



Auka (Suing as Legal Rep of the Estate of Charles Otieno Osir, Deceased) v Oyugi (Environment and Land Appeal E082 of 2024) [2025] KEELC 6150 (KLR) (18 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6150 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E082 OF 2024
E ASATI, J
SEPTEMBER 18, 2025**

BETWEEN

**MOUREEN JOY AUKA APPELLANT
SUING AS LEGAL REP OF THE ESTATE OF CHARLES OTIENO OSIR,
DECEASED**

AND

FREDRICK OTIENO OYUGI RESPONDENT

(Being an appeal from the ruling of Hon. J. M. Wekesa Senior Principal Magistrate delivered on 25th September 2024 in Nyando MC ELC NO. E025 OF 2024 on the appellant's applications dated 21st May 2024 and 14th June 2024)

JUDGMENT

1. A brief background of the present appeal as can be gathered from the Record of Appeal dated 3rd February, 2025 is that Moureen Joy Auka, the Appellant herein in her capacity as the Legal Representative of the estate of one Charles Otieno Osiro, deceased, is the Plaintiff in an ongoing case before the trial court namely; Nyando MC ELC Case No. E025 of 2024 (the suit). The Respondent herein is the Defendant in the suit.
2. The record shows that the appellant filed two (2) applications dated 21st May, 2024 and 14th June, 2024 which applications were heard before the trial court and a ruling in respect thereof delivered on 25th September, 2024. The trial court found that both applications lacked merit and dismissed them with costs to the Defendant/Respondent.

The appeal

3. Aggrieved by the ruling, the Appellant filed the present appeal vide the Memorandum of Appeal dated 9th October, 2024 seeking for orders that;



- a. The appeal be allowed.
 - b. The Respondents' Supplementary Affidavit sworn on 23rd July, 2024 be expunged from the court record.
 - c. The ruling of Hon. J.M. Wekesa – Senior Principal Magistrate delivered at Nyando on 25th September, 2024 on the Applicant's application dated 21st June, 2024 be set aside and an order be made allowing the application with costs.
 - d. The suit be placed before a different Magistrate with jurisdiction other than Hon. J.M. Wekesa for hearing and final determination.
 - e. That costs of the appeal be awarded to the Appellant.
4. The grounds of appeal as contained in the Memorandum of Appeal are that the learned Magistrate erred in law and fact;
1. in that despite cogent evidence availed by the Appellant found that the Appellant had not fulfilled the three requirements for injunctive orders.
 2. by failing to appreciate that the irreparable loss that cannot be compensated by an award in damage was to suffer by the estate of Charles Otieno Osiro (Deceased) and not the Appellant in person and consequently arrived at a wrong final decision.
 3. by failing to appreciate that the primary purpose of injunctive orders is to preserve the subject matter of a suit and contract and even proven the continuation of a breach of contract and therefore arrived at a wrong decision.
 4. in failing to appreciate that the Appellant's suit in the trial court was hinged on the Respondent taking illegal possession of the suit property and such issue cannot be determined at an interlocutory stage by affidavit evidence but after full hearing and therefore ended up making wrong conclusion.
 5. in failing to appreciate that even if there was none disclosure of material facts which is denied that there was none, there was prima facie evidence of breach of contract and the Respondent took possession of the suit property in contravention of the terms of the land sale agreement.
 6. by hinging the entire ruling on a singular ground of an alleged material nondisclosure, when none was proved and yet there were other critical issues and grounds to be addressed like breach of contract to name just but one.
 7. in failing to appreciate that in the least she ought to have maintained the status quo of the suit property pending hearing and determination of the suit and thus ended up making a wrong decision in dismissing the Appellant's application.
 8. in failing to appreciate that if the Appellant averred that Respondent took possession of the suit property illegally and the Respondent averred otherwise raised a prima facie case.
 9. in finding that the Appellant is guilty of none disclosure or material that the Respondent was in occupation of the suit property and had made some development, when the Appellant gave evidence that the Respondent was in occupation of the suit property but obtained such occupation and possession illegally and/or in breach of the contract on the land.
 10. by failing to appreciate that the suit property is registered in the name of a deceased person and therefore required caution in dealing with it and it was more probable than not that the



Respondent took advantage of the demise of the deceased to breach the land sale agreement over the suit property and irregularly take possession.

