

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ELC SUIT NO. 044 OF 2025 (OS)

**IN THE MATTER OF LIMITATION OF ACTION ACT CHAPTER 22
LAWS OF KENYA**

**IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION
PURSUANT TO SECTION 38 OF THE LIMITATION OF ACTION
ACT**

AND

**IN THE MATTER OF LAND PARCEL WAWARE
SOUTH/SAKWA/285**

**BETWEEN GEORGE COLLINS OUMA (Suing on behalf
of the Estate of Samwel Odera Ogara-
deceased).....APPLICANT**

VERSUS

**OTIENO FRANKLIN
OMONDI.....RESPONDENT**

RULING

**(On whether the applicant should be granted temporary
injunctive and inhibitory orders)**

The application

1. The applicant filed a Notice of Motion which he brought under certificate of urgency. The Motion was dated 29th September 2024. He sought Orders that:

- 1. ...Spent**
- 2. ...Spent**

- 3. This honourable court be pleased to issue an order inhibiting the registration of any transfer, lease, charge or any other instrument whatsoever in respect of L.R WAWARE SOUTH/SAKWA/285 situate in Migori county pending the hearing and determination of this suit.**
 - 4. This honourable court be pleased to issue temporary order of injunction against the respondent and /or his agents from trespassing, building, fencing, excavating, cultivating, demolishing and /or erecting structures on L.R WAWARE SOUTH SAKWA/285 until this suit is heard and determined.**
 - 5. That costs of this application be in the cause.**
2. The application is premised on grounds set out on the application as well as the grounds outlined in the supporting affidavit annexed to the application and deposed by George Collins Ouma, the applicant herein.
 3. The applicant's case is that he is an adverse possessor of the suit property, having taken possession thereof since the year 1977. He stated that his late father, Samwel Odero Ogola bought the suit property on 13th July 1977 from the original owner, one Owich Mikwa. He also stated that, immediately after his father bought the land, his family took immediate possession of the suit land.

- 4.** The plaintiff further stated that his family has been in open and continuous occupation of the suit and that his father and mother are buried suit property, having died in 1997 and 2024 respectively.
- 5.** The applicant added that a grandson of Owich Mikwa by the name Leaky sold and transferred the suit land to the respondent despite being aware of the fact that applicant is the rightful owner of the suit property. The applicant reiterated that his family has been in quiet, continuous/uninterrupted, non-permissive and adverse or hostile use and occupation of 1.6 hectares of the suit property in question.
- 6.** Further, the applicant maintained that his family has established a home on the suit property, having become the owners of the said property by way of adverse possession. He stated that the suit property is at risk of being transferred and /or alienated unless the orders he seeks are granted, and that failure to grant the said order would render his suit nugatory.
- 7.** Lastly, the applicant maintained that he has an arguable case and that it is in the interest of justice that the orders he seeks in his application be granted.
- 8.** The applicant's supporting affidavit reiterates the contents of the application save to add that applicant annexed several annexures thereto, which the court has considered. These annexures are a land sale agreement dated 14th July 1977 between his late father-Samwel Ogola and Owich Mikwa, a copy

of the official search, and limited grant of letters of administration *ad litem*.

Response

- 9.** The respondent filed grounds of opposition dated 3rd November 2025 and opposed the application on the basis of several grounds. Briefly, the respondent maintained that the application and the originating summons filed by the applicant are fatally defective and incompetent for failing to comply with Order 37 Rule 7 (2) of the Civil Procedure Rules, 2010.
- 10.** The respondent also argued that the originating summons and the application herein are premature as they are given the provisions of Sections 7, 13, 17, and 37 of the Limitations of Actions Act as read together with Order 37 Rule 7 of the Civil Procedure Rules. The respondent also stated that the applicant seeks orders against persons who are not plaintiff in the suit, that the applicant has neither established a *prima facie* case nor shown that that the estate of his late father will suffer irreparable loss should the orders sought not be granted, he also argued that the balance of convenience does not in favour of granting the orders sought.
- 11.** Finally, the respondent argued that there is no sufficient cause shown for granting the orders sought, and that the application is frivolous, scandalous and an abuse of court process.

