



REPUBLIC OF KENYA



Onyando & 5 others v Malala & 2 others (Environment and Land Case Civil Suit E003 of 2025) [2025] KEELC 6893 (KLR) (9 October 2025) (Ruling)

Neutral citation: [2025] KEELC 6893 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT E003 OF 2025
SO OKONG'O, J
OCTOBER 9, 2025**

BETWEEN

**MARIA AUMA ONYANDO 1ST APPLICANT
CAREN ATIENO ONYANDO 2ND APPLICANT
PAMELA ACHIENG ONYANDO 3RD APPLICANT
LUCIA JUMA ONYANDO 4TH APPLICANT
FRANCIS OTIENO ONYANDO 5TH APPLICANT
PETER OCHIENG ONYANDO 6TH APPLICANT**

AND

**LEOTINE MALALA 1ST RESPONDENT
MILLICENT MALALA 2ND RESPONDENT
ROBINSON MALALA 3RD RESPONDENT**

RULING

1. The Applicants brought this suit through Originating Summons dated 21st January 2025, seeking the following orders;
 1. That the Applicants have a right and/or interest in the parcels of land known as Title No. Kisumu/Koru/280 and Title No. Kisumu/Koru/680 (hereinafter referred to as “the suit properties) by virtue of the allotment thereof to Thomas Onyando Omieri, deceased (hereinafter referred to as “the deceased”), who was the husband of the 1st Applicant and the father of the 2nd to 6th Applicants.



2. That the Respondents have no right or interest in the suit properties pursuant to the award of the Land Disputes Tribunal in a dispute between one, Wilkister Onyando, on one hand, as the Plaintiff and the 1st and 2nd Respondents as the Defendants.
 3. That the title deed obtained by the deceased John Malala Ojunga and subsequently by the 2nd Respondent through succession was obtained irregularly and should be cancelled and new title deeds issued in accordance with the law to the Applicants.
 4. That any sale and transfer of the suit properties by any of the Respondents be declared null and void.
 5. That the 1st, 2nd, and 3rd Respondents be permanently barred from having any dealings with the suit properties.
 6. The costs of the Originating Summons.
2. The Originating Summons was brought on the grounds set out on the face thereof and on the supporting affidavit of the 6th Applicant. In summary, the Applicants averred that Thomas Onyando Omieri (the deceased) was allocated the suit properties by the Settlement Fund Trustees in 1971. The Applicants averred that the deceased attempted to sell the suit properties to John Malala Ojunga, also deceased (hereinafter referred to as “Malala”). The Applicants averred that the deceased’s family opposed the sale transaction. The Applicants averred that the dispute over the sale of the suit properties was referred to the Land Disputes Tribunal (hereinafter referred to as “the tribunal”) by one of the deceased’s widows, Wilkister Onyando. The Applicants averred that the tribunal case, which was against the 1st and 2nd Respondents herein, was determined in favour of Wilkister Onyando. The Applicants averred that the tribunal cancelled the transaction and directed the Respondents to use the suit properties over a period of time to recover the purchase price paid to the deceased, after which they were to surrender the suit properties. The Applicants averred that the titles for the suit properties were issued to Malala and subsequently to the 1st and 2nd Respondents irregularly, contrary to the tribunal’s decision.
 3. The Applicants averred that although the Respondents had used the suit properties and recovered in excess of Kshs. 550,000/-, they were still holding on to the titles for the suit properties. The Applicants averred that the 1st and 2nd Respondents had filed two suits in the Magistrate’s Court, one in Kisumu and the other in Tamu, seeking the eviction of the Applicants from the suit properties. The Applicants averred that they had been termed squatters on the suit properties and could be evicted from the same through unconstitutional and illegal means by the Respondents. The Applicants averred that the Tamu Magistrate’s Court case was brought against the grandchildren of the deceased, and the Applicants became aware of the same after judgment had been delivered in the matter. The Applicants averred that the Kisumu Magistrate’s Court case was filed against the 1st Applicant and third parties.
 4. Together with the Originating Summons, the Applicants filed a Notice of Motion application dated 21st January 2025 seeking the following orders;
 1. That pending the hearing and determination of the suit, the Respondents be restrained from having any dealings with the suit properties.
 2. That pending the hearing and determination of the suit, there be a stay of proceedings and execution of the judgment made in Tamu MC. Land Case No. 2 of 2017 (“the Tamu suit”).
 3. That pending the hearing and determination of this suit, there be a stay of proceedings in Kisumu MC. Land Case No. 176 of 2023 (“the Kisumu suit”).



