

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ELC NO. 59 OF 2015

FLORENCE AUMA NEKESA 1ST

PLAINTIFF/RESPONDENT

(Substituted by) **SAMUEL WAFULA**

MARY ATIENO 2ND PLAINTIFF/RESPONDENT

WILFRIDA OTSIENO NGEA alias
ODA SITUNDO OTIENO (Substituted as
legal representative of the

Estate of **SITINDO OTSIENO 3RD**

PLAINTIFF/RESPONDENT

= VERSUS =

PATRICK OMONDI KEYA

DEFENDANT/APPLICANT

JOSEPH MUYA KEYA

DEFENDANT

PACRAS MUGA

DEFENDANT

PATRICK RAPENDA

DEFENDANT

FRANCIS ODUOR

DEFENDANT

KIZITO NDAKALA

DEFENDANT

THE COUNTY GOVERNMENT OF BUSIA

DEFENDANT

R U L I N G

1. The dispute herein between the parties with regard to the land parcel **NO MARACHI/ELUKONGO/1293** (the suit land) had been heard and determined by **OMOLLO J** vide a judgment delivered on 28th September 2022. That judgment was however set aside vide a ruling delivered on 4th February 2025 in order to enable the Defendants prosecute their counter-claim against the Plaintiff which had not been considered in the judgment. The Defendants were given 15 days to file and serve their amended defence and other documents while the Plaintiffs were also given 15 days from the date of service to file and serve their response to the amended defence and counter-claim. The parties were directed to appear before the Deputy Registrar on 17th February 2025 for pre-trial directions and thereafter take a date for hearing. The record shows that the parties did not appear before the Deputy Registrar on 17th February 2025 to confirm compliance with pre-trial direction and take a date for hearing of the suit as directed. Instead, by a Notice of Motion dated 5th March 2025 **PATRICK OMONDI KEYA** (the 1st Defendant) has approached this Court seeking the following orders:

1) Spent

2) Spent

3) That pending the hearing and determination of this application, this Honourable Court be

pleased to issue an order of temporary injunction restraining the Plaintiffs/Respondents by themselves, their agents, employees or any other person from selling, transferring, interfering with alienating, and/or tampering with the land parcel NO MARACHI/ELUKONGO/1293.

4) Costs of this application be provided for.

5) Such further and/or other orders be made as the Court may deem fit and expedient.

2. The Motion is premised on the provisions of **Order 40 Rule 1** of the **Civil Procedure Rules** as well as **Sections 1A, 1B, 3A** and **63(e)** of the **Civil Procedure Act**. It is based on the grounds set out therein and supported by the affidavit of the 1st Defendant.
3. The basis of the Motion is that the Court vide a ruling delivered on 4th February 2025 set aside the judgment herein and allowed the Defendants to prosecute their counter-claim. However, the Plaintiffs who are the current registered proprietors of the land parcel **NO MARACHI/ELUKONGO/1293** (the suit land) are currently disposing of portions of the same after a caution was removed without the Defendants' consent and if that is allowed to continue, this litigation will be delayed and irreparable loss will ensue.
4. The following documents are annexed to the Motion:

- 1) Certificate of confirmation of Grant issued to the 1st Plaintiff in **BUSIA HIGH COURT SUCCESSION CAUSE NO 18** of **2016** in respect to the Estate of **SITUNDO OTSIENO**.
 - 2) Certificate of Official Search in respect to the land parcel **NO MARACHI/ELUKONGO/1293**.
5. **SAMUEL ONYANGO SITUNDO** who (together with **MARY ATIENO WEKESA** and **WILFRIDA ATIENO NGESA** alias **ODA SITUNDO OTIENO**) have since substituted the deceased 1st Plaintiff **FLORENCE AUMA NEKESA** following this Court's ruling dated 4th February 2025 filed a replying affidavit dated 25th October 2025 in response to the Motion in which he basically traced the registration of the suit land in the name of the deceased **FLORENCE AUMA NEKESA** and other beneficiaries following the succession process in **BUSIA HIGH COURT SUCCESSION CAUSE NO 18** of **2016**, **BUSIA HIGH COURT SUCCESSION CAUSE NO E19** of **2024** and **KISUMU HIGH COURT SUCCESSION CAUSE NO 113** of **2025**. That he is no longer a party in these proceedings nor an Administrator to the Estate of the deceased **FLORENCE AUMA NEKESA**. That the suit was heard and determined and the Defendants were evicted out of the suit land and their only option is to appeal. That the application is res judicata and the Defendants cannot re-open the suit. This application should be dismissed with costs.