11. by failing to appreciate that the suit property is registered in the name of a deceased person and there was yet to be appointed a representative of the estate of the deceased to receive any money on behalf of the estate of the deceased.
12. by admitting in evidence the Respondent's Supplementary Affidavit sworn on 23rd July, 2024 when the same was filed without leave of court and despite objection by the Appellant and the trial court never made a finding on the objection and yet it is very apparent that the ruling was fully founded on the allegations in the Supplementary Affidavit and yet the Appellant was not given a chance to respond to the Supplementary Affidavit thereby denying the Appellant the right to be heard.
13. when she completely ignored and did not make a decision on the Appellant's objection to the admission of the Respondent's Supplementary Affidavit and therefore rendering the final decision erroneous in all aspects.
14. by failing to appreciate that the Respondent and his agents disobeyed a direct court order issued on 6th June, 2024 even after the Respondent admitting to such disobedience whether court order was regular or irregular.
15. by failing to appreciate that the Respondent's and his agents' disobedience of the court order issued on 6th June, 2024 was not in any way connected to or related to the final determination of the Appellant's Application for injunction and therefore ended up reaching a wrong decision.
16. and wrongly applied her discretion by failing to appreciate that suit property relates to preservation of the estate of a deceased person and ended up condemning the estate of the deceased to pay costs.
17. and already clouded her mind in finding that there was material nondisclosure of facts on the part of the Appellant and there is no way the magistrate would change her mind and handle the matter objectively during hearing of the main suit and would most probably find that there was no breach of contract by the Respondent and it is therefore very apparent that the Appellant would not find justice if the matter proceeds before the very learned trial magistrate as justice must not only be done but be seen to be done.
18. by totally disregarding the evidence on record and ended up reaching a wrong conclusion and decision.

Submission

5. Vide directions given on 18th February, 2025, the appeal was heard by way of written submissions. Written submissions dated 15th March, 2025 were filed by the firm of Shabaan & Associates on behalf of the Appellant.
6. No submissions were filed on behalf of or by the Respondent.

Issues for determination

7. The appellant framed the issues for determination to be;
 - a. whether or not the learned trial Magistrate erred in law and fact in dismissing the Appellant's prayers for an interim injunction.



- b. whether or not the learned trial Magistrate erred in law and fact in dismissing the Appellant’s prayers for an interim injunction
- c. whether the learned Magistrate erred in law and fact in dismissing the Appellant’s prayers for contempt orders against the Respondent
- d. whether the appellant is entitled to the orders sought herein.

Analysis and determination

8. This being a first appeal the court has a duty to reconsider the whole evidence produced before the trial court, re-evaluate it and arrive at its own independent conclusion. While doing so, the court keeps in mind the fact that the trial court had the advantage, which this court does not have, of seeing and hearing the parties and their witnesses first hand. In the case of *Gitobu Imanyara & 2 others –vs- Attorney General* [2016] e KLR the court held that the principles upon which a first appellate court proceeds are well settled and stated that:-

"Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect".

9. The orders appealed against emanate from two applications filed by the Appellant before the trial court. The record shows that the first application dated 21st May, 2024 sought for orders that;
- a. pending hearing and determination of the application and the suit the honourable court be pleased to issue an order of temporary injunction against the Respondent, his proxies, agents assigns and/or employees from trespassing onto, selling, transferring, charging, quarrying and selling stones, tilling, building or planting crops or in any way dealing in the land parcel No. Kisumu/Fort Tenant/720.
 - b. Pending hearing and determination of the application and the main suit the honourable court be pleased to issue an order of mandatory injunction against the Respondent his proxies, agents, assigns and/or employees allow the family members of Charles Otieno Osiro to access and work on the land parcel No. Kisumu/Fort Tenant/720.
 - c. The costs of the application be provided for.
10. The record of appeal shows that the grounds upon which the application was brought were inter alia; that land parcel number Kisumu/Fort Tenant/720 (the suit land herein) was registered in the name of the late Charles Otieno Osiro and yet the Respondent and his agents had trespassed there onto, fenced it, built on it and begun quarrying and selling stones from the land.
11. That the Respondent and his agents were committing irreversable acts of trespass on the land. That there was danger that the Respondent could sell the land anytime. That the Applicant and the family of Charles Otieno Osiro did not have an alternative land to host the family and that they were bound to suffer irreparable loss, grave injustice and be dispossessed of their land and incur avoidable losses and damage. That the Applicant had a prima facie case with a probability of success.
12. The record of appeal shows that in response to the application, the Respondent filed a Replying Affidavit which he swore on 14th June, 2024. He averred that he bought the suit land from Charles Otieno Osiro deceased at Kshs.10,260,000/- where upon he paid part of the purchase price and took possession of the land. That they could not complete the transaction because the Land Registry at



