



**Obul & 2 others (Suing on their own Behald and on Behalf of others) v
KCA University & another (Enviromental and Land Originating Summons
E011 of 2020 & Environment and Land Miscellaneous Application E015 of 2022
(Consolidated)) [2025] KEELC 4093 (KLR) (29 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4093 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS
E011 OF 2020 & ENVIRONMENT AND LAND MISCELLANEOUS
APPLICATION E015 OF 2022 (CONSOLIDATED)**

E ASATI, J

MAY 29, 2025

**AS CONSOLIDATED WITH KISUMU ELC MISC. APP. CASE
NO.E015 OF 2022 MOSES ODHIAMBO OBUL & 2 OTHERS VS KCA
UNIVERSITY & ANOTHER AND KISUMU CMC ELC NO.101 OF 2012**

BETWEEN

**MOSES ODHIAMBO OBUL 1ST PLAINTIFF
TABITHA ADOYO OBUL 2ND PLAINTIFF
LINET AUMA ODOYO 3RD PLAINTIFF
SUING ON THEIR OWN BEHALD AND ON BEHALF OF OTHERS**

AND

**KCA UNIVERSITY 1ST DEFENDANT
NATIONAL LAND COMMISSION 2ND DEFENDANT**

RULING

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1. The application before court for determination is the Notice of Motion dated 2nd August, 2024 brought pursuant to the provisions of article 159(1), 2(a) and (d) of *the Constitution*, sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 51 Rule (1) of the Civil Procedure Rules 2010.
2. The application seeks for orders that;



- a. The application be certified as urgent and be heard in the first instance
 - b. The Respondent do remove and/or demolish or pull down the structures/buildings that are trespassing or encroaching on the Applicant's parcel of land known as the Land Reference No.KISUMU LR 24810 within seven days of the making of the order herein and failure to do so the Applicant be at liberty to do same at the Respondent's costs.
 - c. A permanent injunction do issue to restrain the Respondents whether by themselves, their agents, servants, employees or any person acting under the Respondents' mandate and/or authority or direction from trespassing or encroaching or entering or construction or erecting or developing in any way howsoever from interfering with the Applicant's ownership, use and possession of all that parcel of land known as Land Reference No.KISUMU LR 24810.
 - d. That the Honourable court do issue an order, that the Respondents graves in KISUMU LR 24810 be exhumed by the Respondent from their site of burial and re-buried at places of the Respondents own choosing outside the KISUMU LR 24810 within seven days of the orders of the Honourable Court and failure to do so the Applicant be at liberty to exhume the graves and relocate them to any available public cemetery at Respondents' cost.
 - e. The OCS Kisumu Central Police Station do assist with the compliance of the orders of the court.
 - f. The Honourable court do grant any such further orders as it deems fit.
 - g. The costs of this application be provided to the Applicant.
3. The application was supported by the averment in the Supporting Affidavit sworn by Teresia Irura on 2nd August, 2024 and the annexures thereto.
 4. The application was opposed vide the Replying Affidavit sworn by Moses Odhiambo Obul on 30th August, 2024.
 5. The court record shows that the suit herein had been finalized vide a consent order that resulted in the decree dated 6th December, 2023.
 6. The grounds upon which the application was brought are that there is material non-compliance of the Applicant with the terms of the decree dated 6th December, 2023. That the Respondents ought to have vacated the suit land by 31st December, 2023 with all their belongings and relinquished all claims against KCA University over the suit property.
 7. That while the Applicant complied with the terms of the decree, some of the Respondent Members have refused to vacate the suit property and/or have vacated and left structures and/or graves at the suit property.
 8. That the Applicant is desirous of developing the suit property which desire has become impossible because of the abandoned structures and graves on the site and also because the Respondents have refused to vacate as per the terms of the decree.
 9. That the actions of the Respondents have denied the Applicant full rights and privilege conferred by sections 24 and 25 of the *Land Registration Act* as well as Article 40 of *the Constitution*. That the application seeks merely to give effect to the decree of the court dated 6th December, 2023.



