

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC LAND CASE NO.E059 OF 2025

BHALVINDER PAL SINGH PLAINTIFF

VERSUS

LORNA ADHIAMBO AGWARA DEFENDANT

R U L I N G

1. This ruling is in respect of the Plaintiff Notice of Motion application dated 23rd September, 2025 expressed to be brought pursuant to the provisions of section 3, 3A, 63(c) & (e) of the Civil Procedure Act Cap 21 Laws of Kenya and Order 40 Rules 1(a) 2(1) and 2(2), 4 and 8 of the Civil Procedure Rules.
2. The relief sought is contained in prayer 3 of the application namely; that pending hearing of the suit, the court be pleased to issue a permanent injunction restraining the Defendant/Respondent and her servant agents, employees or any other person acting through or under her instruction or order from encroaching on, fencing, cultivating, construction on the disputed portions of the parcel L.R. NO.7478/13 measuring 0.06 & 0.07 Ha or in any other way interfering with or dealing with the effected portion and the plaintiff's

sugarcane crop and access to the portion claimed by the Plaintiff and on which the Plaintiff has planted sugarcane. The application also seeks for an order that the costs be awarded to the Plaintiff/applicant.

3. The application was supported by the averments in the Supporting Affidavit of BHALUVINDER PAL SINGH and the annexures thereto.
4. The application was opposed vide the Replying Affidavit sworn by Engineer Carren Oyola, holder of Power of Attorney on behalf of the applicant, on 26th February, 2026.
5. The substantive prayer sought is an order of a permanent injunction. A permanent injunction cannot issue at this interlocutory stage of the trial for to issue the same is to determine issues before hearing the evidence. Order 40 Civil Procedure Rules under which the application is brought provides for grant of temporary injunction where the condition for grant of the same are proved. In the case of Kenya Power & Lighting Co. Limited v Sheriff Molana Habib (2018) eKLR it was held, *inter alia*,

“a permanent injunction, which is also known as perpetual injunction is granted upon the hearing of the

suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties.”

6. But assuming that what the Applicant seeks is an order of temporary injunction, Order 40 Rules 1 Civil Procedure Rules provides for the instances where an order of temporary injunction may issue as follows:-

“where 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 a 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 a suit.

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

7. Both parties relied on the case of *Giella -vs- Casman Brown* on the principles for the grant of a temporary orders of injunction namely; that that the applicant must demonstrate a prima facie case with a probability of success, and that the applicant must demonstrate that he will suffer irreparable injury if the

order sought is not granted and that when the court is in doubt, it shall decide the case on a balance of convenience.

8. The Applicant's case herein is that he has been cultivating and occupying portions measuring 0.06 and 0.077 hectares of land parcel known as LR NO.7478/13 (the suit land) belonging to the Defendant for over 40 years and has accrued rights of prescription over the said portions of land. That on 15th September, 2025 the Defendant commenced digging holes and erecting fence posts on the portion of the suit land occupied by the Applicant. That unless the court intervenes and issues injunctive orders, the Respondent is likely to persist with her activities on the disputed portions of the suit land thereby causing irreparable loss, destruction of property and violation of the Applicant prescriptive rights and his right to possession and use and that he will be denied his accrued proprietary rights thus rendering the suit nugatory.

He averred in his Supporting Affidavit that he has been on the disputed portion since the year 1984 and that his use of the disputed portion of land has been non-permissive, non-consensual, open, notorious, exclusive and adverse and that the Defendant's actions are oppressive, wrongful and irregular.

9. The Respondent's case as contained in the Replying Affidavit is that she is the registered proprietor of the suit land which measures 10 acres which she bought in the year 2020, had beacons placed. That thereafter she fenced and took possession but did not carry out any developments thereon as she moved to the United Kingdom for further studies. That while in the United Kingdom she learnt that the Plaintiff/Applicant trespassed onto her land in February, 2022 unlawfully removed the beacons therein and started tilling a portion of the suit land and planting sugarcane. That upon negotiation, the Defendant allowed the Plaintiff to harvest the sugarcane in 2023 and 2025 but in July 2025, the unlawfully Plaintiff moved in to fence the encroached portion.

The plaintiff averred that a survey exercise verified the boundary and a report prepared in respect thereof confirmed that the Plaintiff had encroached onto the Defendant's land.

I have considered the application, the Replying Affidavit and the submissions by Counsel.

It is not in dispute that the suit land is registered in the name of the Defendant. The Plaintiff acknowledges this in paragraph 4 of the Supporting Affidavit that the Defendant recently

acquired land parcel described as L.R. NO.7478/13 Kibos. Also in ground 1 of the application, the Applicant states that his claim relates to only portions measuring 0.06 Ha and 0.07Ha of land parcel No.7478/13 belonging to the Defendant.

The basis of the Plaintiff claim is the doctrine of adverse possession. The evidence so far placed before court to shows the adverse possession is photographs of sugarcane crop.

That Defendant on the other hand who has documents of ownership of the land denies the adverse possession and explains that the Plaintiff encroached onto the land in the year 2022 and planted the sugarcane. This was not rebutted.

Ground survey report attached to the Replying Affidavit confirms that the Plaintiff's parcels of land neighbouring the Defendant's land had encroached onto the suit land by various acreages.

The issues of adverse possession is one of the substantive issues to be determined at the hearing. At this interlocutory stage what has been demonstrated to the court, prima facie, is that the Applicant encroached onto the suit land and as such cannot be entitled to an order of injunction to continue enjoying the encroached portions of the suit land.

The Defendant's rights as the registered proprietor are protected by both the constitution and statute. The court is guided by article 40 of the Constitution of Kenya, sections 24, 25 and 26 of the Land Registration Act, Order 40 Rule 1 of the Civil Procedure Act and the cases of Giella vs Cassman Brown Co. Ltd (1973) 358 on the grounds for grant of interlocutory injunction, Mrao Ltd vs First American Bank Kenya Ltd & 2 Others [2003] eKLR on the definition of a prima facie case.

I find that the Plaintiff has not proved by Affidavit or otherwise the grounds for grant of an order of temporary injunction.

- i. The application is dismissed.**
- ii. Costs to the Respondent.**

Orders accordingly.

Ruling dated and signed at Kisumu, read this 14th day of May, 2026, virtually, through Microsoft Teams online application.

**E. ASATI,
JUDGE.**

In the presence of

Atika: Court Assistant

Maganga for the Applicant
Agwara for the Respondent.