



REPUBLIC OF KENYA



**KENYA LAW**  
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**Omar v Omar (Civil Appeal E008 of 2025)  
[2025] KEHC 15767 (KLR) (3 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 15767 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MARSABIT  
CIVIL APPEAL E008 OF 2025**

**FR OLEL, J**

**NOVEMBER 3, 2025**

**BETWEEN**

**MASUR SHEIKH OMAR ..... APPELLANT**

**AND**

**HALIMA SHEIKH OMAR ..... RESPONDENT**

**RULING**

**A. Introduction**

1. The Appellant/Applicant filed his Amended Notice of Motion application dated 11th September 2025 seeking the following orders;
  - a. Spent
  - b. Spent
  - c. That an order of injunction do issue restraining the respondent either by himself, agents servants, employees, workers, proxies or anybody claiming under him from entering into selling, sub dividing, leasing alienating, developing, cultivating, grazing, cutting down trees, harvesting sand or in any other way dealing with or using the parcel of land known as plot 324, Marsabit pending hearing and determination of the intended appeal against the judgment herein of 26<sup>th</sup> August 2025 in Marsabit Succession Cause No. 003 of 2025
  - d. That the Applicant be granted leave to amend the Appeal
  - e. That costs of this application be provided for.
  - f. That the court be pleased to issue any other remedy it may deem fit and just to grant.
2. The Application is supported by the grounds espoused on the face of the said Application and the supporting affidavit of the applicant, who depones that he is the exclusive owner of the plot 324,



Marsabit ( hereinafter known as the suit parcel of land), which the Hon Kadhi caused to be distributed amongst his family members on the basis that it formed part of the deceased estate, which finding was erroneous as the same had been passed to him by the deceased before his death and his evidence to that effect had been ignored.

3. He further averred that the respondent and other family members were occupying the suit parcel of land and carrying out illegal activities thereon, without his consent, thereby depriving him of mesne profit that would otherwise accrue. He therefore urged the court to grant him the orders sought in order to prevent the respondents from disposing off or wasting his property.

### **B. Response**

4. This application was opposed by the respondent, who filed her replying affidavit dated 27<sup>th</sup> October 2025, where she deponed that she was the 2<sup>nd</sup> wife to the late Sheikh Omar Ali, who died intestate in 1979 and that he had a first family settled in Malindi. She confirmed that the appellant was her first-born son, who had illegally converted the suit parcel to himself, yet it belonged to her husband and was to benefit his entire 2<sup>nd</sup> family as the 1<sup>st</sup> family had their parcel of land in Malindi and did not have a share in the suit parcel herein.
5. She reiterated that the Appellant's claim to have been granted the suit parcel through Gift Inter vivos was without foundation as the deceased did not gift the same to him and that the correct position was that he had proceeded to fraudulently acquire the suit parcel and effected transfer to his name without the family consent, thus was the one intermeddling with the deceased estate.
6. She further averred that the Appellant had filed MARSABIT MCEL NO E007 OF 2025 MANSUR SHEIKH OMAR VRS SALAH SHEIKH OMAR & 2 OTHERS & ALIMA SHEIKH OMAR INTERESTED PARTY, where he had been granted temporary injunction on 9<sup>th</sup> July 2025. In view of the said order the Appellant did not stand a chance to suffer irreparable harm and the balance of convenience did not favour granting of the order sought. The Appellant was also guilty of non-disclosure and thus underserving of the orders prayed for.
7. The respondent thus urged the court to find that this application lacks merit and be pleased to dismiss the same.

### **C. Plaintiff's Further Affidavit**

8. The plaintiff filed his further affidavit dated 29<sup>th</sup> October 2025, where he reiterated that his late father Sheikh Omar Ali (Deceased ) did gift him the suit parcel of land in 1979, which parcel by then was under Wabera upgrading scheme plot no E120/1. This had been prompted by issues of paternity since the respondent had sired children out of wedlock and had failed to disclose the same to the deceased.
9. The delay in transferring the suit parcel was as a result of the upgrading of the scheme, but the deceased had effected the transfer during his life time, which facts the Hon Kadhi has ignored. He insisted that the respondent had the nefarious plan of disposing of the suit parcel, under pressure from his step brother, who had no beneficial interest in the said property. He thus urged the court to find that his application had merit and be pleased to allow the same.

### **C. Analysis & Determination**

10. I have carefully considered the Application, the affidavits filed in support of the same, the replying Affidavit filed and parties submissions made in support and in opposition to this Application. The only issue for determination is whether the applicant has met the threshold for grant of injunctions as set out in the Giella Casman Case. The applicant must establish a prima facie case with a probability



of success, that he will suffer irreparable loss if the order is not granted and when the court is in doubt on a balance of convenience

11. Order 42 Rule 6(1) & 6(6) of the Civil Procedure Rules specifically provides that;

“(1) No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such orders thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such an order set aside.

(6) Notwithstanding anything contained in sub-rule (1) of this rule the High court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

12. In Halsbury’s Laws of England [Halsbury’s Laws of England, Third Edition, Volume 21, paragraph 739, page 352.] it is stated that :-

“It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term 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 that the 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 in question”  
In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. But what exactly is “irreparable harm

11. The Court in *Bilha Mideva Buluku V Everlyne Kanyere* (2016) Eklr was of the considered view that when a Court is considering an application for injunction pending appeal, it should be guided by the principles set out in *Patricia Njeri & 3 others v National Museum of Kenya* [2004] eKLR which principles are as follows:-

- a) An order of injunction pending appeal is a discretionary one and the discretion will be exercised against an applicant whose appeal is frivolous.
- b) The discretion should be refused where it would inflict greater hardship than it would avoid.



- c) The applicant must show that to refuse the injunction, would render the appeal nugatory.
  - d) The court should also be guided by the principles in *Giela v Casman Brown Ltd* 1973 EA 358.
13. Finally in *Charter house Bank Limited Vrs Central Bank of Kenya & others* (2007) Eklr the court of Appeal held, with regard to granting an injunction pending Appeal that;
- “The purpose of granting an injunction pending Appeal is to preserve the status quo and to prevent the appeal, if successful, from being rendered nugatory.(Also see *Madhupaper international limited V Merr* (1985)KLR840)”
14. I have considered the above principles and applied them to the facts at hand. The applicant has already obtained injunctive orders issued on 9<sup>th</sup> July 2025 in *Marsabit MCELC No E007 of 2025 MAnsur Sheikh Omar Vrs Salah Sheikh Omar & 2 Others & Alima Sheikh Omar Interested Party* , which fact he did not disclose in his pleadings and cannot be allowed to have a second bit on the cherry, through these proceedings.
15. The applicant has therefore not proved that he will suffer any substantial loss, if the injunction is not granted nor does the balance of convenience favour him under the said circumstance.

**D. Dispostion**

16. Taking all relevant factors into consideration I do find that the Amended Notice of Motion dated 11<sup>th</sup> September 2025 lacks merit and the same is dismissed with costs to the Respondent.
17. It is so ordered.

**READ, SIGNED AND DELIVERED VIRTUALLY AT MARSABIT ON THIS 3<sup>RD</sup> DAY OF NOVEMBER , 2025.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 3<sup>RD</sup> DAY OF NOVEMBER, 2025.**

In the presence of: -

N/A ..... Applicant

N/A ..... Respondent

Mr. Jarso .....Court Assistant

