



Walukaya (Suing as the administrator of the Estate of Francis Sibabo Salasya - Deceased) v Wabuko & 4 others (Environmental and Land Originating Summons E015 of 2025) [2025] KEELC 5522 (KLR) (23 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5522 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E015 OF 2025
A NYUKURI, J
JULY 23, 2025

BETWEEN

BEATRICE NAMALWA WALUKAYA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF FRANCIS SIBABO SALASYA - DECEASED) APPLICANT

AND

YUSUF BWIRE WABUKO 1ST RESPONDENT

CALEB XAVIER OSORE WABUKO 2ND RESPONDENT

VINCENT MUKABANA WABUKO (SUED AS ADMINISTRATOR OF THE ESTATE OF MWANAMISI MATSESHE WABUKO - DECEASED) 3RD RESPONDENT

JULIUS ANDATI MASANGA 4TH RESPONDENT

WYCLIFFE AGGREY EMIRUNDU 5TH RESPONDENT

RULING

1. Before court is a Notice of Motion application dated 30th April 2025 filed by the applicant seeking the following orders:
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. That an inhibition and or prohibitory order be issued against the suit title Nos E. Wanga/ Eluche/4120, 4121, 4122 and 4123 to protect and preserve them pending the hearing and determination of this suit.



- e. That a temporary order of injunction be issued against all the respondents and or through their agents, relatives, employees and or servants, from selling or offering for sale, alienating, transferring, laying claim to, trespassing onto, utilizing, developing, carrying out any works on, demolishing the applicant's buildings or structures or crops thereon and or interfering with the applicant's peaceful occupation, use and possession of the suit parcels of land Nos. E Wanga/ Eluche/4120, 4121, 4122 and 4123 whose boundaries are clearly delineated pending the hearing and determination of this suit.
 - f. That in the alternative, the status quo prevailing on the suit parcels of land Nos. E Wanga/ Eluche/4120, 4121, 4122 and 4123 be maintained pending hearing and determination of this suit.
 - g. Costs of this application be in the cause.
2. The application is anchored on the supporting affidavit of the applicant sworn on 30th April 2025. The applicant's case is that Rajab Wabuko Anzweno the father of the 1st to 3rd respondents sold a portion of land from Parcel No. E Wanga/ Eluche/1024 to the applicant's husband on Francis Sibabo Salasya on 3rd June 1973, which he subdivided to create among other titles, parcel No. E Wanga/ Eluche/1043 which he intended to transfer to the applicant's husband, but he unfortunately died before the transfer was effected.
 3. She stated that upon the aforesaid sale, the applicant with her husband took possession of the purchased parcel and began planting maize and sugar cane thereon. That they also constructed permanent buildings on the suit property being a residential house and a slaughter-house which commenced operations in 1973.
 4. That the 1st to 3rd respondents carried out succession in regard to their father's estate and that instead of transferring the applicant's land to her as had been agreed, they secretly subdivided parcel No. 1043 into the current titles being Nos. E Wanga/ Eluche/4120, 4121, 4122 and 4123, which they transferred to the 4th and 5th respondents. That the respondents have begun trespassing on the suit property, have cut down the applicant's crops and threatened to demolish her house and the slaughter house and evict her with her family from the suit property. She argued that the suit property should be preserved pending determination of the suit.
 5. The application was opposed. In response, the 1st and 2nd respondents swore a replying affidavit on their own behalf and on behalf of the 3rd to 5th respondents. They stated that the applicant had failed to demonstrate that their father sold her late husband a portion of parcel 1024 and that her claim was suspicious and in bad faith. Further that she failed to prove that her husband purchased parcels Nos. E Wanga/ Eluche/4120, 4121, 4122 and 4123 because the agreement refers to parcel Nos. E Wanga/ Eluche/1024 which title has since been closed. That the applicant has not shown that together with her husband they are the legal owners of parcel Nos. E Wanga/ Eluche/4120, 4121, 4122 and 4123.
 6. It was further their assertion that they had not threatened to interfere with the suit property in any way and that they never agreed to transfer the suit property to the applicant's husband. They stated that it was not true that they were trying to evict the applicant from the suit property. That the applicant is not in use of the entire suit property and that the 4th and 5th respondents are purchasers and are in use of parcels Nos. E Wanga/ Eluche/ 4121 and 4122 respectively. They stated that the applicant had not demonstrated irreparable loss and her application did not meet the conditions for grant of orders of injunction as stated in the case of *Giella v Cassman Brown*. They attached the Chief's letter.



7. Parties filed submissions in regard to the application. On record are the applicant's submissions dated 16th May 2025 and the respondents' submissions dated 15th May 2025, both of which this court has duly considered.