Issues, Analysis and Determination

- 12.** The issues that arise for determination in the instant application are whether the applicant should be granted temporary injunctive orders as well as orders of inhibition. The court will also determine the issue of costs of the application.
- 13.** The court has analyzed the application in its entirety as well as the grounds of opposition filed by the respondent. The applicant maintains that his father purchased the suit property in the year 1977 and settled thereon together with his family. He also stated that his family has been in peaceful continuous and open position of the suit property since the year 1977 to date and added that what is parents are buried on the suit property. He argued that a grandson of the original owner transferred the suit property respondent hearing despite his knowledge that the applicant and his family were the legitimate owners for the suit property.
- 14.** It is on the above basis that he seeks a temporary order of injunction as well as an inhibition one preventing the respondent from charging, leasing, fencing, erecting and or demolishing buildings on the suit property or otherwise dealing with the property to his detriment.
- 15.** The respondent opposed the application on the grounds that the applicant had not complied with Order 37 Rule 7 (2) of the Civil Procedure Rules. He also argued that the applicant seeks orders against “persons who are not plaintiffs in the suit”.
- 16.** Before delving into whether the reliefs sought by the applicant should be granted, it is imperative to examine

whether the applicant has complied with requirements of Order 37 Rule 7 of the Civil Procedure of the Civil Procedure rules, which provided that:

(1) An application under section 38 of the Limitation of Actions Act (Cap. 22) shall be made by originating summons.

(2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

17. The court has taken the liberty to examine the evidence provided by the applicant so as to ascertain the veracity of the allegations fronted by the defendant/applicant. The court notes that the applicant has annexed copy of a certificate of official search of the suit property to his supporting affidavit.

18. The rationale of annexing a certified extract of title was expounded by the Court of Appeal in ***Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another, Malindi civil appeal no. 11 of 2014*** where it was held that:

The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of Githu v Ndele [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of

those in their respective possession from the larger suit premises that they sought to have decreed to them. It is exactly for this reason, perhaps that there was a mandatory requirement under the old Civil Procedure Act and the rules made thereunder that when taking out and O. S. anchored on adverse possession that an extract of the title to the subject land be annexed to the application.

19. In ***Sarah Kimani v John Wanyoike Gerald, ELC case no. 791 of 2023 (OS)***, the court held that:

The purpose of annexing an extract of the title is to ascertain who the title holder is, and when the title holder acquired rights over the said land. It provides a means to the court to ascertain the existence and proprietorship of the suit land. See Symon Gatutu & 587 others v E.A. Portland Cement (2011) eKLR. It is therefore not a technicality as submitted by the Plaintiff, but a mandatory requirement in a claim of adverse possession (emphasis added).

20. As earlier noted, the applicant did not annex a certified copy of the extract of title for the suit property. Rather, he annexed a copy of a certificate of official search to his supporting affidavit. The question this court should answer is, whether the applicant's failure to annex a certified copy an extract of title is

fatal to his cause, as the Respondent alludes. This court in case ***Adongo v Ogola (Environment and Land Originating Summons E08 of 2025) [2025] KEELC 6452 (18 September 2025) (Ruling)***, this court had the opportunity of answering this question. Thus:

“Having ascertained that the purpose of the certified copy of the extract of title is to ascertain the ownership of the land, the question this court should seek to answer is whether an official search would suffice in the instant circumstances? This question was addressed by the Court of Appeal in Johnson Kinyua v Simon Gitura Rumuri, Civil Appeal no. 265 of 2005. The court held that:

On our part, we have weighed the submissions made on behalf of the parties. Concerning the effect of failure to annex an extract of title we are of the view that nothing turns on this as the disputed land is registered under the Registered Land Act and a search certificate under the Registered Land Act duly signed by the Registrar constitutes evidence of the entries set out in the certificate. Thus section 36(2) of the Registered Land Act provides:

“Any person may require an official search in respect of any parcel, and shall be entitled to receive particulars of the subsisting entries in the register relating thereto and certified copies of any documents or of the registry map or of any plan filed in the registry.”

Concerning the same point section 37(2) of the Registered Land Act states:

“Every document purporting to be signed by a Registrar shall, in all proceedings be presumed to have been so signed until the contrary is proved.”

In our view reference to certified extracts in Order 37 refers to titles under the other systems of land registration and not to Registered Land Act type of registration. Under the latter system of registration, we think a search certificate meets the requirements of the relevant law (emphasis added).

- 21.** The court is satisfied that the applicant has annexed a certificate of official search of the suit property to his affidavit, and the same suffices for purposes of Order 37 Rule 7 (2) of the Civil Procedure Rules. To this end, the application is neither defective nor bad in law.

22. The Respondents argued at one point that the applicant seeks orders against people who are not plaintiffs in the suit. This court has carefully analyzed the pleadings. It does not find any fact to support such an assertion. The argument is thus not tenable as it cannot be substantiated.