- Nyando got burnt hence paralyzing all the operations. That it is not true that he had trespassed onto the suit land.
13. That he only has a balance of Kshs.4,700,000/- of the purchase price which is being held by his advocates awaiting completion of the succession process.
 14. That he will be the one to suffer irreparable loss and damage since he has paid a substantial amount of money to the deceased and the deceased's estate and has invested on the suit property. That it is the deceased who granted him possession of the suit land in good faith.
 15. That on the suit land, he has planted about 11,000 coffee bushes, constructed a perimeter wall, gate and workers' quarters.
 16. The record shows that upon considering the application and the response thereto, the trial court found that there was non-disclosure of material facts by the Plaintiff/Applicant. That the Plaintiff did not disclose that the Defendant was in occupation of the suit land and had made some developments. The court further found that the Applicant had not demonstrated that she had a prima facie case with a probability of success or that she stands to suffer irreparable injury if the order sought was not granted and proceeded to dismiss the application.
 17. The Applicant faults the trial court for these findings and decision.
 18. It was submitted on behalf of the Appellant that the principles applicable in an application for grant of orders of temporary injunction were set out in the case of Giella -vs- Cassman Brown (1973) EA 358.
 19. That the Applicant demonstrated that the deceased was the registered owner of the suit parcel and that the Respondent had not demonstrated any rights in the land other than a purchaser who had not fulfilled his obligation. That according to clause 82 of the agreement, possession of the suit property could only be handed over immediately upon payment of the entire purchase price which the Respondent had not done.
 20. That the Respondent was quarrying and selling stones from the suit land. That the Appellant and the family of the deceased only know the suit land as the only property that the deceased left for them to settle on.
 21. That the trial court disregarded the submissions by the Appellant in respect of where the balance of convenience tilts.
 22. I have considered the material placed before the trial court. Indeed, the application does not disclose that there was a land sale agreement on going or which had already been signed between the owner of the suit land and the Respondent pursuant to which the Respondent had made substantial payment of the purchase price.
 23. The Applicant vide her Affidavit in support of the application painted a picture of the Respondent as a person who without any basis whatsoever trespassed onto the suit land, fenced it, built on it and begun quarrying and selling stones and denied the Appellant and members of the deceased's family access to the land by placing guards at the gate.
 24. In this appeal, it was submitted that under clause 8.2 of the agreement, possession of the land could only be given to the Respondent upon payment of the entire of the purchase price.
 25. The Applicant does not disclose the date of trespass or Respondent's entry onto the suit land.



