



Otiende (Suing on his behalf and as the Legal Representative and Administrator of the Estate of Manasseh Nyajeri Otiende - Deceased) & another v Land Registrar, Kakamega County & 3 others (Constitutional Petition E002 of 2024) [2025] KEELC 4612 (KLR) (11 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4612 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
CONSTITUTIONAL PETITION E002 OF 2024**

**A NYUKURI, J
JUNE 11, 2025**

BETWEEN

**SAMWEL OLEWE OTIENDE (SUING ON HIS BEHALF AND AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF MANASSEH NYAJERI OTIENDE - DECEASED) 1ST PETITIONER
STEPHEN OMAMO OTIENDE 2ND PETITIONER**

AND

**THE LAND REGISTRAR, KAKAMEGA COUNTY 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT
THE COUNTY SURVEYOR, KAKAMEGA COUNTY 3RD RESPONDENT
ELIUD OTIENO ATITA 4TH RESPONDENT**

RULING

Introduction

1. Before court is a Notice of Motion dated 15th August, 2024 filed by the petitioners seeking the following orders:
 - a. Spent
 - b. Spent
 - c. Pending the hearing and determination of this suit, an order of temporary injunction do issue restraining the respondents by themselves, their servants, agents, workmen and/or any other persons whomsoever and whatsoever from advertising, offering for sale, disposing of,



alienating, transferring or in whatever way interfering with the petitioners proprietary interests in six acres in Land Parcel No. Kisa/Doho/185.

- d. That costs be provided for.
2. The application is anchored on the grounds on its face as well as the supporting affidavit sworn by Samwel Olewe Otiende, the 1st petitioner. The applicants' case is that land parcel No. Kisa/Doho/185 (suit property) is an ancestral land which was occupied by their late father Wellington Otiende since 1955 until his demise in 1971. The applicants claimed that during adjudication in 1967, the suit property was allocated to his late father while survey thereof was done on the 17th April, 2000 and that all along there has not been any dispute.
 3. He further deponed that in 1967 Succession Case in Khwisero Court Case No. 17 of 1976 gave possession to Manasseh Nyanjeri Otiende, Stephen Omamo Otiende and Samwel Olewe Otiende whereof the four of them became registered proprietors thereof in 1987. He further stated that in Khwisero Land Disputes Tribunal Case No. 10 of 1997 the court granted the Land abutting the suit property being parcel No. Kisa/Doho/184 to Daniel Namatsi Okusimba and stated that Manasseh Nyanjeri "should try to recover his portion from John Ouko Majeri". According to the applicant the import of that decision was that Daniel Namatsi Okusimba to hive off part of the suit property.
 4. He claimed that the decision of Khwisero Land Disputes Tribunal was adopted on 21st December, 1999 vide Kakamega CMCC Misc. Application No. 142 of 1998. He stated that the late Manasseh Nyajeri Otiende appealed against the said decision vide Provincial Land Appeals Tribunal Case No. 6 of 2000, which made a decision on 10th April, 2003 reversing the Khwisero Tribunal's decision and ordering maintenance of status quo on the land as at the time before the dispute arose. He further stated that vide Kakamega Civil Case No. 132 of 2023, an appeal against the appeal's Tribunal decision, the appeal was struck off.
 5. The applicant maintained that during the pendency of the aforementioned cases, the 1st – 3rd respondents by fraud used tricks to amend the map of the suit property to suit the award of the Khwisero Tribunal's decision but that that was contrary to the order of stay of execution granted. He complained that the respondents had interfered with the boundaries of the suit property and extended parcel Kisa/Doho/184 from 1.84 acres to its current size being 4.8 acres and that the size of the suit property was reduced from 6 acres to 2.5 acres.
 6. He insisted that the suit property should revert to 6 acres as it was in 1987 and parcel No. Kisa/Doho/184 be reduced to be as at 1986 and that the area map be amended by the surveyor to reflect the original map of 1978. He asserted that consequent to the interference with the boundaries of the suit property, the 4th respondent had threatened to evict the petitioners from the suit property. He stated the 4th respondent had frustrated the petitioners from enjoying the fruits of the judgments given by courts as stated above and violated the petitioner's right to own property under Article 40 of [the Constitution](#). He stated that the 4th respondent has threatened to harm the petitioners if he is removed from the portion of land he is illegally occupying.
 7. The applicant claimed that the 4th respondent had trespassed on the 3.5 acres of the suit property. He stated that he had been utilizing 6 acres of the suit property for many years. He stated that there was a likelihood that the suit property was in danger of being alienated. He attached a copy of the grant, authority to plead; decision of Khwisero Land Disputes Tribunal, orders issued in CMC Miscellaneous Award No. 142 of 1998; the decision of the Provincial Land Disputes Tribunal, Judgment in Kakamega High Court Case No. 132 of 2003 on 29th May, 2013; a letter from Mukabane & Kagunza Advocates and photographs.



