

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
KAKAMEGA
ELC CASE NO. E033 OF 2025 (OS)

FLORA SHAGWILA VAKASI 1ST

APPLICANT

JACOB JUMA SHAMALA.....2ND

APPLICANT

-VERSUS-

ROSELYNE NASIMIYU.....
RESPONDENT

RULING

Introduction

1. Before court is a Notice of Motion application dated 16th June 2025 filed by the applicant seeking the following orders:

a) Spent

b) An order of prohibitory injunction be issued restraining the respondent/defendant(s) whether by themselves, agents, servants or by any other person whomsoever from evicting trespassing upon, developing, building upon, damaging, wasting, utilizing or in any manner whatsoever from interfering with applicants' possession and occupation of their portion of the suit property, namely Isukha/Kambiri/1464 pending the hearing and determination of the suit herein.

c) THAT an order of status quo ante be issued that is the continuous occupation by applicants and family in their respective portions measuring 0.12 and 0.248 HA in the suit property Isukha/Kambiri/ 1464 pending the hearing and determination of the instance application and suit.

d) An order of temporary injunction be issued restraining the respondent/defendant whether by themselves, agents, servants or by any other persons whomsoever from enforcing the eviction notices issued on the 19/05/2025 and on 10/06/2025 and evicting the applicants from suit property, namely Isukha/Kambiri/ 1464

pending the hearing and determination of the application and suit herein.

e) An order of prohibitory injunction be issued restraining the respondent/defendant(s) whether by themselves, agents, servants or by any other persons whomsoever from offering for sale, selling, transferring (other than to the plaintiff), charging, mortgaging, leasing, assigning, disposing, advertising or in any other manner whatsoever dealing with the suit Property, namely Isukha/Kambiri/ 1464 pending the hearing and determination of this application and suit.

f) THAT costs of this application be provided for.

2. The application is predicated on the supporting affidavit of the 1st applicant sworn on 17th June 2025. The applicants' case is that they have occupied 0.248 Ha and 0.21 Ha respectively part of parcel No. Isukha/Kambiri/1464 for more than 20 years, which they have both developed with dwelling houses. That they were served with demand letters for eviction dated 19th May 2025 and 10th June 2025. That they are afraid they will be evicted. That they purchased the suit property from the respondent's father in 2002, obtained consent

from the Land Control Board and commenced transfer process which was not concluded. That the 2nd applicant purchased the suit property from Ruth and Isaac Shamala who had bought from Isaac Shamalla in 2005. That the applicants discovered that the suit property had been fraudulently transferred to the defendant from the late Simeone Anami Shamala in 2025. That the respondent holds the suit property in trust for the applicants. He attached photographs, demand letters, sale agreement, land control board consent and a letter from the DCI.

3.The application was opposed. The respondent filed replying affidavit sworn on 1st July 2025. She stated that the application was incompetent and amounted to abuse of the court process. That none of the applicants is in occupation of the suit property hence none is in adverse possession. That the suit is incurably defective with no chance of success. That no survey has been done and the applicants claim is based on mere speculations. That she has held title to the suit property since 2014 which is less than 12 years. That the title for the suit property was

created in 2014 hence allegations of occupation for over 20 years does not arise. That there is no evidence of purchase. She attached title deed for parcel No. Isukha/Kambiri/1464 which was issued on 17th September 2014.

4.The application was disposed by way of written submissions. On record are submissions filed by the applicants dated 22nd August 2025 and those by the respondent dated 11th November 2025; both of which the court has duly considered.

Analysis and determination

5.The court has carefully considered the application, the response thereto as well as submissions and authorities cited. The issue that arises for this court's determination is whether the applicant has met the conditions for grant of temporary injunction and status quo orders pending hearing and determination of this suit.

6.Order 40 Rule 1 of the Civil Procedure Rules grants this court the jurisdiction to grant temporary injunction where it is shown that the subject matter of the suit is at

risk of waste, damage, alienation, disposal or sale in execution of a decree; and where it is demonstrated 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.

7.To obtain a temporary injunction, it is trite that an applicant must demonstrate that they have a *prima facie* case with chances of success; that they stand to suffer irreparable loss that may not be compensated in damages and where the court is in doubt, it ought to decide on a balance of convenience. (**See Giella v Cassman Brown [1973] EA 158**).

8.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.”

9. In the instant case, the application herein is founded on the applicants' allegation that they have acquired the suit property under the doctrine of adverse possession. They stated that they have been on the suit property for over 20 years.

10. While Order 37 Rule 7 (1) and (2) of the Civil Procedure Rules makes it mandatory that an application for adverse possession must be supported by an affidavit where an extract of title of the disputed land is attached. In the instant matter, no such extract was attached.

11. The respondent contended that the title for the suit property was created in 2014 and hence the applicants' averments that they were on the property for over 20 years is not true. I have considered the title deed presented by the respondent. The same shows that it was opened in 2001 but registered in the name of the respondent in 2014. The applicants have not provided the extract of title /green card in respect of the suit property as required by law, and therefore apart from violating

the mandatory provisions of Order 37 Rule 7(1) and (2) of the Civil Procedure Rules, this court is unable to ascertain the history of the said title.

12.A claim for adverse possession is based on adverse occupation by a trespasser for a period of 12 years. From 2014 when the respondent became registered as proprietor of the suit property to the date of filing this suit, 12 years have not lapsed. That being the case, the court finds that the applicant has not demonstrated a *prima facie* case and the suit as currently presented is incompetent for non-compliance with Order 37 Rule 7 (1) and (2) of the Civil Procedure Rules.

13.I therefore find no merit in the application dated 16th June 2025, which I dismiss with costs.

14.It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA
IN OPEN COURT/VIRTUALLY THROUGH
MICROSOFT TEAMS VIDEO CONFERENCING
PLATFORM THIS 18TH DAY OF MARCH 2026**

A. NYUKURI

JUDGE

In the presence of;

Mr. Edaki for the applicants

No appearance for the respondent

Court Assistant: Delphine