Okoyo v Guti & 8 others (Environment and Land Case 004 of 2022)
[2025] KEELC 6751 (KLR) (6 October 2025) (Ruling)

Neutral citation: [2025] KEELC 6751 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY

ENVIRONMENT AND LAND CASE 004 OF 2022

FO NYAGAKA, J

OCTOBER 6, 2025

BETWEEN

JOHN OWUORE OKOYO ..... PLAINTIFF

AND

DOMINIC OWINO GUTI ..... 1ST DEFENDANT

JAMES OYUGI MODI ..... 2ND DEFENDANT

JOSHUA CALVINS OMOLO ..... 3RD DEFENDANT

BENERD OCHIENG OWINO ..... 4TH DEFENDANT

JOSHUAM ODHIAMBO MODI ..... 5TH DEFENDANT

FESTUS ODHIAMBO MODI ..... 6TH DEFENDANT

FESTUS ONYANGO JUMA ..... 7TH DEFENDANT

JAMES OYUGI MODI ..... 8TH DEFENDANT

SHEM RICHIE ANYAMA ..... 9TH DEFENDANT

RULING

1. The Plaintiff Applicant filed a Notice of Motion application dated 19th June 2025. He brought it under Certificate of Urgency on 19th June, 2025. He sought orders:

   a. ...Spent

   b. ...Spent

   c. Thatpending the hearing and determination of this suit, an injunction do issue restraining the respondents herein, their relatives, agents or lessees or whomsoever is acting in pursuit of

a common goal with the respondents from carrying out mining activities and or wasting in whatsoever manner the suit land known as West Kasipul Kanyango Kokal 1961, 2054, 3508, 3509, 3510, 3511, 3512, 3513, 3514 and 3515.

2. The application was based on a number of grounds set out on the face of it as well as the depositions in the Supporting Affidavit which was sworn the Applicant, John Owore Okoyo on 19th June 2025.

3. The applicant stated thatthe suit property belonged to his deceased father, one Okoyo Kunga, who was the registered owner of the same. The parcel of land was known as WEST Kasipul Konyango KokaL 658. He deponed further thathe was the surviving beneficiary of the Estate of his deceased father. Further thatthe defendants, in his absence, went through or conducted a Succession process at Kisii (presumably law courts), obtained letters of administration and subsequently shared the suit land among themselves hence denying him his right to inheritance. The applicant added thathe instituted the instant suit against the defendants, but during the pendency of the suit, the defendants began mining gold from the suit properties. As a consequence, he approached this court seeking injunctive reliefs against the defendants and all those associated with them who were involved in the course of interfering with the suit property.

4. The Applicant annexed a letter dated 23rd October 2020, written by the area Chief. It indicates thathe was the only son of his father, Okoyo Kunga, now deceased. He added thatthe same letter discloses thatthe said Okoyo Kunga was the original proprietor of land parcel no. 658. In addition, the Applicant attached several photographs of whathe stated to be gold mining activity on the suit property.

The Respondent's Case

5. In response, the 1st Respondent filed a Replying Affidavit sworn by him on 7th July, 2025. He deponed thathe had express authority the swear the affidavit and make representation on behalf of the 3rd, 4th, 5th and 7th defendants. The Court did not, however, see any written authority of the sort.

6. The 1st Respondent contends thatthe application is incompetent and fatally defective by reason of the Plaintiff not substituting the 9th Respondent who died long before the suit was filed and thatno legal representative had been brought on board as provided under Order 24 Rule 4 of the Civil Procedure Rules. For this reason, he prays thatthe suit be struck out or dismissed with costs for have been instituted against a deceased person.

7. Further, the 1st Respondent deposed thathe was the registered owner of land parcel known as West Kasipul Konyango Kokal 3511 while the 3rd and 4th Respondents were said to be the registered owners of land parcels West Kasipul Konyango Kokal 2045 and 1691 respectively. Moreover, he deposed thatthe 5th Respondent was the registered owner of land parcels West Kasipul Konyango Kokal 3508, 3513 and 3518. Lastly, the 1st Respondent deponed thatthe 7th Respondent was the registered owner of land parcel West Kasipul Konyango Kokal 3514.

