

REPUBLIC OF KENYA

IN ENVIROMENT AND LAND COURT IN SIAYA

ELC CASE NO E016 OF

2025

ROSEMARY AGUTU ATHIENDE (**suing as** the legal
representative of the **Estate of**
Michael Athiende)PLAINTIFF

VERSUS

JOSEPH OWINO MAROKO.....1ST
DEFENDANT

ERICK **ODHIAMBO** ATHIENDE.....2ND
DEFENDANT

CLEMENT OMONDI MCOKETCH.....3RD **DEFENDANT**

LAND REGISTRAR, SIAYA COUNTY.....4TH
DEFENDANT

RULING

1. The applicant filed the present suit together with Notice of Motion application dated 24/4/2025. The application seeks the following verbatim orders;-
 - 1) SPENT
 - 2) SPENT

3) THAT pending the hearing and determination of this suit, a temporary injunction be issued restraining the Respondents/Defendants by themselves, their agents, servants, employees, assigns, personal representatives or any other person in authority from selling or disposing of all that parcel of land known as UHOLO/ SIGOMERE/ **37**, UHOLO/ SIGOMERE/ **1190**, UHOLO/ SIGOMERE/ **1191**, UHOLO/ SIGOMERE/ **1192**, UHOLO/ SIGOMERE/ **1193**, UHOLO/ SIGOMERE/ **1194**, UHOLO/ SIGOMERE/ **1195**, UHOLO/ SIGOMERE/ **2408** by way of public auction or any other way interfering with the plaintiff's proprietary interest in the said parcel of land.

4) The costs of this application be provided for.

2. The application is premised on the following verbatim grounds

1. The applicant has been the legal administrator of the Estate of the late Michael Athiende being land parcel no. UHOLO/ SIGOMERE/ **37**.
2. That the Respondents herein have illegally subdivided and sold the said land parcel without the consent of the applicant herein.
3. The 1st defendant fraudulently and illegally **UHOLO/ SIGOMERE/ 37 into UHOLO/ SIGOMERE/ 1190, UHOLO/ SIGOMERE/ 1191, UHOLO/ SIGOMERE/ 1192, UHOLO/ SIGOMERE/ 1193 UHOLO/ SIGOMERE/ 1194, UHOLO/ SIGOMERE/ 1195, UHOLO/ SIGOMERE/2408** and illegally sold it to strangers without letters of administration.

4. That the said land parcel covers the homestead of the late Michael Athiende and the same place is where he was buried.
 5. The Applicants stand to suffer substantial loss, damages and prejudice that cannot be quantified nor compensated by costs be it in monetary terms if the scheduled sale is not stopped.
 6. The illegal actions and intended sale by the Respondents should be stopped pending hearing and determination of this application.
 7. It's in the wider interest of justice that the orders sought herein be granted and further that the Respondents stand to suffer no loss or prejudice should the orders sought are granted.
3. The application is also supported by the affidavit of the applicant ROSEMARY AGUTU ATHIENDE. The deponent avers that she has been the legal administrator of parcel no UHOLO/ SIGOMERE/ **37**. A copy of the grant is attached. That the land was registered in the name of her father, MICHAEL ATHIENDE and his 2 brothers, Johanna Maroko and Gabriel Wanyanga both deceased. A copy of the title deed is attached.
4. It is deponed that the applicants father Michael Athiende had 2 wives and a total of 9 children, some of whom are deceased but are survived by spouses and children. That the deponents uncle Johana Maroko had 4 wives and 6 children, the other uncle, Gabriele Wanyanga had no wife and children.

5. It is averred that after the demise of the deponents father and uncles, the 1st, 2nd and 3rd defendants with the assistance of the 4th defendant illegally and fraudulently subdivided and distributed, sold and transferred the suit parcel of land without consideration, inclusion and the consent of all the family members. Copies of the searches are attached. The fraudulent subdivisions are UHOLO/ SIGOMERE/ 1190, UHOLO/ SIGOMERE/ 1191, UHOLO/ SIGOMERE/ 1192, UHOLO/ SIGOMERE/ 1193 UHOLO/ SIGOMERE/ 1194, UHOLO/ SIGOMERE/ 1195,UHOLO/ SIGOMERE/2408.
6. The deponent asserts that the 1st, 2nd and 3rd defendants did the subdivision, transfer and sale of the said land parcel illegally without grant of letters of administration for the estate the deponents father.
7. That no prejudice will befall the Respondent in the event the application is allowed infact, it will help the court to arrive at a just decision having looked at all the facts.

