



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MILIMANI, NAIROBI

SUIT NO. ELCLC E472 OF 2025

MARY WAITHIRA MWANGI.....

PLAINTIFF/APPLICANT

-VERSUS-

RUTH WAMBUI MUIGAI.....

DEFENDANT/RESPONDENT

RULING

Introduction

1. The Matter is in relation to land parcel LR NAIROBI/BLOCK 105/5809 herein referred to as the suit property.
2. The plaintiff/applicant instituted the suit via an originating summons application dated 15th September 2025 seeking for adverse possession orders and also filed a notice of motion application dated an even date seeking for injunctive orders to preserve the suit property
 - a) Spent
 - b) That an interim injunction do issue restraining the defendant her servants, agents, nominees, and /or persons acting under her authority from evicting the plaintiff, entering, disposing, charging, encroaching, blocking access to, sub dividing, registering any disposition, trespassing or in any way interfering with the plaintiff's quiet possession of the suit property

NAIROBI/BLOCK 105/5809 pending hearing and determination of this application.

- c) That an interim injunction do issue restraining the defendant her servants, agents, nominees, and /or persons acting under her authority from evicting the plaintiff, entering, disposing, charging, encroaching, blocking access to, sub dividing, registering any disposition, trespassing or in any way interfering with the plaintiff's quiet possession of the suit property NAIROBI/BLOCK 105/5809 pending hearing and determination of this suit.
- d) An injunction do issue restraining the defendant from registering any transfer and or change the ownership of the suit property NAIROBI/BLOCK/5809
- e) Costs be in the cause.

3. The defendant/respondent in response filed a replying affidavit and notice of preliminary objection both dated 24th November 2025. The respondent raised the issue that the suit was time barred as per the limitations of actions act that placed actions for the recovery of land as at 12 years. She also raised the plea of res judicata

4. The application and notice of preliminary objection was dispensed off by way of written submissions. The defendant filed submissions dated 26th January 2026 addressing the notice of preliminary objection and application whereas the applicant filed submission dated 12th February 2026.

Respondent 's submissions

5. The defendant buttressed the fact that the suit was time barred and in contravention to sections 4, 7 and 8 of the statute of limitations act relying in the case of Gathoni versus Kenya Cooperative Creameries Ltd [1982] KLR 104

He also reiterated that the matter was res judicata to ELC no 317 of 2010 Stanley Thiong'o Nduati & another vs James Wachira Harrison & another AS consolidated with ELC no. 860 of 2013 James Wachira Harrison vs James Waithaka & another and ELC 874 of 2013 Stanley Thing'o Nduati & another vs Ruth Wambui Muigai & another placing reliance in the case of **Okaka v Ojango & another (Environment and Land Case E026 of 2024)[2025] KEELC 8259 (KLR)(19 November 2025)**

Lastly the defendant submitted that the plaintiff's suit raised no cause of action as against the defendant

Applicant's submissions

6. The applicant submitted that the defendant could not claim the suit to be statute barred under section 7 of the Limitations act as the said section provided for one way of extinguishing of rights over a suit property after the owner had not laid claim after 12 years hence the application seeking for orders of adverse possession

7. On the issue of res judicata, the applicant indicated that res judicata cannot amount to a preliminary objection since it requires the interrogation of facts by the court to determine matters in the former suit in relation with the current suit for such a plea to surface.
8. On the merits of the application, counsel submitted on whether they had met the conditions for issuance of injunctive orders as in the **Giella Vs Cassman Bow case**. She submitted that there was proof of a prima facie case having established that she had been in the suit property for a period of over 12 years uninterrupted hence extinguishing any other rights over the same by way of adverse possession. That irreparable harm will be occasioned if she is evicted and lastly the balance of convenience tilted in favour of the applicant as she sought preservation of status quo as it had been for the number of years she had been in possession without any interruption.

Analysis and determination

9. Since the notice of preliminary objection seeks to dispose of the suit for lack of jurisdiction, this court will determine it first for if it is competent then there is no need to entertain the application and suit .The issue for determination is therefore whether the Notice of Preliminary Objection dated 24th November 2025 is merited .The threshold of a preliminary objection was set out by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696** as follows:“...a preliminary objection consists of a pure point of law which has been

pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit.

“The Court went further to note that:

–“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.”

The preliminary objection in this matter is founded on the notion that the suit is time barred as per Section 7 of the limitations of actions Act which goes into the issue of jurisdiction of the court.

Section 7 reads “An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.’

10. It goes without saying that without the requisite jurisdiction a court of law down sits tools meaning that the objection, if successful, is capable of finally disposing the whole matter. The objection, therefore, attains the threshold of a pure preliminary point of law.