8. He annexed to his Affidavit copies of titles deeds for land parcels West Kasipul Konyango Kokal 3508, 3511, 3513 and 3515 all of which were seemingly issued on 6th December 2019. The 1st defendant maintains thatthe 3rd, 4th, 5th and 7th Respondents as well as himself resided on their registered parcels of land wherefrom they derived a livelihood through farming.

9. Additionally, the 1st Respondent vehemently denies being involved in gold mining and maintained thatthe Applicant has misrepresented facts by presenting to the court photographs thatwere misleading since the same relate to a pit latrine digging exercise at the 1st and 5th Respondents' land. He further deponed thatgold mining requires licensing from the National Environment Management Authority, which licence he had not acquired.

10. The 1st Respondent concluded thatthe application is based on speculation and conjecture and amounts to abuse of the due process of the court and as such, the same should be dismissed with costs for want of merit.

11. In addition to the annexed copies of title deeds, the 1st Respondent also attached several photographs of whathe termed a pit latrine digging exercise.

Evidence of Area Chief

12. Since the facts raised by the Applicant were greatly contested by the Defendants who contended, as seen below, thatthe activities on the land were not related to mining gold but merely digging of pit latrines, the Court sought information from a neutral source: the evidence of the Area Chief. Thus, the Court summoned the area chief to testify on this matter. He attended the Court virtually on 16 07 2025. The Chief, one Denise Owuor, stated thathe had been called upon by the Court to visit the disputed area and note the activities thatwere ongoing or had just happened and report to the Court. He visited the suit land and found three open casts (for mining activities). The first one fell on parcel No. 3515 which parcel was occupied by one Joshuam Odhiambo. The second one was on parcel No. 3511 occupied by Dominic Guti. The third one was on parcel No. 3512 occupied by Janes Modi.

13. Regarding the open casts, he added thatthe 1st one was active since it had a ladder leading into it. Even the one which was on parcel No. 3511 had some evidence of mining activity going on. But the 3rd one was very dormant.

14. The area chief stated on cross examination thathe concluded thatmining was ongoing because the open cast holes were very deep and a lot of murram had been drawn from them and heaped on the side. He also added thatheaps of murram were drawn from the deep (pits). He, however, could not estimate how deep the holes were but from his observation and the quantity of murram extracted the open casts were deep.

15. The parties decided not to submit but rely on the affidavit evidence already in Court. The Respondent's counsel submitted orally on one sentence to the effect thatthe area chief could not ascertain whether the activity on the suit parcels was mining or something else.

Issues for Determination

16. After considering the prayers and content of the application very carefully, and those in the supporting affidavit and the annexures thereto as well as the 1st Respondent's Replying Affidavit together with the annexures thereto, it is my humble view thatthe issues thatarise for determination are:

    a. Whether the application and suit should be dismissed on account of the applicant having sued the 9th Respondent who is said to have died long before the suit was instituted; and

    b. If the suit is not dismissed, whether the application is merited

    c. Who to bear the costs of the application

Analysis and Determination

17. I have carefully analyzed the application in its totality as well as the Replying Affidavit filed by the Respondent. At the onset, I must point out thatthe 1st Respondent deponed thathad the express authority of the 3rd, 4th, 5th and 7th defendant to swear and affidavit and make representations on their behalf. However, the 1st defendant did not annex any written Authority to swear on behalf of the said defendant respondents. Whereas I note thatfailure to annex the said Authority is not fatal (see

Brownstone Agencies Limited & another v County Government of Bomet & another, Bomet High Court Petition no. E002 of 2021), in the absence of the said Authority, I would take the depositions expressed in the Replying Affidavit to be those of the 1st Respondent only, and to the extent thatthere be any part thatdraws from or purports to be on behalf of a party who has not duly authorized the deponent thatpart be expunged, struck out or be treated as inadmissible hearsay.

a. Whether the application and suit should be dismissed for reason of the Plaintiff suing the 9th Defendant (which is said to be deceased)

18. The 1st Defendant deponed thatthe Applicant herein instituted a suit against the 9th defendant whom he states died long before the suit was instituted. He maintains thatthe suit is fatally defective because the plaintiff applicant did not substitute the 9th Respondent's name with thatof a legal representative from his estate pursuant to Order 24 Rule 4 of the *Civil Procedure Rules 2010*.

