



Nyakeno & another (Suing as the administrators & legal representatives of the Estate of Margaret Odoyo Nyakeno - Deceased) v Nyidha (Environment and Land Appeal E110 of 2024) [2025] KEELC 1356 (KLR) (20 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1356 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E110 OF 2024**

**E ASATI, J
MARCH 20, 2025**

BETWEEN

JANES AYOO NYAKENO & SAMUEL AJWANG (SUING AS THE ADMINISTRATORS & LEGAL REPRESENTATIVES OF THE ESTATE OF MARGARET ODOYO NYAKENO - DECEASED) APPELLANT

AND

CHARLES NYIDHA RESPONDENT

(Appeal from the Judgement of the Senior Principal Magistrate's Court at Winam by Honourable D.K. Mtai in Winam Land Case No. E033 of 2024 – Janes Ayoo Nyakeno & Samuel Ajwang (suing as the Administrators & Legal Representatives of the Estate of Margaret Odoyo Nyakeno – deceased)

RULING

1. This ruling is respect of the Notice of Motion application dated 13th January, 2025 brought pursuant to the provisions of section 1A, 3 & 3A and 80 of the Civil Procedure Act, Order 42 Rule 6 and Order 51 Rule 1, 3 and 4 of the Civil Procedure Rules.
2. Although the Notice of Motion lists 12 prayers, only prayers 4, 7, 10, 11 and 12 thereof are outstanding as the rest of the prayers sought for interim orders pending hearing and disposal of the application and are therefore spent.
 - i. Prayer 4 and 10 are somewhat similar as they seek for an order directing that the road of access to land parcel numbers Kisumu/Kogony/5551 and 5550 be opened pending hearing and determination of the appeal.



- ii. Prayer No.7 seeks for an order that the OCS Kochung Police Post be ordered to enforce the orders to ensure that the public access road is cleared open pending hearing and determination of the appeal.
 - iii. Prayer 11 seeks that the court may issue judgement directing the Respondent to open the public access road accessing property land parcel number Kisumu/Kogony/5551 AND 5550.
 - iv. Prayer 12 seeks that costs of the application be provided for.
3. The application was supported by the averment in the Supporting Affidavit sworn by the 1st Applicant on 13th January, 2025 and the annexures thereto.
 4. The application was opposed vide the contents of the Replying Affidavit sworn by the Respondent on 28th January, 2025 and the annexures thereto.
 5. The application was argued orally on 5th February, 2025.
 6. It was the Applicant's case that the application seeks for an order of injunction and for stay of execution pending appeal.
 7. Counsel submitted that there will be no prejudice to be suffered by the Respondents if the road is re-opened.
 8. On behalf of the Respondent, it was submitted that the Applicant is seeking mandatory interlocutory injunction for which the degree of proof is higher. Counsel relied on the case of Kenya Breweries Ltd. -vs- Washington Okeyo and the case of Giella -vs- Casman Brown and submitted that no prima facie case had been demonstrated.
 9. That the road had been found to have been created illegally. That the trial court ordered that the road be closed and deleted from the map.
 10. That there is an appeal pending before the Court of Appeal where the Appellant herein is seeking the same orders of re-opening the road.
 11. Counsel submitted further that the prayers in the application are the same prayers in the appeal. That to grant the prayers will amount to determining the appeal at this stage.
 12. That the balance of convenience favours the Respondent as the road no longer exists, having been deleted by court order.
 13. I have considered the application, the ground of opposition raised in the Replying Affidavit and the submissions made. There is no prayer for stay of execution in the application, contrary to the submissions by the Applicant.
 14. The substance of the prayers sought is for re-opening of the access road and for police to provide security and enforce the order and ensure that the road is opened.
 15. The road the subject matter of the application was the subject matter of the suit before the trial court from which the appeal herein arises. The trial court found that the road was illegally created and ordered for its closure. It seems the trial court's orders have been executed and the road closed hence the prayer for its re-opening.
 16. The appeal herein challenges the decision of the trial court and seeks that the same be set aside. What the Appellant is seeking in the appeal ultimately is that the road be re-opened. Prayer 3 in the Memorandum of appeal seeks that Respondent be restrained from blocking the public access road



accessing the appellant's land parcel numbers Kisumu/Kogony/5551 and 5550. Hence granting the application will amount to determining the appeal before hearing it.

17. Prayer 11 seeks for judgement directing the Respondent to re-open the road. These are final orders that can only be granted after hearing the appeal.

18. I find that the application lacks merit. The application is dismissed. Costs to the Respondent.
Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 20TH DAY OF MARCH, 2025 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen - Court Assistant.

Awuor Odipo h/b for Odhiambo for the Appellant/Applicant.

Ndolo for the Respondent.