11. In this case however the applicant is seeking to invoke the said section 7 to lay a claim for adverse possession as it distinguishes the rights of the defendant over the suit property after not laying any claims over it for a period of more than 12 years. This is not a claim for recovery of land rather a claim under section 38 of the limitations of actions act and, on this ground, the preliminary objection is not merited

12. On the issue of the suit being res judicata It is apparent from the foregoing that Preliminary Objection should raise pure points of law, argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any of facts have to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion. Further, the objection should be capable of disposing of the suit. The substantive law on res judicata is found in Section 7 of the Civil Procedure Act, which provides that: *“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”*

The doctrine of res judicata prohibits a court from re-litigating matters that have been conclusively determined between the same

parties, or those claiming under them, over the same issues, by a court of competent jurisdiction. It operates as a jurisdictional bar and, where the material facts are undisputed and ascertainable from the pleadings alone without recourse to extraneous evidence, it raises a pure point of law capable of determination at the preliminary stage. The plaintiff's suit and application are founded on the ownership to the suit property on the basis of adverse possession. It is her claim that she has been on the said property uninterrupted for a period of over 12 years. A perusal through the pleadings attached on the replying affidavit does not shed light on the former issue and it would cause for this court to call for additional evidence to be able to ascertain what was the substantial issue in the former suits which was also not heard and determined on merit rather dismissed for want of prosecution.

It is common ground that proper preliminary objection must not be blurred with factual details liable to be contested or proved by the process of evidence. In the case of **Oraro versus Mbaja (2005) 1KLR 141** the court held as follows: - *"Wheree a court needs to investigate facts, matter cannot be raised as Preliminary Objection. Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence."*

The the preliminary objection herein is majorly premised on the doctrine of res judicata. In the case of **George Kamau Kimani & 4 Others vs County Government of Trans Nzoia & Another (2014) eKLR**, the Court while dealing with the issue of res judicata raised in a preliminary objection held as follows held that: - *“ I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection”*.

In view of the foregoing, it is the finding of this court that the grounds raised in the notice of preliminary objection are not pure points of law. In essence therefore, the preliminary objection as filed does not meet the threshold/criteria of what amounts to a proper preliminary objection.

13. Moving on to the merits of the application the issue for determination is whether the applicant has satisfied the conditions for issuance of injunctive orders

14. In deciding whether to grant the injunctive orders or not it is trite law that I should be guided by the well-established principles enunciated in the locus classicus now famous precedent of **“Giella v Cassman Brown [1973] E.A. Page. 358** whose holding is as follows: - “The condition for the grant of an interlocutory injunction are now, I think well settled in East Africa.

- i. First, an applicant must show a prima facie case with a probability of success.
- ii. Secondly an interlocutory injunction will be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.
- iii. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience the issue of prima facie case.

The three conditions set out in *Giella* (supra), need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of:- **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR**, *“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. 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 betweenen."

The applicant is seeking orders to be declared as the legal owner of the suit land by virtue of adverse possession. She claims to have been in occupation and taken possession of the suit land continuously and uninterruptedly for over 12 years. The Respondent if anything corroborates by trying to insinuate the suit is time barred being filed over 12 years after the applicant took possession.

On the issue whether the Applicant will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Applicant must demonstrate that it is a harm that cannot be quantified in in monetary terms or cannot be cured. The applicant is apprehensive that the respondent might attempt to illegally evict them having issued a notice of eviction from the suit property. The applicant has to demonstrate that irreparable injury will be

occasioned to her if an order of temporary injunction is not granted. The judicial decision of “**Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR**” provides an explanation for what is meant by irreparable injury and it states; *“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.”*

Quite clearly, the Applicant would not be able to be compensated through damages as she has shown the court that its rights to the suit property by the by the continuous occupation. She therefore satisfies the second condition as laid down in Giella’s case.

Thirdly, the applicant has to demonstrate that the balance of convenience tilts in her favour I have relied on the decision of **Amir Suleiman vs Amboseli Resort Limited [2004] eKLR** where the Learned Judge offered further elaboration on what is meant by “balance of convenience” and stated “The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”

Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits

15. Based on the surrounding facts and the inferences of this case, therefore, I am convinced that if orders of temporary injunction are not granted in this suit, the suit land which is in dispute is in danger of being dealt in the manner set out in the application and apprehended by the applicant. In view of the foregoing, I find that the applicant has met the conditions for grant of orders of temporary injunction

Final disposition

16. That the Notice of Preliminary Objection dated 24th November 2025 be and is hereby found to lack merit and is dismissed

17. That the Notice of Motion application dated 15th September 2025 be and is hereby found to have merit and is hereby allowed in its entirety.

It is so ordered.

DATED, SIGNED and DELIVERED virtually at **NAIROBI** on this **13th day** of **April 2026**.

MOHAMMED N. KULLOW
JUDGE

Ruling delivered in the presence of: -

Mr. Mungai..... for the Plaintiff/Applicant

Ms. Muigai..... for the Respondent

Philomena W...... Court Assistant

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