19. First of all, it is worth noting thatthe legal position regarding adduction of evidence is thathe who alleges proves. The burden is on them to do so, unless the law specifically shifts the burden and places it on the other person. Section 107 of the *Evidence Act* is the relevant provision regarding thatlegal position.

20. Order 24 Rule 4 of the *Civil Procedure Rules 2010* provides that:

    (1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court on an application made in thatbehalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

21. Despite alleging thatthe 9th Respondent died long before the suit was filed, the 1st Respondent did not annex any evidence showing thatindeed the 9th Respondent was deceased at the time the suit was filed or even afterwards. So, as things are, thatfact is not proved as to render the suit either defective as a whole or in part.

22. Be thatas it may, assuming thatthe said person died, Order 24 Rule 4 of the *Civil Procedure Rules* deals with cases where a party who is already a defendant dies in an existing suit dies and the suit survives him. It does not deal with a case where a suit is filed against a person who is already deceased at the time the time suit is filed. Additionally, if a party sues a wrong party, then in terms Order 1 Rule 9 of the *Civil Procedure Rules* thatsuit cannot be defeated for misjoinder. It provides that,

> " No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

23. The 1st Respondent maintains thatthe suit was filed long after the 9th defendant died. If indeed the 9th Respondent is deceased, whether he died during or before the institution of the suit, the only part of the claim thatis incompetent is thatwhich is against him. The rest of the living (persons) must face the claims against them. The case against the deceased can be withdrawn or struck or if he died during the pendency of the suit, and the suit survives him, and he is not substituted within twelve months of the death, then the suit against him abates, and it is only the suit against him thatwould abate and not the whole suit.

24. Further, although the allegations about the demise of the 9th Respondent are not substantiated, I would like add, in clarification, thatif thatis the position, then there would be no need for substituting the 9th

defendant Respondent as the courts have time and again held thata suit filed against a deceased person is a nullity and as such, not even an amendment can breathe life into the nullity. The High Court in *Vicktar Maina Ngunjiri & 4 others v Attorney General & 6 others* [2018] eKLR had this to say:

> The estate of a deceased person may take over proceedings against him if thatperson were alive at the time the suit was filed. Thatnotwithstanding, the estate must be made a party and authorized by the court through an executor or a personal representative. A formal application has to be filed to facilitate this. No grant of representation has been presented to court. In the instant case this cannot happen because the deceased died before the suit was filed and the representative of the estate has not been identified. Even if the representative were identified it is not possible to take over a nullity.

25. Lastly on this point, would the suit abate for all the Respondents had it been established thatthe 9th Respondent died long before the suit was instituted as alleged by the 1st respondent? I do not think so. The living Respondents are parties who, in my humble view and in relation to this application, are seeking to cling to every straw or reed as they drown in the flood thathas been brought in by the applicant's clear evidence on the issues of mining taking place. The case should and ought to proceed at the instance of the surviving defendants respondents. This was the position of the court in *Manyange (Deceased v TG (Minor suing through her mother and next friend WMG)* Civil Appeal E005 of 2022[2024] KEHC 1083 (KLR) where the court cited the Indian case *Pratap Chand Mehta v Chrisna Devi Meuta* AIR 1988 Delhi 267 and stated as follows:

> "…. if a suit is filed against a dead person then it is a nullity and we cannot join any legal representative; you cannot even join any other party, because, it is just as if no suit had been filed. On the other hand, if a suit has been filed against a number of persons one of whom happens to be dead when the proceedings were instituted, then the proceedings are not null and void but the court has to strike out the name of the party who has been wrongly joined. If the case has been instituted against a dead person and thatperson happened to be the only person then the proceedings are a nullity and even Order 1 Rule 10 or Order 6 Rule 17 cannot be availed of to bring about amendment." (Emphasis added)

26. I would also hasten to add thatthe language of Order 24 of the *Civil Procedure Rules* which the 1st Respondent relies on, albeit erroneously does not anticipate thata suit should wholly terminate as against all the defendants when one defendant dies. The situation would not be different where only one of several defendants was deceased at the point time the suit was filed.