Analysis and determination

8. The court has carefully considered the application, the response thereto as well as submissions and authorities cited. In my considered view, the issues that arise for this court's determination are:-

- a. Whether the applicant deserves orders of inhibition.
- b. Whether the applicant has met the conditions for grant of temporary injunction, and
- c. Whether orders of status quo should issue in the alternative.

9. Section 68 of the *Land Registration Act* grants this court the power to make an order of inhibition as follows;

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.

10. An order of inhibition are in the nature of a temporary injunction as it restrains the registration of dealings on a title for a period of time. Order 40 Rule 1 of the Civil Procedure Rules grants this court the jurisdiction to grant temporary injunction where the applicant demonstrates that the subject matter of the suit is at risk of waste, damage, alienation, disposal or sale in execution of a decree; and 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. 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 if the injunction is not granted, they stand to suffer irreparable loss that may not be atoned 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).

11. Principles for grant of temporary injunctions were also stated in the case of *American Cyanamid Co vs. Ethicon Limited* 1975 AAER 504, where the court enumerated elements to be satisfied before grant of a temporary injunction as follows;

- a. There must be a serious/fair issue to be tried;
- b. Damages shall not be an adequate remedy
- c. The balance of convenience lies in favour of granting or refusing the application.

12. 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.”

13. The concept of irreparable injury seeks to protect the prima facie case established by the applicant from being rendered nugatory, hence there must be a prima facie case, before the existence of an irreparable injury. To show that the applicant shall suffer irreparable injury, they have to demonstrate that the



injury likely to be suffered cannot be adequately compensated by costs. In the case of Pius Kipchirchir Kogo Vs. Frank Kimeli Tenai [2018] e KLR, the court sated as follows;

“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.”

14. In the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai (supra), the court held that for the balance of convenience to tilt in favour of the applicant, they must show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction, will be greater than that which is likely to arise from granting it.

15. In this case, the respondents are the registered proprietors of the suit property. Title is protected under sections 24 25 and 26 of the [Land Registration Act](#) which provides as follows;

Interest conferred by registration.

24. Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. Rights of a proprietor.

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26. Certificate of title to be held as conclusive evidence of proprietorship.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and



conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

16. Therefore, a registered proprietor of land has absolute and indefeasible rights to enjoy his land without interference by third parties. Those rights cannot be interfered with, halted or suspended unless there is lawful justification.
17. Registered land is subject to overriding interests, that may not be noted in the register. Section 28 (h) and (j) of the *Land Registration Act* provides for overriding interests to include rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription and any other rights provided under any written law.
18. Therefore, prescriptive rights created under the *Limitation of Actions Act* including claims of adverse possession are overriding interests which registered land is subject to. Hence an applicant seeking to obtain an order of inhibition or injunction in regard to land registered in the name of another person on the basis that they have a claim of adverse possession over the same, must first demonstrate a prima facie case regarding adverse possession.
19. Essentially, where the court is satisfied that an applicant has shown a prima facie case with chances of success for a claim of adverse possession; that there is a likelihood that the title in dispute may be dealt with to the detriment of such applicant which may delay or obstruct execution of any decree that may be made in their favour; that they stand to suffer irreparable injury if the inhibition is not issued; and that the balance of convenience tilts in favour of granting an inhibition, then the court may grant an inhibition against the title in dispute.
20. In the instant case, the applicant gave the following story; that in 1973, her late husband Francis Sibabo Salasya purchased a portion of land out of parcel No. E Wanga/ Eluche/1024 from the late Rajab Wabuko Anzweno the father of the 1st to 3rd respondents. That the seller subdivided parcel No. E Wanga/ Eluche/1024 creating parcel No. E Wanga/ Eluche/1043 among other parcels. That the late Rajab had intended to transfer parcel No. 1043 to the applicant's late husband but died before the transfer. That the 1st to 3rd respondents undertook succession of their father's estate and that instead of transferring the said title to the applicant, they transferred it to the 4th and 5th respondents. The applicant maintained that together with her husband, they had constructed a permanent residential house and slaughter house on the suit property and that they also planted maize and sugarcane on the suit property. That the respondents have threatened to evict her with her family and have been cutting down her crops.
21. On their part, the respondents have not contested the fact that the applicant has been on the suit property since 1973. They also admit that there is an agreement between the applicant's late husband and their late father but state that the same is in regard to parcel No. E Wanga/ Eluche/1024 and not parcel Nos. E Wanga/ Eluche/4120, 4121, 4122 and 4123. They deny threatening to evict the applicant but state that parcel Nos. E Wanga/ Eluche/4121 and 4122 are registered in the names of the 4th and 5th respondents respectively. They also stated that the applicant does not occupy the entire suit property.
22. From the evidence on record, it is apparent that the late Rajab sold land to Francis Salasya on 3rd June 1973 in the presence of five witnesses and the village elder at a consideration of kshs. 750/=



which amount was paid in full at the execution of the agreement. The respondents have not challenged the authenticity of the said agreement. However, what is being claimed by the applicant is not the enforcement of the land sale agreement but a claim based on continuous occupation. The applicant presented photographic evidence showing permanent buildings on the suit property. The respondents have not contested the fact that the applicant has put up permanent structures on the suit property and has been living on the suit property since 1973 to date.