26. According to the Respondent, it is the deceased who placed him in possession. The death certificate attached to the application shows that the deceased died on 20th November, 2023. The land sale agreement exhibited by the Respondent was dated 8th March, 2023.
27. An Affidavit sworn by Benard Otieno Okondo on 12th June, 2024 supported the Respondents' averment that the Respondent was given possession by the deceased.
28. It was upon the Appellant to prove that the entry onto the land was without the permission of the registered owner and therefore unlawful. I find that the trial court was justified to find that there was material non-disclosure.
29. The purpose of an order of temporary injunction is to preserve and/or protect the suit property from being wasted, destroyed, alienated or wrongly sold. See order 40 Rule 1 of the Civil Procedure Rules 2010. For this reason, the Respondent can only be restrained from activities that waste, destroy or alienate the land pending hearing of the suit.
30. There is no evidence that in the lifetime of the deceased, the Appellant or members of the deceased's family resided on the suit land.
31. The second application was the Notice of Motion dated 14th June, 2024 seeking for orders inter alia that;
 - a. The Defendant/Respondent and his farm manager one Brian be summoned before the court to show cause why they should not be cited for contempt of court.
 - b. The Defendant/Respondent and his farm manager one be found to be in contempt of the court order issued on 6th June, 2024 and be penalized for contempt of court by committal to civil jail for 2 months.
 - c. The honourable court be pleased to direct the OCS Muhoroni and/or Koru Police station to assist in the enforcement of the court order of 6th June, 2024.
 - d. Costs be provided to the Applicant.
32. The grounds upon which the application was brought were that the court had issued an order dated 6th June, 2024. That the Respondent and his agents were served with the order. That the Respondent and his agents had in blatant disobedience of the order continued to trespass onto, till and work, quarry, trespass and sell stones from the land parcel No. Kisumu/Fort Tenant/720 to the Plaintiff's detriment.
33. That the Respondent had doubled the force so as to quarry more stones. That the institution of the court, the rule of law and the administration of justice suffer loss of stature, integrity and the deserved respect by the Respondent and his workers' disobedience of the court order of 6th June, 2024. That the court order of 6th June, 2024 was very clear and unambiguous and that the Respondent and his agents had proper notice of the orders.
34. The application was supported by the Supporting Affidavit sworn by the Applicant/appellant herein and the annexures thereto.
35. The application was opposed vide the contents of the Replying Affidavit sworn by the Respondent on 19th June, 2024. The Respondent denied being in contempt of court. The court after hearing both sides found that the court could not grant the orders sought in the application dated 14th June, 2024 as the same were not merited due to non-disclosure.



36. Contempt of court in a civil case is the wilful breach, violation or disobedience of a court judgement, decree or order or direction or other process of a court or wilful breach of an undertaking given to the court.
37. In the case of Johari School Limited -vs- Rosemary Wamburu t/a Johari School [2021]eKLR the court highlighted the elements of contempt of court namely;
- a. the existence of a valid court order whose terms are clear, unambiguous and binding on the Respondent,
 - b. proof that the Respondent had knowledge or proper notice of the terms of the order,
 - c. proof that the Respondent acted in breach of the terms of the order and
 - d. that the conduct of the Respondent was deliberate or wilful.
38. In this case, the existence of the court order in clear and unambiguous terms and the Respondent's knowledge thereof were demonstrated and were not denied. What was in controversy was whether the respondent had breached the court order in contempt of the court.
39. As proceedings seeking a party to be cited for contempt of court are quasi-criminal in nature, the standard of proof is higher than proof on a balance of probabilities. In Mutitika vs Baharini Farm Limited (1985) KLR 229 the Court of Appeal held that "in our view, the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, almost but not exactly beyond a reasonable doubt."
40. One of the prayers sought in the application was that the respondent and his farm Manager be Committed to jail for some period for contempt of court. This means that the liberty of the respondent and that of his farm manager are at stake hence the need for prove of the alleged contempt to the required standard.
41. I find no evidence placed before the trial court in proof of wilful breach of the court order by the respondent or his farm manager. The photographs exhibited have no dates, do not show who the people in the photographs are and what they are doing.
42. The trial court dismissed the application on grounds of non-disclosure of material facts. I find that even on merit, the applications was not proved.
43. I find no reason to interfere with the findings and decision of the trial court in respect of the application dated 14th June, 2024.
44. The appeal therefore succeeds partly and consequently the ruling of the trial court delivered on 25th September 2024 is hereby set aside and replaced with an order allowing the application dated 21st May, 2024 in the following terms;
- a. Pending hearing and determination of the suit, a temporary order of injunction is hereby issued restraining the Respondent (Defendant in the suit) by himself, his agents, assigns and employees from selling, transferring, charging, building on, quarrying on and selling stones quarried from land parcel No. Kisumu/Fort Tenan/720.
 - b. Each party to bear own costs of the appeal as the suit is still on-going.
 - c. The suit to proceed to hearing in the same Magistrate's Court at Nyando as no reason has been shown for transfer of the matter to another Court/Magistrate.



Orders accordingly.

JUDGMENT DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 18TH DAY OF SEPTEMBER 2025 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE.

In the presence of:

Maureen: Court Assistant.

Amugune for the Appellant.

Kinuva for the Respondent.

