



Obiero v Moretti alias Dianella Proske & another (Sued in their capacity as co-administrators of the Estate of the Late Lydushka Hornik Piotto) (Land Case E008 of 2025) [2025] KEELC 5939 (KLR) (14 August 2025) (Ruling)

Neutral citation: [2025] KEELC 5939 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
LAND CASE E008 OF 2025
CG MBOGO, J
AUGUST 14, 2025

BETWEEN

PIUS OYUYO OBIERO PLAINTIFF

AND

DIANELLA MORETTI ALIAS DIANELLA PROSKE 1ST DEFENDANT

ROBERTO SAINAGHI 2ND DEFENDANT

SUED IN THEIR CAPACITY AS CO-ADMINISTRATORS OF THE ESTATE OF THE LATE LYDUSHKA HORNIK PIOTTO

RULING

1. Before this court for determination is the notice of motion dated 14th January, 2025 filed by the plaintiff/applicant and it is expressed to be brought under Order 40 Rules 1,4 and 10, Order 51 Rules 1, 3, 4, 10 and 13 of the Civil Procedure Rules, Sections 3 and 13 of the *Environment and Land Court Act*, Sections 7, 17, 37 and 38 of the Limitations of Actions Act, Sections 1A, 1B and 3A of the *Civil Procedure Act* and Articles 40 and 162 [2] [b] of *the Constitution*, seeking the following orders:-
 1. Spent.
 2. That this honourable court be pleased to grant a temporary order of injunction restraining the respondents herein whether by themselves, their servants, agents and/or anyone acting under their behest from trespassing, invading, wasting, damaging, converting, leasing, letting out, selling, alienating, transferring, charging, mortgaging, making any entries on any register, interfering with any requisite registration document/records, registering any instrument, evicting and or in any manner interfering with the applicant's use, occupation and peaceful possession of all that piece of land known as land reference number 10107 containing by



measurement 4.067 hectares and situate in Karen [hereinafter referred to as the suit property] pending the hearing and determination of the instant application.

3. That this honourable court be pleased to grant an order preserving all that piece of land known as Land Reference Number 10107 containing by measurement 4.067 hectares and situate in Karen [hereinafter the suit property] pending hearing and determination of the instant application.
 4. That this honourable court be pleased to grant a temporary order of injunction restraining the respondents herein whether by themselves, their servants, agents and/or anyone acting under their behest from trespassing, invading, wasting, damaging, converting, leasing, letting out, selling, alienating, transferring, charging, mortgaging, making any entries on any register, interfering with any requisite registration document/records, registering any instrument, evicting and or in any manner interfering with the applicant's use, occupation and peaceful possession of all that piece of land known as land reference number 10107 containing by measurement 4.067 hectares and situate in Karen [hereinafter referred to as the suit property] pending the hearing and determination of the instant suit.
 5. That this honourable court be pleased to grant an order preserving all that piece of land known as Land Reference Number 10107 containing by measurement 4.067 hectares and situate in Karen [hereinafter the suit property] pending hearing and determination of the instant suit.
 6. That costs of this application be in the cause.
2. The application is premised on the grounds inter alia that the plaintiff/applicant has been in use, peaceful occupation and exclusive possession of LR. No. 10107 I.R. 5849/7 situate in Karen for over 18 years.
 3. The application is supported by the affidavit of the plaintiff/applicant sworn on even date. The plaintiff/applicant deposed that he entered into the suit property in January 2001 when he was employed as a property manager and the personal assistant to Ms. Lydushka Hornik Piotto the registered owner of the suit property. He deposed that the registered owner informed him that she would travel outside the country in the year 2006, and that since then he has lived with his family on the suit property. Further, he deposed that he filed a suit in Nairobi ELC No. 314 of 2016 [OS] and in a ruling delivered on 5th December, 2024, the suit was struck out as having been filed against a deceased person. That as a result, his recourse lies in pursuing his claim against the administrators of the estate of the deceased. He deposed that he is apprehensive that the defendants/respondents will evict him and his family from the suit property despite the fact that he has been in peaceful occupation and exclusive possession of the same.
 4. The application was opposed vide the replying affidavit of the 2nd defendant/respondent sworn on 4th February, 2025. The 2nd defendant/respondent deposed that the plaintiff/applicant is guilty of material non-disclosure. He deposed that the plaintiff/applicant instituted ELC Case No. E015 of 2022 [OS] and that he is also a witness in ELC Case No. E023 of 2023 [OS] which he sought injunction orders which was dismissed on 5th December 2024. He deposed that the plaintiff/applicant withdrew ELC Case No. E015 of 2022 [OS] and the said withdrawal is untenable unless costs are first settled.
 5. The 2nd defendant/respondent deposed that the plaintiff/applicant was an employee of the deceased whose salary was paid by himself and his co-administrator. He deposed that the suit property has been undergoing active litigation in succession cause no. 2039 of 2008, and that the suit property having been transmitted to the defendants/respondents, the suit property is deemed to be in their possession.