Replying Affidavit

- 8.The application is opposed vide the replying affidavit of **CLEMENT OMONDI MAKOKETCH** sworn on 26/5/2025. The deponent avers that the Applicant does not have any legal authority to administer the estate, as she only has an AD-LITEM which document only gives her authority to institute this suit. A copy of the AD-LITEM issued on 24th January 2025 is annexed.
- 9.That the applicant had instituted the same suit with the same / substantially cause action as the previously withdrawn suit on 27th April 2022 in the Principal Magistrate's Court of Kenya at

Ukwala, ELC Case **number E043 of 2022**. The said matter was withdrawn but with costs to the Defendants. Consequently, the Defendants prepared a bill of cost which was taxed at **Ksh 67,400** on 18.9.2024 and the Applicant was given 30 days stay of execution which has since elapsed. The terms of the ruling remain uncomplied.

10. It is averred that the Applicant has ignored/ and or refused to pay the amount taxed on the bill of cost, only to come to seek the same orders before this court thus demonstrating unclean hands and cannot claim equitable remedies.

11. The respondent claims that he has both legal and equitable rights over the suit parcel of land since due process was followed in having his interests registered. That the Applicant took over 10 years before lodging her claim, shows that she clearly was aware of the deponents existence in the said portion. That the application is defeated for unreasonable delay and should be dismissed with costs. A copy of a Certificate of Search for land parcel UHOLO/SIGOMERE/2408 is attached.

12. It is averred the 2nd Respondent states that he is one of the sons of the late MICHAEL ATHIENDE, the original proprietor of the suit parcel **UHOLO/SIGOMERE/37** which led to subsequent subdivisions 1190,1191,1193,1194 and 1195. He confirms that the Applicant's family, who were from the 1st household, were awarded **UHOLO/SIGOMERE/1195** while

they remained with UHOLO/**SIGOMERE/1194** which they sold to the 2nd respondent at a consideration of Ksh 235,000/= in the year 2014.

13. That the 1st Respondent states that he is one of the nephews of the late MICHAEL ATHIENDE who died intestate on 25th December 1975 leaving behind two widows surviving him and their children. He further states that after his uncle's demise, they went ahead and conducted an official search in the year 2002 and discovered that the land parcel UHOLO/SIGOMERE/37 was registered under 3 people namely- Johana Maroko, who is his father, Michael Athiende his uncle and Gabriel Wanyanga. That after demise of all the registered members, they held a meeting in the chief's presence and decided that they sub-divide the parcel which led to UHOLO/SIGOMERE/1190, 1191, 1193, 1194 and 1195. The Plaintiff's family was awarded **UHOLO/SIGOMERE/1195** and his brothers, one WILLIAM WERE ATHIENDE and ROMANUS ATHIENDE, who have built their homes on the said parcel and have the title deed of the same. Copies of the Certificate of Search for parcel number UHOLO/SIGOMERE/1195 and photograph's of a home belonging to ROMANUS ATHIENDE built on the said parcel are attached.

14. The Attorney General entered appearance but did not participate in the present application.

Submissions

15. The application was heard by way of written submissions. The applicants submissions are dated 10/07/2025. The respondents submissions are dated 2/07/2025.

ANALYSIS AND DETERMINATION

16. I have read the affidavits sworn in support of the application and those sworn in reply. I have also given due consideration to the submissions of the learned counsels appearing.

17. The main issue that lies for determination is whether the Plaintiff has satisfied the conditions for the grant of interlocutory injunction and what orders should issue in the circumstances.

18. The law governing the granting of interlocutory injunction is set out under **order 40(1) (a) and (b) of the Civil Procedure Rules 2010** which provides that:

"Where in any suit it is proved by affidavit or otherwise—

(a) That any 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 [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 - 165;

(b) That the defendant threatens or intends to remove or dispose of his property in

circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may 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.

19. The conditions for consideration in granting an injunction were settled in the celebrated case of **Giella v Cassman Brown & Company Limited (1973) E A 358**, as follows: -
2. *"Firstly, 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 adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."*
20. Based on the provisions of Order 40(1) (a) and (b) of the Civil Procedure Rules 2010 it trite that in granting temporary injunctions there has to be proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated

by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property, the court is in such a situation enjoined to grant a temporary injunction to restrain such acts see **Robert Mugo Wa Karanja Vs Ecobank (Kenya) Limited & Another [2019] eKLR.**

21. The first condition is the establishment of a prima facie case in the suit property. Simply put they have to demonstrate an interest in the property. It is the interest that would entitle the plaintiff to complain of the respondents proposed activities. In this regard see the case of **Naftali Ruth Kinyua Vs. Patrick Thuita Gachure & Another (2015) eKLR** cited by the applicant. One may therefore have an interest in land without necessarily having a title. I state so because it is contended by the respondent that the applicant does not have any legal authority to administer the estate, as she only has an AD-LITEM which document only gives her authority to institute this suit.
22. For me the applicant seems to have taken out the grant to enable her sue the defendants on the property. According to the applicant the suit property was initially registered in the name of her father, MICHAEL ATHIENDE and his 2 brothers, Johanna Maroko and Gabriel Wanyanga both deceased before it was subdivided. A copy of the title deed was attached. For

me this suffices for a prima facie case. It is trite that at this stage of the application the court is not supposed to delve into the merits of the case which I note is what the parties have done and specifically the very robust replying affidavit of the respondents. These can only be interrogated at a full hearing where parties will be put through the rigours of cross examination to enable the court effectually adjudicate over the contest between the parties.