5. The application was supported by the affidavit of the 6th Applicant. The Applicants averred that they were the heirs and dependants of the deceased Thomas Onyando Omieri. The Appellants averred that the 1st and 2nd Respondents filed the Tamu suit against the grandchildren of the deceased and one, John Mathenge. The Applicants averred that they were not made parties to the Tamu suit, although the 1st and 2nd Respondents were aware that they were heirs and dependants of the deceased. The Applicants averred that the 1st and 2nd Respondents did not disclose to the Tamu court the existence of the tribunal decision in favour of the 1st Applicant and Wilkister Aoko Onyando, deceased. The Applicants averred that the 1st and 2nd Respondents had received over Kshs. 550,000/- from the sugar cane harvested from the land parcel, Title No. Kisumu/Koru/280 (Plot No. 280), but still held onto the title deeds for the suit properties. The Applicants averred that their homesteads were on the land parcel, Title No. Kisumu/Koru/680 (Plot No. 680). The Applicants averred that the records held at the Settlement Fund Trustees showed that the suit properties belonged to the deceased.
6. The Applicants averred that the Respondents had also filed the Kisumu suit against the Applicants and others. The Applicants averred that the Respondents had no legal or constitutional right to claim or occupy the suit properties. The Applicants averred that the Respondents were in the process of selling the suit properties to a third party. The Applicants averred that it was in the interest of justice that the orders sought be granted pending the hearing and determination of the suit.
7. The Respondents opposed the application through a replying affidavit sworn on 19th February 2025 by the 3rd Respondent. The Respondents averred that the deceased sold the suit properties to Malala, and after the death of Malala, the properties were transferred to the 1st and 2nd Respondents by transmission after succession. The Respondents averred that the Tamu suit was filed by the 1st and 2nd Respondents against trespassers on the suit properties. The Respondents averred that if the Applicants were on the suit property when that suit was filed, they would have been joined to the suit as defendants together with the other trespassers. The Respondents averred that the Applicants attended court during the proceedings in the Tamu suit and could not feign ignorance of that case. The Respondents averred that the Applicants were not residents and had never resided on the suit properties. The Respondents averred that the 1st and 5th Applicants participated in the sale of the suit properties, while the 2nd, 3rd and 4th Applicants were married and were residing in their matrimonial homes away from the suit properties. The Applicants averred that the 1st, 5th and 6th Applicants were at the time of filing this suit residing elsewhere and not on the suit properties. The Respondents averred that there was no need to file a suit against the Applicants as they were not residing on the suit properties. The Respondents averred that the orders sought, if granted, would prevent the Respondents from enjoying the fruits of the judgment they obtained in the Tamu suit. The Respondents averred that the present application should have been filed in the Tamu suit, and filing it in a new suit amounted to an abuse of the court process. The Applicants filed a further affidavit sworn by the 6th Applicant on 17th March 2025. The Applicants averred that they were in possession of the suit properties and were properly before this court.

Analysis and determination

8. The application was heard through written submissions. The Applicants filed submissions dated 22nd April 2025, while the Respondents filed submissions dated 21st May 2025. I have considered the Applicants' application together with the affidavits filed in support thereof. I have also considered the replying affidavit filed by the Respondents in opposition to the application.
9. The Applicants' application has two limbs. The first limb seeks a stay of execution and a stay of proceedings pending the hearing of the suit. The second limb seeks a temporary injunction pending



the hearing of the suit. The Applicants' application was brought under Sections 13 and 19 of the *Environment and Land Court Act* 2011, Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 22 (sic) Rule 6 of the Civil Procedure Rules. The Applicants have sought a stay of proceedings and execution of the judgment delivered in the Tamu suit. It is common ground that the Applicants were not parties to the Tamu suit. It is also common ground that the Tamu suit was heard and a judgment delivered. There is no evidence that those who were sued in the Tamu suit appealed against the judgment of the court in that suit. There is also no evidence that the Applicants who claim not to have been aware of the suit applied for review and setting aside of the judgment. The judgment of the Tamu court could be challenged before that court through review or before this court on appeal. I am of the view that the judgment in the Tamu suit, having not been challenged before that court or this court on appeal, remains a valid and binding judgment. There is no basis, therefore, upon which this court can stay the execution proceedings or execution of the said judgment. The provisions of the law cited by the Applicants do not give the court such power. This court's power to stay execution resides in Order 42 Rule 6 of the Civil Procedure Rules. The power can only be invoked upon filing of an appeal to the court. In the absence of an appeal, the court has no power to grant a stay of execution.