27. On the basis of the foregoing, I hold and find thatthe application is competent and properly before me despite the allegations thatone of the defendants died before the suit was instituted.

b. Whether the application is merited

28. The prayers sought herein are for an injunction to be granted, if successful, during the pendency of the instant suit. Order 40 Rule 1 of the *Civil Procure Rules, 2010* provides courts with the power to grant temporary interlocutory reliefs and is expressed as hereunder:

> Order 40, Rule 1
>
> Where in any suit it is proved by affidavit or otherwise—
>
> a) thatany property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

b) thatthe Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability thatthe Plaintiff will or may be obstructed or delayed in the execution of any decree thatmay be passed against the Defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

29. The above cited legal provision is buttressed by the locus classicus case on injunctions *Giella v Cassman Brown & Co Limited* (1973) EA 358 where the Court of Appeal set out the conditions thatmust be met by an applicant so as to warrant the grant of a temporary injunction by the court. Accordingly, the court held that:

> " First an applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience." (Emphasis added).

30. The three requirements must all be established as was held in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR where the court held:

> " These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established thatall the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Limited - Versus - Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case thatalone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied thatthe injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at thatstage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between".

31. As to whatconstitutes a prima facie case, the court in *Mrao Ltd v First American Bank of Kenya and 2 others* (2003) KLR 125, defined a prima facie case was defined in the following terms:

> " A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later".

32. Further, in *Pius Kichirchir Kogo V Frank Kimeli Tenai* [2018] eKLR, the court noted that"a prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed."

33. The Applicant herein maintains thathe was the only beneficiary of his father's estate and annexed a letter from his area chief elaborating on the same. The chief identified the decease's father as being the original registered proprietor of land parcel no. 658. The Applicant maintains thatthe respondents, in his absence, proceeded with the Succession process at a Kisii court and subsequently subdivided his father's property thus disinheriting him.

34. The Applicant further deposed thatthe Respondents had begun mining gold on the respective parcels of land thatthey had acquired from his deceased father's estate. This, he maintained, was despite the fact thathe had filed a suit in court seeking the determination of the ownership of the said property. To prove these allegations, the Applicant annexed photographs thathe maintained were a depiction of the gold mining in the said property.

35. The 1st Respondent maintained thatthe Respondents had been in occupation of the suit property at all material times of the suit and thathave always derived their livelihood from the same land through farming. He maintained thatthe photographs annexed to the affidavit of the Applicant was misleading and a misrepresentation of the reality and thatthe same save for annexures marked the first and second photographs in annexure marked JOO2. The 1st respondent annexed several photographs in replying affidavit thathe maintains depict pit latrine digging at his parcel of land as well of thatof the 5th Respondent.

36. I am alive to the fact thatthe Applicant is not required to prove the case as though he would be expected to prove during the trial of the suit. All he needs to do at this stage is to lead evidence, which can lead this court to believe thata right may have been breached, hence the need for a rebuttal from the defendants. The Respondent's counsel argued thatthe area Chief could not tell whether the activities which he saw on the three parcels of land which he termed as open (mining) casts were indeed mining activities or other. It is worth of note thatthe Chief was clear in his evidence thatthe holes dug were very deep and there was a lot of murram thathad been dug out of them. This tallied with the photographic evidence thatthe applicant gave to the court.

