

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELCLC E027 OF 2025

JOSEPH TOM NYAMIRA PLAINTIFF

VERSUS

REBECCA GESARE ARAKA & JARED OYAGI ARAKA (Sued as the Legal

Representatives of the Estate of Benina Bosibori Araka)

..... 1ST DEFENDANTS

SOLOMON OIGO NYAMBANE 2ND DEFENDANT

RULING

1. The suit herein was commenced through a plaint filed on 30 July 2025. Together with the plaint, the plaintiff filed an application for injunction and it is that application which is the subject of this ruling.
2. In the plaint, the applicant avers to be the owner of the land parcel West Kitutu/Bomatara/1086. He avers that he purchased this land from the previous owner, one Araka Chweya (now deceased), in 1973. He pleads that they obtained consent of the Land Control Board; that the land was transferred to him; and he was issued with a title thereto on 21 March 1974. He pleads that he was working with a bank at Bungoma and he arranged with friends of his to oversight the land which is in Kisii. In 2007, he relocated to the USA after obtaining a green card. In 2013, he sent someone to check on the land and he found a temporary structure. On further investigation, it was discovered that Benina Bosibori Araka (now deceased) the wife of Araka Chweya, had obtained registration of the said land parcel No. 1086 in the year 2010, and she proceeded to subdivide the land into two, bearing the numbers West Kitutu/Bomatara/4318 and 4319 (parcels No. 4318 and No.4319). She then transferred the parcel No. 4319 to the 2nd defendant. It is his contention that the said Benina Bosibori obtained title through fraud, inter alia for initiating a claim for adverse possession in the Land Disputes Tribunal without notice to him. In the suit, he inter alia seeks a declaration that he is the rightful owner of the land parcel No. 1086 and cancellation of the titles to the parcels No. 4318 and 4319.

3. In the application for injunction, the applicant seeks orders to restrain the defendants from selling, leasing, renting, transferring, charging, or mortgaging the land parcels No. 4318 and 4319 pending hearing and determination of the suit. In his supporting affidavit, he has more or less reiterated the averments in the plaint which I have already set out above. He has added that he had an earlier suit, Kisii ELC No. 261 of 2013, which he withdrew owing to some technicalities.
4. The joint 1st defendants filed a replying affidavit sworn by Rebecca Gesare to oppose the motion. Inter alia, it is deposed that succession for the estate of Benina is yet to be done. It is further deposed that Benina obtained title after successfully claiming the land by way of adverse possession before the Land Disputes Tribunal, which orders have not been challenged on appeal. It is contended that the applicant has not mentioned that he has another pending suit i.e Kisii ELC No. 187 of 2013. There was also filed a preliminary objection, inter alia that the suit is time barred; that the suit is sub judice given the case Kisii ELC No. 187 of 2013; and that the plaintiff ought to have challenged the adoption of the order (the order of the tribunal).
5. The applicant filed a supplementary affidavit where he inter alia deposed that he only filed one plaint, which had initially been given the number Kisii ELC No. 187 of 2013 but was renumbered Kisii ELC No. 216 of 2013. He has added that the Land Disputes Tribunal did not have jurisdiction to determine a case of adverse possession and that he only came to be aware in 2013 when he filed the first case.
6. Counsel filed written submissions which I have taken note of. At the hearing of the application, counsel for the applicant submitted that he has withdrawn the application against the 2nd defendant and therefore the application is only as against the 1st defendants.
7. As I mentioned earlier, what is before me is an application for injunction and I stand guided by the principles in the case of *Giella vs Cassman Brown (1973) EA 358*. One needs a prima facie case with a probability of success; demonstrate loss that may not be made good by an award of damages; and where the court is in doubt it will decide the application on a balance of convenience.
8. From the material so far presented, I have seen the title that was issued to the applicant dated 21 March 1974 in respect of the land parcel West Kitutu/Bomatara/1086. It would appear that Benina (now deceased) filed a suit before the Land Disputes Tribunal to claim adverse possession and an award was made in her favour, and she thus became registered as proprietor of this land on 22 December 2010. The applicant did not participate in the tribunal proceedings, his position being that he was not served. I have looked at the

tribunal proceedings and the record indeed shows that he was never served. What I see is that the members of the tribunal recorded that the applicant could not be traced and they opted to proceed in his absence. In addition, the applicant contends that the tribunal did not have jurisdiction in the matter and I think he has an arguable point. Section 3 of the now repealed Land Disputes Tribunal Act provided as follows on the jurisdiction of the tribunal :

3. (1) Subject to this Act, all cases of a civil nature involving a dispute as to—

(a) the division of, or the determination of boundaries to land, including land held in common;

(b) a claim to occupy or work land; or

(c) trespass to land,

shall be heard and determined by a Tribunal established under section 4.

9. I do not see in the above Section the jurisdiction to hear a case of adverse possession and I think the applicant raises a genuine issue in urging that the award of the tribunal may have been made out of jurisdiction. The 1st respondents urge that the applicant ought to have appealed the award. Well, the applicant says he was not aware of the proceedings, and I think that the issue of whether or not he ought to have appealed, given those circumstances, is not an issue that I can conclusively make determination at this stage but is one to be determined at the hearing of the case. So too the issue that the suit is time barred for reason that the applicant may very well benefit from the extension of time provided in Section 26 of the Limitation of Actions Act, Cap 22, Laws of Kenya, which inter alia provides that in cases of fraud, time starts running from the discovery of the fraud. That can only be determined after taking evidence. It is of course raised that there is a pending suit but I am persuaded that the applicant has adequately responded to that by his deposition that there was only one suit which was renumbered.
10. My view is that given the fact that he was registered as proprietor of the land parcel West Kitutu/Bomatara/ 1086, and the doubt as to whether the tribunal had jurisdiction to award Benina the suit land by way of adverse possession, I am persuaded that the applicant has a prima facie case with a probability of success. I am also persuaded that if the joint 1st defendants are not restrained from dealing with the land parcel West Kitutu/Bomatara/4318, they may proceed to enter into dispositions which may make the subject matter of the suit unavailable, leading to irreparable loss upon the applicant.

11. Given the above circumstances, I am persuaded that the application for injunction is merited. The applicant withdrew the application against the 2nd respondent and therefore I will only issue orders of injunction against the 1st defendants in the following terms :

- (i) That the 1st defendants are barred by an order of injunction from selling or charging the land parcel West Kitutu/Bomatara/4318 or entering into any registrable disposition, until this case is heard and determined.
- (ii) That the 1st defendants are barred by an order of injunction from constructing or further constructing, or making any structures or planting permanent crops on the land parcel West Kitutu/Bomatara/4318, pending the hearing and determination of this suit.
- (iii) That an order of inhibition is hereby issued barring the registration of any disposition in the register of the land parcel West Kitutu/Bomatara/4318.
- (iv) That costs of the application will be costs in the cause.

12. It is so ordered.

DATED AND DELIVERED THIS 11 DAY OF FEBRUARY 2026

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Nyambati for the 1st defendants/respondents

No appearance on the part of Mr. Juma for the plaintiff/applicant

No appearance on the part of the 2nd defendant

Court Assistant – Michael Oyuko