10. The Respondents' case on the other hand is that they moved out of the suit property as per the decree. The 1st Respondent Moses Odhiambo Obul vide the Replying Affidavit stated that he moved out of the suit land together with his family including the 2nd Respondent and that he stays Ahero.
11. That his mother by the name Tabitha Adoyo Obul and his cousin by the name of Fredrick Okumu Ochuka who were staying on the land had moved out and their homes demolished and were currently residing in Seme sub-county within Kisumu County.
12. That the Applicant want to obtain a court order so that it can extend the acreage of its land which had clearly demarcated and installed beacons – that the Applicant through its agents had issued notices but served strangers to the proceedings and who are non-family members and who are occupying portions outside the Applicant's delineated land. That the orders are meant to evict innocent Kenyans.
13. That the application as presented is ambiguous and beyond the limits of the Respondent taking into account the legitimate consent which is subsisting. That the application is made in bad faith.
1. It was submitted on behalf of the Applicant vide the written submissions dated 26th January, 2025 filed by the firms of Okwach & Company Advocates that even though the main suit was concerned with ownership of the property, the orders the Applicant is seeking are supplementary to ownership. That the Applicant may not truly enjoy vacant possession of the suit property when the graves of the kin of the Respondents still lay on the suit land.
14. That the orders sought are those that the court has power to issue.
15. That upon the court's discretion, they approached the Respondent's Counsel and made the suggest that they modify the earlier consent.
16. That the Applicant would be happy if directions were given in terms of the said modification. That the rest of the prayers in the application are proper extracts from the decree being executed.
17. On behalf of the Respondent, it was submitted vide the written submissions dated 17th February, 2025 filed by Enock Anyul O. Dickson Advocates that the Respondents have vacated the suit land and that their homes were demolished.
18. That the people the Applicant is targeting and whom it has served eviction notices are not related to the Respondents and that they are strangers occupying portion of land outside the Applicant's delineated land.
19. I have considered the application. The starting point is that the Applicant is a decree holder and who if the Respondent fail to comply has access to the procedure available in law for execution of decree.
20. A reading of the decree dated 6th December, 2023 shows that it provided for voluntary moving of the Respondents from the suit land or eviction. The decree also made provision for police assistance to be accorded to the Plaintiff (Applicant herein) through the OCPD Kisumu Police Division.
21. The 2nd prayer in the application is for demolition of premises. The Respondents have averred that they have moved out of the suit land and demolished their houses. The Applicant has not given particulars as to which of the Respondents' building or structures are still on the suit land for which the Applicant requires an order for demolition.
22. Demolitions and evictions have serious consequences and a party seeking the same must prove sufficiently that the intended demolitions and/or evictions will be lawful.



23. The second prayer is for an order of injunction. The grounds for grant of an order of injunction are that the Applicant must prove that his/her rights have been infringed and that his case has a probability of success. This is a matter that is already finalized and there is no evidence placed before court that the Respondents have re-entered the land.
24. The contention by the Respondents that the present orders are being sought against people who are strangers in these proceedings who occupy land outside the suit land have not been denied.
25. No evidence has been placed before court that the structures sought to be demolished are within the suit land. Court orders are not made in vain.
- 2.6 The third prayer sought is for an order that the Respondents' graves on KISUMU LR.24810 be exhumed by the Respondents from the site of burial and be reburied at places of the Respondents' own choosing outside LR 24810 within 7 days of the orders of the court and failure to do so the Applicant be at liberty to exhume the graves and relocate them to any available public cemetery at the Respondents' cost.
27. There are no particulars placed before court in respect of this prayer either in application, Supporting Affidavit and submissions. There is no details of how many graves, in respect of which deceased person.
- 28 The court finds the prayer to be not only to general but also ambiguous.
- 29 As observed in *Concelia Ondieki vs Grace Achieng Otieno & another* [2019] eKLR it was held
- An order for exhumation of the remains of a deceased person is a drastic and unpleasant order, grant of which should only be made in special, unique and compelling circumstances. This is so because, exhumation is offensive to cultural and religious beliefs and practices, and it may cause public outrage.
- 30 There is therefore a burden on the person seeking the order to persuade the court that the right circumstances exist for grant of the order. In determining whether to grant the order or not, the court must weigh the interests of the appellant/applicant as against those of the deceased and her family. It is only where the rights of the applicant outweigh or override those of the deceased's family that exhumation orders can be granted."
- 31 The case herein having been settled amicably vide a Consent order that resulted in the decree, the orders prayed for in the application seek to review the consent and as submitted on behalf of the Respondent, grounds for review of the consent judgement have not been demonstrated.
- 32 The court finds that the application lacks merit and is hereby dismissed.
- No orders as to costs.
- Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 29TH DAY OF MAY 2025 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

**E. ASATI
JUDGE.**

In the presence of:

Maureen: Court Assistant.

Anyul for the Plaintiffs/ Respondents.



Muga for the 1st Defendant/Applicant.

No appearance for the 2nd Defendant.