6. The following documents are annexed to the replying affidavit:

- 1) Copy of Identification Card for **SAMUEL WAFULA**.
- 2) Copies of Certificates of death for
 - (a) **FLORENCE AUMA WEKESA**,
 - (b) **SITUNDO OTSIENO**
- 3) Copy of Green Card for the land parcel **NO MARACHI/ELUKONGO/1293**.
- 4) Copy of Chamber Summons filed in **BUSIA HIGH COURT SUCCESSION CAUSE NO 18** of 2016.
- 5) Copy of amended Certificate of Confirmed Grant issued in **KISUMU HIGH COURT SUCCESSION CAUSE NO 112** of 2005 to **FLORENCE AUMA NEKESA** in respect to the Estate of **SITUNDO OTSIENO**.
- 6) Copy of transfer by personal representative of title **NO MARACHI/ELUKONGO/1293** to persons entitled under a will or intestacy.
- 7) Copy of ruling delivered by **KIARIE WAWERU KIARIE J** on 17th July 2018 in **BUSIA HIGH COURT SUCCESSION CAUSE NO 18** of 2016.
- 8) Copy of ruling delivered by **W. M. MUSYOKA J** on 15th March 2024 in **BUSIA HIGH COURT SUCCESSION CAUSE NO 18** of 2016.
- 9) Copy of ruling delivered on 25th November 2024 by **W. MUSYOKA J** in **BUSIA HIGH COURT**

**MISCELLANEOUS APPLICATION NO E019 of
2024.**

7. When the Motion was placed before me on 12th March 2025, I directed that it be canvassed by way of written submissions and granted prayer **NO 2**. The 1st Defendant was to file his submissions within 7 days and serve the Plaintiffs with the same and submissions. The Plaintiffs were to file their responses and submission within 14 days of service. However, although the 1st Defendant complied, the Plaintiffs only filed the replying affidavit. Their counsel **MR ODERA** opted not to file any submissions.
8. I have considered the Motion, the rival affidavits and annexures thereto as well as the submissions by the 1st Defendant.
9. I must start by observing that the 1st Defendant is acting in person and as a result, the Motion is not well crafted. That is not surprising for parties acting in person. For instance, in paragraph 4 of his supporting affidavit, he has deposed thus:
“That the 1st Defendant/Respondent has been disposing off portions of land to third parties and recently the boundary that we had planted between my late father’s share of lad and their late father of share was uprooted and upon enquiry from those staying around that place, I was told it was the 1st Defendant.”

Then in paragraph 10 of the same supporting affidavit, he has deposed thus:

10: “That if the 1st Plaintiff /Respondent is allowed to continue the same process of partitioning and transferring said portion of land, the action will lengthen litigation of this matter, delay is from getting our right inheritance thereto causing irreparable loss and suffering to me since I am just a peasant farmer.”

Those lapses are also evident in the crafting of the Motion itself. However, this Court must look beyond those lapses and try and serve substantive justice to the parties while invoking the provisions of **Article 159(2) (d)** of the **Constitution**. Besides, the Plaintiffs have not raised any issue about being prejudiced by that want of form especially where the 1st Defendant has referred to himself as being the one disposing off the suit land when he should infact be referring to the Plaintiffs.

10. Having dispensed with prayer **NO 2** of the Motion, what remains for my determination is the prayer seeking an order of temporary injunction pending the hearing and determination of this suit which was revived following the setting aside of the earlier judgment delivered on 28th September 2022. It is instructive to note that no appeal was filed against my ruling delivered on 4th February 2025 which set aside that judgment.
11. An application for an order of temporary injunction has to be considered in line with the principles set out in the case of

GIELLA -V- CASSMAN BROWN & COMPANY LTD 1973

E.A. 358. These are:

- 1) The applicant must establish a prima facie case.
- 2) The applicant must demonstrate that he stands to suffer irreparable loss which would not adequately be compensated by an award of damages.
- 3) If in doubt, the Court will determine the application on a balance of convenience.

A prima facie case, as was held in the case of **MRAO LTD - V- FIRST AMERICAN BANK OF KENYA 2003 KLR 125.**

“... is a case which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the letter.”

