



**Awadh v National Museum of Kenya & 3 others (Environment & Land
Case E034 of 2024) [2025] KEELC 978 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 978 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E034 OF 2024
EK MAKORI, J
FEBRUARY 27, 2025**

BETWEEN

ADIL SALIM AWADH PLAINTIFF

AND

NATIONAL MUSEUM OF KENYA 1ST DEFENDANT

HARON TETE NDUNDI 2ND DEFENDANT

RICHARD KEN CHONGA 3RD DEFENDANT

COUNTY GOVERNMENT OF KILIFI 4TH DEFENDANT

RULING

1. Notice of Motion dated 26th March 2024 seeks an order of injunction directing the defendant from trespassing onto Plot Number 318/III/MN (the suit property), demolishing the perimeter boundary wall erected thereon, and interfering with the rights of the plaintiff to peaceful, quiet possession, control, ownership and occupation over the said suit property with the attendant costs.
2. The application is supported by the affidavits of the plaintiff, Adil Salim Awadh, sworn on 26th March 2024 and 17th May 2024, and the annexures contained therein.
3. The 1st defendant, the National Museums of Kenya, has opposed the application through a replying affidavit sworn on its behalf by Prof. Mary Gikungu on 11th April 2024.
4. The 2nd and 3rd defendants did not enter an appearance nor file any response to the application. The 4th defendant, the County Government of Kilifi, has, on its part, filed grounds of opposition. The County Government of Kilifi is involved in this case due to its alleged intention to demolish the plaintiff's boundary wall.
5. The application was canvassed through written submissions.



6. From the materials and submission, I frame the following issues for this court to determine - whether the plaintiff is entitled to an injunction and who should bear the application costs. These are the key legal issues at stake at this stage.
7. The plaintiff avers that he is the registered proprietor of the suit property and remains in possession thereof to date. To demonstrate the foregoing, the plaintiff has produced a copy of the Certificate of Title and Certificate of Postal Search as the annexure marked ASA1.
8. To buttress the root of his title, the plaintiff has gone further and produced a copy of the sale agreement dated 23rd August 2022 entered between him and I & M Bank Limited as Chargee (in exercise of the Chargee's contractual right and statutory power of sale) selling the suit property to the plaintiff at a consideration of Kshs. 150,000,000/- with the consent of the borrower, evidenced by the annexure marked ASA2, demonstrating how the plaintiff acquired ownership of the suit property.
9. Upon acquiring ownership of the suit property, the plaintiff diligently obtained approval from the County Government of Kilifi, the National Environment Authority (NEMA), and a Certificate of Compliance from the National Construction Authority (NCA) to construct a perimeter boundary wall. The plaintiff produced the relevant copies of the approvals, demonstrating his approach to securing the property—annexure marked ASA4.
10. The plaintiff firmly believes that the defendants' actions were not just about the land but about intimidating him into relinquishing it. His belief in the defendants' malicious intentions is further strengthened by the 1st defendant's blockage of the public access road between the suit property and the opposite parcel of land, Title 944/III/MN.
11. The plaintiff believes that the actions by the defendants were aimed at scaring him to let go of the suit property, which is prime land so that they can have it for themselves. He contends that his apprehension was realized when, on 25th March 2024, officers from the County Government of Kilifi informed him that as of 26th March 2024, the 4th defendant shall descend on the suit property for the sole purpose of demolishing the boundary perimeter wall constructed by him around the suit property. The plaintiff's fear of losing the property prompted him to file this suit and application on 26th March under the certificate of urgency.
12. Plaintiff avers that on 28th March 2024, the Permanent Secretary in charge of the 1st defendant and other public officials from the 1st defendant National Museums of Kenya, the 2nd and 3rd defendants, and the 4th defendant descended onto the suit property with hired goons and County askaris with a view of demolishing the perimeter boundary wall of the plaintiff erected thereon. The Court can take judicial notice that the foregoing events occurred and were captured all over the media on the said date. Indeed, the defendants and their officers and hired goons managed to bring down the entrance gate and a section of the perimeter boundary wall constructed by the plaintiff despite having been duly served with the injunctive order issued by the court on 27th March 2024.
13. The plaintiff states that none of the defendants have denied that they descended onto his property to demolish the boundary perimeter wall constructed thereon. If the defendants are not restrained pending the hearing and determination of this suit, they shall finish their intended job and render this suit moot and nugatory.
14. 1st defendant aver that 'the ruins on the North bank of Mtwapa Creek' were gazetted in 1935 as national monuments under the then Preservation of Objects of Archaeological and Paleontological Interest Ordinance, (now the *National Museums and Heritage Act*, 2006) vide Gazette Notice No. 445 dated 15th June, 1935. In paragraphs 5 and 6 of the plaintiff's supplementary affidavit dated 17th May 2024,



the plaintiff rightly admits that the area generally referred to as ‘North bank of Mtwapa Creek’ relates to all parcels of land, including the subject suit land, that falls with Mtwapa Bridge to the right and northwards towards Kanamai-Kikambala areas. What the applicant denies, however, is that his alleged suit property does not contain ruins or monuments within it to form part of what the 1935 Gazette Notice intended to declare as national monuments. The 1st defendant believes this is a mere denial, and the totality of all documents and pleadings placed before the court points towards the presence of ruins at the suit property. This Court should deliberate to visit the site and confirm the existence, or lack thereof, of ruins and/or monuments within the suit property. The reports on pages 18 to 27 of PMG-4 and page 45 of PMG-8 of the 1st defendant’s replying affidavit as testaments of the existence of protected ruins within the suit property.