23. In support of her position, the applicant attached a green card for parcel No. E Wanga/ Eluche/1043, measuring 0.09 hectares, which title was a subdivision of parcel No. E Wanga/ Eluche/1024. She also attached green cards for parcel Nos. E Wanga/ Eluche/4120 measuring 0.23 hectares, 4121 measuring 0.062 hectares, 4122 measuring 0.05 hectares and 4123 measuring 0.16 hectares. The green cards show that all the four titles are a subdivision of parcel No. E Wanga/ Eluche/4066.
24. Clearly, although the applicant states that parcel No. E Wanga/ Eluche/1043 was subdivided to create titles Nos. E Wanga/ Eluche/4120, 4121, 4122 and 4123, that is not the correct position because the green cards for title Nos. E Wanga/ Eluche/4120, 4121, 4122 and 4123, show that they all resulted from a subdivision of parcel No. E Wanga/ Eluche/4066. More importantly, parcel Nos. E Wanga/ Eluche/4120, 4121, 4122 and 4123 measure a total of 0.502 hectares while parcel No. E Wanga/ Eluche/1043 measures 0.09 hectares. Therefore, the two parcels are not mother and subdivision resultant titles, respectively. And, no evidence was presented by the applicant to show any nexus between parcel Nos. E Wanga/ Eluche/1043 and 4066. These facts are key in view of the fact that the respondents assert that the applicant does not occupy all the suit property and that her husband purchased parcel No. 1024 and not the four titles which are the suit property herein. Therefore, the court cannot tell whether the applicant is apparently in occupation of the 0.09 hectares in parcel No. 1043 or the 0.502 hectares being the total acreage of the suit property.
25. To demonstrate a prima facie case in regard to the claim for adverse possession, a claimant ought to demonstrate that apparently, they have been in possession of a specific area of land registered in the name of the true owner but that they have dispossessed the true owner of the land by having occupied it openly, as of right without interruption for a period of 12 years. In the case before me, the applicant although having an agreement for sale of land, did not specify in her pleadings and the instant application, the acreage of land she claims to be entitled to, and her narration that her land being parcel No. E Wanga/ Eluche/1043 (measuring 0.09 hectares) was subdivided to create parcel Nos. E Wanga/ Eluche/4120, 4121, 4122 and 4123 (measuring 0.502 hectares) does not make any sense as the alleged mother title is smaller in size than the resultant titles from the alleged subdivision. In addition, the green cards provided in regard to the four titles show that they were subdivided from parcel 4066 and not from Parcel No. 1043. No evidence or explanation was given to show the nexus between parcel No. 1043 and No. 4066.
26. In these circumstances, the applicant has not presented clarity on the specific title where her parcel of land is situated and how much land she is claiming. The court cannot issue an inhibition or temporary injunction in circumstances where there is no clarity on the specific title claimed and the area of land claimed under the doctrine of adverse possession. The court will not guess where the applicant's land is situated. As explained above, registration confers absolute and indefeasible rights to the owner of land, and there must be clarity, specificity and justification before the enjoyment of those rights are halted, even if just for a moment. For those reasons, I find and hold that the applicant has failed to demonstrate that she deserves orders of inhibition and temporary injunction having failed to make a prima facie case in regard to the title Nos. E. Wanga/Eluche/4120, 4121, 4122 and 4123.
27. However, as the applicant's agreement and occupation since 1973 are acknowledged by the respondents, it appears to me that she might be in adverse possession of the area of land she occupies,



which she has failed to disclose to this court. In that context therefore, the order that commends itself in the circumstances of this case, which I hereby grant, is an order that the status quo obtaining in regard to the parcel of land physically occupied by the applicant be maintained so that none of the parties herein shall alienate, transfer, subdivide, charge or in any way deal with that parcel of land; and there will be no eviction on, or invasion of, the said land occupied by the applicant, pending hearing and determination of this suit. In view of the circumstances obtaining in this matter, I make no order as to costs

28. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 23RD DAY OF JULY 2025

A. NYUKURI

JUDGE

In the presence of;

Mr. Shiloya for the applicant

Ms Masakhwe for the respondent

Court Assistant: M. Nguyai