And in the case of **NGURUMAN LTD -V- JAN BRONDE NIELSEN & OTHERS C.A. CIVIL APPEAL NO 77 of 2012,** the County stated:

“We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. 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 or is threatened with violation. The applicant need not establish title. It is

enough if he can show that he has a bona fide question to raise as to the existence of the case closely All that the Court is to see is that on the face of it, the person applying of an injunction has a right which has been or is threatened with violation. The applicant need not establish title. It is enough if he can show that he has a bona fide question to raise as to the existence of the right which he alleges.” Emphasis mine

Finally, as was held in the case of **FILMS ROVER INTERNATIONAL -V- CANNON FILM SALES LTD 1986 3 ALL ER 772**, the Court considering such an application must take the cause that appears to carry the lower risk of injustice. I shall be guided by the above precedents amongst others.

12. On the issue of prima facie case, the Defendants claim that they have an equitable interest in the suit land on which they have been living and tilling. It is also instructive to note, as I did in paragraph 12 of my ruling dated 4th February 2025, that **WILFRIDA ATIENO NGESA** alias **ODA SITUNDO OTIENO** the 3rd Plaintiff herein, did acknowledge that her late father **SITUNDO OTSIENO** held the suit land in trust for himself and his late brother **KEYA OTSIENO** who is the father of the Defendants. That is a clear fact that demonstrates that the Defendants have a prima facie case and that is why the suit property should be preserved as

they prosecute their counter-claim and also defend the suit against them.

13. On the issue of irreparable loss, I can do no better than cite my own decision in the case of **MARY CIUMWARI NJERU - V- DANIEL NJERU THAGANA 2016 eKLR** where I said:

“On the issue of irreparable loss, this Court stands guided by the Court of Appeal’s decision in the case of MUIRURI -V- BANK OF BARODA (KENYA) LTD 2001 K.L.R 183 where the Court held that land evokes a lot of eMotions and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss.”

In the circumstances of this case, if the injunctive relief is not granted and the suit land is disposed of, the Defendants stand to lose part of their inheritance. Such a loss is no doubt irreparable in damages and it is sentimental as well.

14. The record also shows that although the 1st Defendant had placed a caution on the suit land on 4th December 2013 claiming a beneficial interest, the same was removed and the land was registered in the name of the late **FLORENCE AUMA WEKESA & 3 OTHERS** following succession proceedings. The 1st Defendant has deposed in paragraph 7 of his supporting affidavit that the said caution was removed without him being notified and when he complained to the Land Registrar, he was advised to go to Court and obtain prohibition order. That order was indeed granted by this

Court on 12th March 2025. I have no doubt in my mind that the Defendants are entitled to the orders sought and even if there was, I would not hesitate in determining the Motion in favour of the Defendants.

15. I am also persuaded and guided by the decision in **FILMS ROVER INTERNATIONAL -V- CANNON FILM SALE LTD** (supra) that the lower risk of injustice will be achieved by granting the orders sought rather than by declining to do so. This Court must also reiterate that the prohibitory order earlier granted shall remain in situ until this case is heard and finally determined.
16. The up-shot of all the above is that this Court issues the following disposal orders upon considering the Notice of Motion dated 5th March 2025:

- 1) **The Order of prohibition inhibiting any dealings with the land parcel NO MARACHI/ELUKONGO/1293 and earlier issued on 12th March 2025 shall remain in situ until this case is heard and finally determined by this Court.**

- 2) **An order of temporary injunction is hereby issued restraining the Plaintiffs by themselves, their agents, servants, employees or any other persons acting through them from selling, transferring, interfering with, alienating or in any other manner dealing with the land parcel NO**

MARACHI/ELUKONGO/1293 pending the hearing and determination of this case.

- 3) The parties shall ensure that they comply with all the directions issued by this Court on 4th February 2025 and prepare this suit for hearing.**
- 4) In that regard, pre-trial shall be held before the Deputy Registrar on 25th November 2025 who shall then list it for trial upon confirming compliance.**
- 5) The parties to ensure that this suit is heard and determined within 12 months from the date of this ruling otherwise the order of temporary injunction will lapse unless the Court otherwise orders.**
- 6) The parties shall each bear their own costs of the Motion.**

BOAZ N. OLAO

JUDGE

12TH NOVEMBER 2025

Ruling dated, signed and delivered in open Court on this 12th day of November 2025.

1st Defendant Present in person.

2nd Plaintiff present in person.

BOAZ N. OLAO
JUDGE
12TH NOVEMBER 2025

ORIGINAL