10. The Applicants have also sought a stay of proceedings in the Kisumu suit. Only the 1st Applicant herein is a defendant in the Kisumu suit, which has 13 defendants. The other 12 Defendants in the Kisumu suit are not parties to this suit. The Kisumu suit was filed in 2023, while the current suit was filed in 2025. The Kisumu suit is yet to be heard. The 1st Applicant has the opportunity to defend the suit and raise the issues raised before this court in that suit. It has not been suggested by the Applicants that the court in the Kisumu suit has no jurisdiction to hear and determine the Respondents' claim before that court or that the issues raised before this court cannot be determined in the Kisumu suit. The Applicants have not persuaded me that there is any good reason why this court should interfere with the proceedings before another court of competent jurisdiction. In my view, the jurisdiction of this court to stay proceedings in the Kisumu suit has been invoked in a vacuum.
11. Concerning the other limb of the application seeking a temporary injunction restraining the Respondents from dealing with the suit properties pending the hearing and determination of the suit, the following is my view: The principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. In *Giella v. Cassman Brown & Co. Ltd* [1973] EA 358, it was held that an applicant for a temporary injunction must show a prima facie case with a probability of success, and such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In *Nguruman Limited v. Jan Bonde Nielsen & 2 Others* [2014]eKLR, the Court of Appeal adopted the definition of a prima facie case given in *Mrao Limited v. First American Bank of Kenya Limited & 2 Others*[2003]eKLR and went further to state as follows:

"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. ...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 threatened with violation... The applicant need not establish title it is enough if he can show that he has a fair and bonafide 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 applicant's case is more likely than not to ultimately succeed.”

12. From the evidence placed before me, I am not persuaded that the Applicants have established a prima facie case with a probability of success against the Respondents. It is not in dispute that the suit properties were owned by Thomas Onyando Omieri, deceased, before they were sold to John Malala Ojunga, also deceased. The Applicants have claimed that they are the heirs and dependants of the deceased, Thomas Onyando Omieri (the deceased). There is no evidence placed before this court showing that a Grant of Letters of Administration in respect of the estate of the deceased has been taken out and that the Applicants are either the administrators of the estate or the beneficiaries of the estate. In my view, the fact that the Applicants are the widow, daughters, and sons of the deceased does not give them the locus standi to claim the suit properties on behalf of the estate of the deceased. Apart from the issue of the locus standi, I am also not persuaded on a prima facie basis that John Malala Ojunga acquired the suit property in 1986 illegally. If that were the case, I wonder why it took the Applicants 39 years to move the court to challenge the transaction. The Applicants have referred to the decision of the tribunal as the basis of their claim. I do not wish to comment on the decision at this stage, save to state that there is no evidence that the decision was filed in the Magistrate's court and adopted as a judgment of the court. For the foregoing reasons, it is my finding that the Applicants have not established a prima facie case with a probability of success against the Respondents. It is not necessary for me, in the circumstances, to consider the other conditions for granting a temporary injunction. The Applicants are not entitled to the injunction sought.

Conclusion

13. The upshot of the foregoing is that I find no merit in the Applicants' application dated 21st January 2025. The application is dismissed with costs to be in the cause. However, in the interest of justice and to prevent an illegal eviction, I order that the Respondents shall not evict the Applicants herein from the parcels of land known as Title No. Kisumu/Koru/280 and Title No. Kisumu/Koru/680 if they are in occupation thereof, without a court order issued for their eviction from the said properties, pending the hearing and determination of this suit.

DELIVERED AND SIGNED AT KISUMU ON THIS 9TH DAY OF OCTOBER 2025

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Odhiambo for the Applicants

Ms. Mwilolo h/b for Mr. Nyanga for the Respondents

Ms. J. Omondi-Court Assistant