6. The 1st defendant/respondent filed her replying affidavit in opposition to the application which was sworn on 10th February, 2025. She deposed that the plaintiff/applicant cannot establish a prima facie case, as he has admitted that he was on the suit property with the permission of the deceased, that the high court already issued an order for eviction in favour of the administrators, and that the suit is an abuse of the court process.
7. The 1st defendant/respondent deposed that the plaintiff/applicant was present when the deceased passed away and further she has been paying his salary together with other employees from August, 2006 to 2018. She further deposed that the plaintiff/applicant instituted ELC Cause No. 314 of 2016 which was dismissed on 5th December, 2024. Further, that she is aware that on 13th May 2022, the high court in succession cause No. 2039 of 2008 issued an order of eviction of any third parties on the property and in seeking an injunction, the applicant is asking the court to sit on an appeal of a decision of the succession court. She deposed that he cannot maintain an action of adverse possession after a lawful order of eviction has been issued.
8. In response to the replying affidavit filed by the 1st defendant/respondent, the plaintiff/applicant filed a further affidavit sworn on 24th February, 2025. The plaintiff/applicant deposed that there are wild and unsubstantiated allegations levelled against him, and that he was deceived to sign the purported documents on grounds that they were paying him unpaid accrued and outstanding salary under the instructions of the deceased owner. He deposed that he has never been served with the eviction order and he does not fit within the description of a third party under clause 2 of the order. Further, that the claim that the defendants/respondents are the only administrators of the estate of the deceased is in contest, and thus true ownership of the suit property should be determined by this court.
9. The plaintiff/applicant filed a further affidavit sworn on 12th February, 2025 in response to the 2nd defendant/respondent replying affidavit. The plaintiff/applicant deposed that he has not withheld any material facts as this court is a court of record whose documents are available on the court system. With regard to ELC No. E023 of 2023 [OS], the plaintiff/applicant deposed that there was forgery of the supporting affidavit. Further, that no costs were awarded to the 2nd defendant/respondent in ELC No. E015 of 2022 [OS], and that despite his presence on the suit property, he has never been served with any notice by the defendants/respondents.
10. The application was canvassed by way of written submissions. The plaintiff/applicant filed his written submissions dated 17th March, 2025. While relying on the case of Mrao Limited v First American Bank of Kenya Limited & 2 others [2003] eKLR, the plaintiff/applicant submitted that the defendants/respondents have not disputed the fact that he has been in open, peaceful and uninterrupted possession of the suit property, and that he has presented material to demonstrate that his proprietary interests on the same. He further submitted that his family would be rendered destitute and homeless if the defendants/respondents actualize their threat.
11. On balance of convenience, the plaintiff/applicant submitted that he has established that he will suffer irreparable harm that cannot be compensated by damages unless the orders of injunction are granted by this court.
12. The 2nd defendant/respondent filed his written submissions dated 24th April, 2025. While reiterating the contents of his replying affidavit, he submitted that a dishonest litigant is unworthy of the equitable relief of an injunction. Further, that an injunction would visit hardship on the administrators of the estate of the deceased, and that this court must reject the invitation to stall the administration of the estate of the deceased. He submitted that the plaintiff/applicant is abusing the court process and subjecting them to hardship of costs which he has no capacity to meet.



13. I have carefully analyzed and considered the pleadings, the written submissions and the authorities cited. The issue for determination is whether a temporary order of injunction should issue pending the determination of the suit.
14. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the case of *Giella v Cassman Brown* [1973] EA 358. This position has been largely pronounced in numerous decisions and more particularly in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* CA No.77 of 2012 [2014] eKLR where the Court of Appeal held that:-

“in an interlocutory injunction application the applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour. These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.
15. As a result, the plaintiff/applicant ought to first establish a prima facie case. In *Mrao Limited v First American Bank of Kenya Limited* [2003] eKLR, the court stated as follows: -

“... 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 legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
16. The decision whether or not to grant temporary orders of injunction is discretionary. In exercising such discretion, this court is well guided by the above cited authorities and the law. It is not disputed that the suit property in this case belonged to the late *Lydushka Hornik Piotto*. Litigation surrounding this parcel appears to have began after her demise. The plaintiff/ applicant claims ownership of the suit property by virtue of adverse possession. The defendants/ respondents challenge this claim on grounds that there has been litigation ongoing on the suit property through succession proceedings including grant of an order of eviction, and that the plaintiff/ applicant has been an employee of the deceased and thus his entry into the suit property was lawful.
17. By and large, both parties went into detail to argue ‘substantively’ on adverse possession. While I may not wish to dwell on that, it would only be necessary for this court at this stage to establish whether the principles set out above have been established. In support of his claim, the plaintiff/ applicant attached affidavit evidence of his occupation of the suit property which he contended that he has been in peaceful and exclusive possession of the same since the year 2006. In opposition, the defendants/respondents contended that the plaintiff/applicant has failed to disclose previous litigation surrounding the suit property, and the fact that there is an order granting eviction of trespassers on the same. Interestingly, the plaintiff/ applicant alleges not to have been served with the same. From what I have gathered from the rival affidavit evidence is that ownership of this property is highly contested. However, and while this is a court of equity, this court needs to be satisfied that on the material presented before it, there is a right that has been violated and/or is threatened.
18. In the case of *Mbuthia v Jimba Credit Finance Corporation & another* [1988] KECA 116 [KLR], it was stated: -

“The correct approach in dealing with an application for the injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side’s propositions.”



19. Having scrutinized the material before me, I am not satisfied that the plaintiff/applicant has established a prima facie case. Evidently so, there is an order issued on 24th May, 2024 pursuant to succession proceedings regarding the estate of the deceased that cannot be ignored. Also, there is no real or imminent threat that has been shown that would enable this court exercise its discretion.
20. Having found that the plaintiff/applicant has not established a prima facie case, I see no need to consider the other two grounds. The notice of motion dated 14th January, 2025 lacks merit and it is hereby dismissed with costs to the defendants/respondents.

Orders accordingly.

DATED, SIGNED & DELIVERED VIRTUALLY

THIS 14TH DAY OF AUGUST, 2025.

HON. MBOGO C.G.

JUDGE

14/08/2025.

In the presence of:

Mr. Benson Agunga - Court assistant

Mr. Muthoka holding brief for Ms. Ann Makori for the Plaintiff/Applicant