15. The 1st defendant proceeds to state that as regards the legality and otherwise of the plaintiff’s certificate of title produced in respect of the suit property, the 1st defendant submits that the same having been obtained in 1937 when the ‘ruins on the North bank of Mtwapa Creek’ were already gazetted and preserved as monuments for public interest, the process of subdividing and/or excision of the suit property were illegal as the suit property automatically became public land meant public purpose and benefit upon its gazettment as such in 1935. The 1st defendant agrees with the applicant that the gazettal of ‘the ruins on the North bank of Mtwapa Creek’ did not necessarily confer legal ownership of all those parcels of land containing the ruins to the 1st defendant. The gazettal itself didn’t confer National Museums of Kenya legal ownership of the subject gazetted properties, but rather that all parcels of land within which the gazetted ruins were situated became public protected land to be preserved for public purpose and benefit. Similarly, the 1935 gazettment rendered all parcels of land with gazetted ruins within the ‘North bank of Mtwapa Creek’ public land preserved for public purpose and benefit.
16. 1st defendant believes the survey report filed by the plaintiff as ASAS-2 vide his supplementary affidavit dated 17th May 2024 notes that the suit property was excised from Plot No. 108/III/MN and that demarcation of the said Plot No. 108/III/MN was done and completed in 1922. The applicant contends that Plot No. 108/III/MN was a privately-owned property by then. Hence, the subsequent gazettal of the subject ruins in 1935 fell on an already privately-owned property. The 1st respondent believes that the applicant evades the point of pointing out any evidence within the survey report indicating that Plot No. 108/III/MN was privately owned during the said demarcation in 1922 before the excision of the suit property. There is no evidence showing that Plot No. 108/III/MN was privately owned before the gazettment of the subject ruins therein. The said survey report was an afterthought strategy by the applicant. Still, in any event, it doesn’t contain evidence of private ownership of Plot No. 108/III/MN before the gazettment of the ruins in 1935. Land demarcation is not equivalent to private ownership, as the applicant wishes this court to believe. Without evidence of private ownership before the said gazettal in 1935, the suit property became preserved as public land upon the gazettal of the ruins in 1935, and all subsequent allocations to private individuals were rendered null and void.
17. As stated, the 4th defendant filed opposing grounds. Like the 1st respondent, it contends that the suit property remains a gazetted national ruins and monument and unavailable for allocation.
18. Parties cited various authorities to guide this court in reaching a verdict on whether to grant an injunction; of course, the starting point is the celebrated case *Giella v Cassman Brown & Co. Ltd* (1973) EA 358, which established the conditions for granting a temporary injunction:
 - a. The applicant must show a prima facie case with a probability of success
 - b. The applicant must show they will suffer irreparable loss if the injunction is not granted.



- c. If the court doubts, it will decide on the application based on the balance of convenience.
19. A prima facie case has been stated in *Nguruman Limited v Jan Bonde Nielsen & 2 others* (2014) eKLR to entail:

“Recently, this court in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 fashioned a definition for “prima facie case” in civil cases in the following words: “In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the appellant’s case upon trial. That is clearly a standard, which is higher than an arguable case. We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Appellants need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the appellant’s case is more likely than not to ultimately succeed.”

20. We have an applicant claiming ownership of a suit property he acquired through purchase, particularly from a bank exercising a statutory right of sale at a whopping Kshs 150,000,000/. As it turned out, the suit property is claimed by the 1st respondent, who vouches it is a gazetted national ruins and monument—public property vide - *GN No. 445 of 1935*. On the other hand, the applicant traces the title’s root as private property to 1922 and a Certificate of Title issued in 1937!
21. From the foregoing, the root of the title held by the plaintiff vis-à-vis the claim by the 1st defendant will have to be investigated, which can only happen at a hearing. For now, prima facie, the applicant is in actual possession. I agree with the 1st defendant that if the property is proved to have been a gazetted ruins and monument at a hearing, it could not be allocated to a private individual. As I have said, that will be settled at a hearing based on the intricacies of ownership rights, which can be traced back to the 1920s and 1930s!
22. I emphasize that the two warring ownership claims, whether the land is private or public, will be settled at a hearing. What the court can do at this point is to order a status quo pending a hearing and determination of this suit in this manner:
- a. Since the applicant is in possession of the suit property - No. MN 318/III, he remains in possession. This means the suit property may not be altered or transferred until this matter is heard and determined.



- b. The respondents are hereby restrained from trespassing into the suit property No. MN 318/ III and that the respondents be and are hereby restrained from demolishing the perimeter boundary wall constructed thereon and interfering with the peaceful occupation by the plaintiff until this matter is heard and determined.
- c. That the applicant is not to deface and or destroy any ruins or monuments that could be standing on the suit property till this matter is heard and determined.
- d. Since this matter has elicited public interest, and as proposed by the 1st respondent, a scene visit will be necessary for the court to appreciate the history reckoned herein.
- e. Given the disclosure of the site's potential significance for national heritage, the matter should be fast-tracked.
- f. Costs in the cause.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 27TH DAY OF FEBRUARY 2025.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Omondi for the Plaintiff

Mr. Ojwang for the 1st Defendant

Happy: Court Assistant

In the Absence of:

Ms. Abwao for the 4th Defendant