23. Turning to the issue of the orders of both injunction and inhibition as sought, Section 68 of the Land Registration Act, 2012 provides for the court's power to grant inhibitions. It provides that:

(1) 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

(2) A copy of the inhibition under the seal of the court, with particulars of the land, lease or charge affected, shall be sent to the Registrar, who shall register it in the appropriate register.

(3) An inhibition shall not bind or affect the land, lease or charge until it has been registered.

24. On injunctions, the remedy which is an equitable relief is provided under Order 40 of the Civil Procedure Rules, 2010. Rule 1 thereof provides that:

(1) Where in any suit it is proved by affidavit or otherwise—

a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders

25. The principles that govern the grant of injunctions were expounded in ***Giella v Cassman Brown [1973] EA 358***, where the court established that party seeking an injunction should fulfil these three conditions:

a) The applicant must establish his case at the *prima facie* level;

- b) The applicant should demonstrate that he stands to suffer irreparable harm/injury, which cannot be remedied by way of damages; and
- c) If the court is in doubt concerning the above two stated conditions, the balance of convenience should tilt in favor of the applicant.

26. A *prima facie* case was defined in ***Mrao Limited v the First American Bank of Kenya & 2 others [2003] KLR 125*** in the following terms:

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

27. A *prima facie* case was defined in ***Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others (2003)*** as:

“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 as to call for an explanation or rebuttal from the latter. It is more than an arguable case. See also Kenya Commercial Finance Co Ltd vs. Afraha Education Society (2001) 1 EA 86 and Nguruman

Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR.

28. Notably, the standard of proof required to establish a prima facie case is the balance of probabilities standard adopted in civil matters.

29. Irreparable harm or injury on the other hand was defined in ***Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] KECA 606 (KLR)*** as loss that cannot be remedied by way of damages. Equally, in ***re estate of Magdalena Kabon Sawe (deceased) Succession Cause E 034 of 2023 [2024] KEHC 9228 (KLR)***, while placing reliance on the Halsbury's laws of England and held that:

“...by irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages, an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter.”

30. Lastly, the balance of convenience was described in ***Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR*** in the following terms:

The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed...

31. In **Nguruman decision (supra)**, the Court of Appeal held that the conditions established in **Giella v Cassman Brown (supra)** should be surmounted separately and sequentially, and that if, say, a *prima facie* case is not established, the court should not proceed to evaluate the other conditions set out in the test. Thus, the court held that:

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. 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. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001]

Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. 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.

- 32.** On whether the applicant has established a prima facie case, this court notes that the plaintiff/ applicant has annexed crucial evidence to support his allegations, which evidence would require rebuttal on the part of the respondent. He has annexed a land sale agreement to support the averment that his father purchased the suit property from the one Owich Mikwa. He has also annexed to his affidavit a copy of the official search showing that the land in question is registered in the name of the respondent. Since the Applicant is on the land, and there

being a claim of long term occupation thereof and there is a threat to evict him I find that the applicant has established a prima facie case.

33. Having found that the applicant has established a prima facie case, I will now turn to the question of irreparable harm of injury. The applicant averred that his family has been in occupation of the suit land since 1977 and has buried their parents therein. This homely environment as well as the family's connection to their departed ones holds sentimental value that cannot be remedied by way of damages. He has thus satisfied on a balance of probability the second requirement of irreparable loss which cannot be compensated by way of damages.

34. Lastly, the question of balance of convenience only arises where the court is not sure about the first two conditions, that is, prima facie case and irreparable harm or injury. Since the plaintiff has established the first two limbs, and he is on the ground, the balance of convenience tilts in his favour.

35. The upshot of the foregoing is that, the plaintiff's application succeeds in the following terms:

a) There be and is hereby issued an order inhibiting the registration of any transfer, lease, charge or any other instrument whatsoever in respect of L.R WAWARE SOUTH/SAKWA/285 situate in Migori county pending the hearing and determination of this suit.

b) There be and is hereby issued a temporary order of injunction against the respondent and /or his agents from trespassing, building, fencing, excavating, cultivating, demolishing and /or erecting structures on L.R WAWARE SOUTH SAKWA/285 until this suit is heard and determined, if within a year. The injunction to last the first twelve months, subject to extension thereof upon satisfactory explanation for the same.

c) Costs shall be in the cause.

36. Mention for compliance 27th April 2026. Each party has 30 days to file and exchange trial bundles. Mention Notice to issue.

37. Orders accordingly

Ruling dated signed and delivered virtually via the Teams Platform this 26th day of February 2026.

**HON. DR. IUR F. NYAGAKA
JUDGE**

In the presence of,

Odera Advocate for the Respondent.

No appearance for the applicant (though served)