8. The application was opposed. The 1st, 2nd and 3rd respondents filed grounds of opposition dated 8th November, 2024. He stated that according to the records existing at the registry, the said alterations of acreages on the green cards of the suit parcels Kisa/Doho/184 and Kisa/Doho/185 were done vide a court order in Kakamega Chief Magistrates Court Misc. Award No. 142 of 1998.
9. The application was canvassed by way of written submissions. On record are submissions filed by the applicant dated 15th January, 2025 and those filed by the 4th respondent dated 2nd March, 2025; both of which the court has carefully considered.

Analysis and determination

10. The court has carefully considered the application herein, the response thereto and the parties' rival submissions, the only issue that arise for determination is whether the petitioner has met the threshold for grant of orders of temporary injunction.
11. Order 40 Rule 1 of the Civil Procedure Rules grants this court the jurisdiction to grant orders of temporary injunction where an applicant demonstrates that the disputed property is at risk of being wasted, damaged, alienated, wrongly sold in execution of a decree or the defendant threatens or intends to remove or dispose it in circumstances that show that there is probability of the plaintiff being obstructed or delayed in execution of a decree that may ultimately be passed in his or her favour.
12. Conditions for grant of temporary injunction are well settled. An applicant for temporary injunction must demonstrate a prima facie case with chances of success; demonstrate that he or she stands to suffer irreparable injury that may not be compensated in damages and where the court is in doubt, it shall decide the application on a balance of convenience (See *Giella v Cassman Brown* [1973] EA 358.)
13. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [CA No.77 of 2012](#) [2014] eKLR 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”.
14. In the instant application, the petitioners aver that there have been disputes filed in the Succession court, the Land disputes Tribunal, at Khwisero, the Land Disputes Appeals Tribunal, the Magistrates court and the High court. Further and more critically, that the award of Khwisero Land Disputes Tribunal which had been adopted in Kakamega CMC MISC APPL. NO. 142 of 1998, had been stayed by the appeals Tribunal, yet on the basis of the Khwisero Tribunal award, the respondents amended the map to have their land indicated as measuring 6 acres. Essentially, the petitioners are alleging that the respondents' actions are contrary to the decision of the Appeals Tribunal.
15. Clearly, the matters raised herein touch on boundary dispute and are matters raised and determined before the Divisional and Appeals Land Tribunals, and the High Court, in a dispute between the parties herein.



16. Section 7 of the *Civil Procedure Act* bars the court from trying a suit or an issue which was directly and substantially in issue in a former suit and which has been adjudicated upon by a court of competent jurisdiction.
17. In the instant matter, the applicants have raised the issue as to whether the respondents' actions are contrary to specific orders made in a matter decided by Khwisero Land disputes Tribunal, then by the Appeals Tribunal and consequently the High Court. Since the applicants' complaint is that the respondents' actions contravene quasi-judicial pronouncements by the appeals Tribunal, then the applicant ought to seek redress within the forum where the decision of the appeals Tribunal was or was supposed to be enforced and not through filing a fresh suit before this court. In addition, if the applicants are dissatisfied with decision of another court, in this case Kakamega CMC MISC. Appl. 142 of 1998, court, there are legal channels of challenging such decisions and one of them is not by filing a fresh claim by way of a constitutional petition. Besides, the respondent is clear that the rectification of the map was pursuant to orders in Kakamega CMC MISC APPL. 142 of 1998. Therefore, there having been previous proceedings in regard to the boundaries of the suit property, This court has no jurisdiction to again adjudicate the boundary dispute between the parties.
18. As stated above, the dispute herein is purely a boundary dispute and does not raise questions for constitutional interpretation, but matters under sections 18 and 19 of the *Land Registration Act*, which are matters outside the jurisdiction of this court. A mere invoking of Article 40 on the right to property by the petitioners does not transform this dispute to a constitutional question.
19. For the above reasons, I find and hold that the petitioners have failed to demonstrate a prima facie case with any real chance of success. Ultimately, I find and hold that the application dated 15th August 2024 lacks merit and the same is hereby dismissed with costs to the respondents.
20. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 11TH DAY OF JUNE, 2025

A. NYUKURI

JUDGE

In the presence of;

Samuel Otiende the 1st applicant in person

No appearance for the 2nd Applicant

No appearance for the 1st to 3rd Respondents

Eliud Otieno Atita the 4th respondent in person

Court Assistant: M. Nguyai