37. I think thatsome parties underestimate the intelligence of this Court, and courts in general! They think thatjudges and judicial officers do not think deeply. For them to dig open casts for mining and label them as toilets just to convince the court to agree to their side of the story is to underrate the intellect of the Judge too much. Thus, this Court finds and holds thatcontrary to the argument by the Respondents thatthe activity on the parcel of land was not mining, it is too coincidental for three persons who are on three different parcels of land to commence digging of deep pit latrines at the same time, unless their families and relatives who reside with them ran into prolonged severe runny stomach crises thatit would constitute a pandemic thatwould fill their current pit latrines at once and cause them to resort to urgent alternatives, or they intend to hold massive rallies or events thatwould require hundreds of thousands of people to use the 'toilets' at once to fill them . Thatwould call for public health interventions for a crisis of thatmagnitude. Neither the Respondents nor the Area Chief or the public health department of the County or even the applicant have reported severe runny stomach issues of the residents. Even then, for thatto cause urgent toilet search crises it would require the present of great masses of people in order for the people digging the said 'toilets' to be in need of them for reason of scarcity and inadequacy of the current ones. There is none.

38. Given the evidence presented by the Applicant as well as the evidence tendered by the are Chief, I find and hold thatthe Applicant has established a prima facie case.

39. On the issue of irreparable loss thatmay not be adequately compensated by way of damages, the courts have interpreted the same to mean that, if damages can adequately compensate the applicant of the loss sustained, then an injunction should not issue.

40. *In re estate of Magdalena Kabon Sawe (deceased)* Succession Cause E034 of 2023 [2024] KEHC 9228 (KLR), the court placed reliance on the Halsbury's laws of England and noted as below:

> " Where the court interferes by way of injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds; first thatthe injury is irreparable and second thatit is continuous. By irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact thatthe plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages, an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter." (emphasis added)

41. The Applicant maintains thatthe defendants have disinherited him of his deceased father's estate and thatthe said defendants are in the process of mining gold from the said estate, which activity is likely to dissipate and degrade the land. He is apprehensive that, should he be successful in the suit, there may be nothing to inherit from his father's estate.

42. I note thatthe allegation herein is thatthe land in question is ancestral land to which the Applicant may have sentimental ties to. At the same time if mining activities are left to thrive before the issue of ownership is determined, it will change the nature and character of the suit land permanently. Damages may not be adequate to compensate him should he be successful in his cause.

43. I associate myself with the decision of the court *in re estate of Magdalena Kabon Sawe (deceased)* (*supra*) thatan injunction may also issue even where damages may compensate the applicant if the respondents' actions are likely to destroy the subject matter of the suit. Gold mining is an activity thatis likely to destroy the suit property for ever. As such, I find thatthe applicant is likely to suffer irreparable loss thatis not capable of being compensated by way of damages.

44. Lastly, the court is enjoined to determine whether the balance of probabilities tilts in favour of the applicant. In *Pius Kipchirchir Kogo* (*supra*) the court stated that:

> The meaning of balance of convenience in favor of the plaintiff is thatif an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than thatwhich would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed.

45. Since the matter relates to ancestral land thatmay hold significant sentimental value to the plaintiff applicant, failing to stop the alleged mining will have negatively impact the plaintiff applicant more than the defendants as may destroy the suit land. accordingly, I find thatbalance of convenience tilts in granting an injunction in favor of the plaintiff.

46. In conclusion, I find and hold thatthe application succeeds. I grant an injunction in terms of prayer 3 of the application. The injunction is to last for twelve (12) months from today and is subject for extension if the parties have good reason for the application for extension. This matter shall be mentioned on 6th November, 2025 for confirmation of the filing of a formal application for joining other parties.

47. The costs of this application will be borne by the Respondents.

48. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM THIS 6TH DAY OF OCTOBER, 2025.

HON. DR. IUR NYAGAKA,

JUDGE

In the presence of,

Court Assistant: Ms. Fiona Mutiva

Mr. Achillah Advocate for the Plaintiff Applicant

Ms. Wabwire Advocate for O.H. Bunde for 1st, 3rd, 4th, 5th and 7th Respondents.