 12 years. In the instant case, although the applicants alleged occupation, no evidence was provided to support not just occupation but also a 12-year occupation, yet occupation was vehemently contested. Besides, the authenticity of the sale agreement relied upon by the applicants herein was challenged on the registration details of the holder of National identity card number 5130747, which the applicants did not attempt to rebut by availing evidence from Registrar of persons. While the claim herein is not based on

enforcement of a sale agreement, the allegations of forgery which are not rebutted with a reasonable explanation, touches on the credibility of the applicants' case and evidence.

24. For the above reasons, I find and hold that the applicant has failed to demonstrate a *prima facie* case with chances of success and therefore they do not deserve the orders sought. In the premises, I find and hold that the application dated 30th April 2025 lacks merit and the same is hereby dismissed with costs.

25. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA
IN OPEN COURT/VIRTUALLY THROUGH
MICROSOFT TEAMS VIDEO CONFERENCING
PLATFORM THIS 11TH DAY OF FEBRUARY 2026**

**A. NYUKURI
JUDGE**

In the presence of;

2nd applicant in person

No appearance for the 1st applicant

No appearance for the respondents

Court Assistant: Delphine