23. It is the finding of this court that the applicant has surmounted the first hurdle by demonstrating her interest in the property.
24. The second requirement is for the applicant to prove that they will suffer irreparable harm that cannot be compensated by way of damages. The main ground upon which the orders of temporary injunction are sought is that the Respondents herein have illegally subdivided and sold the said land parcel without the involvement of the plaintiff. There are also allegations that the defendants intended to sell the property and it is this sale that should be stopped.
25. The respondents state that there is no evidence that has been placed before court in proof of these allegations. That in the absence of such evidence the applicant is on a fishing expedition and the orders of injunction should not issue. The applicants urge at paragraph 13 that there is a likelihood of the suit property being sold wasted, damaged or alienated by the defendants.

26. The court has not been led to any evidence of the intended or impending sale. I think I will respectfully agree with the respondents that this requirement has not been met.

27. It is trite that all the three hurdles enumerated in the case of **Giella Vs. Cassman Brown** must be surmounted they are conjunctive and not disjunctive. Having failed on the above requirement then the court will not delve into the other requirement.

28. But a doubt has been created in the mind of the court. There are accusations and counteraccusations as to who is entitled to the suit property. The subdivisions are not denied and searches have been presented in this regard. It is not denied that the subdivisions were as a result of the mother title claimed by the plaintiff for which a copy of the title has been presented.

29. I have also noted the proposition that even if the land is sold the same is quantifiable and cannot amount to irreparable loss and is compensable by way of damages. In the case of **Almed vs. Mannasseh Benga & Another [2019] eKLR** the court had this to say;-

3. *“Where it is clear that the defendant’s act complained of is or may very well be unlawful, the issue of whether or not damages can be an adequate remedy for the plaintiff does not fall for consideration. A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it. Support for this view is to be found in the Court of Appeal decision in the*

case of **Aikman vs Muchoki (1984) KLR 353.** See the case of **Joseph Mbugua Gichanga vs Co-operative Bank of Kenya Ltd (2005)eKLR.**

27 The Applicant may also not be compelled to accept payment for damages as was stated in **Joseph Siro Mosioma vs. Housing Finance Company of Kenya Limited & 3 Others [2008] eKLR.** Warsame, J(as he was then) had this to say and I concur;-

4. *“...that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substituted for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction.”*

30. Having pointed the above I think this court must take the lower risk of injustice. I’m emboldened by the holding in **Amir Suleiman v Amboseli Resort Limited [2004] eKLR,** where **Ojwang J.** emphasised that ‘the Court in responding to prayers for interlocutory injunctive reliefs, should always opt for the lower rather than the higher risk of injustice. I find that in the circumstances of this case issuance of injunctive orders will be

a lower risk of injustice as compared to failure to grant the same.'

31. In **Jan Bolden Nielsen vs. Herman Phillipus Steyn alias Hermannus Phillipus Steyn & 2 Others (2012) eKLR** the learned judge stated that:-

'I believe that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set out in the *Giella vs Cassman Brown* case. The court may look at the circumstances of the case generally and the overriding objective of the law. In *Suleiman vs. Amboseli Resort Ltd (2004) eKLR 589 Ojwang Ag. J* (as he then was) at page 607 delivered himself thus:- ' ...counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago in *Giella vs Cassman Brown*, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of *Films Rover International* made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781:- " A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong"...."

32. What orders should suffice therefore in the present circumstances? I find it necessary to preserve the suit properties by maintaining the status quo. The court is guided and persuaded by the position taken in the case of **Thugi River Estate Limited & another Vs National Bank of Kenya Limited & 3 others [2015] e K.L.R.** where Justice Anguto (may his soul rest in peace) explained the circumstances under which orders for status quo may be issued thus; -

“Firstly, an order of status quo will issue through a judicial process. Where the court in exercise of its general or statutory jurisdiction grants orders for maintenance in situ of a particular state or set of facts... the second or alternative order for status quo is the one issued by the court as a case management strategy. It is issued to provide assistance to the case. It also maintains a particular state of affairs or set of facts. Unlike a conservatory order or injunctive order, it is not descriptive. It is originated either by the court or by the consent of the parties. Often the court would not have been moved by either party. The court then expects an existing state of affairs or facts be preserved until a particular occurrence or until the courts’ further orders. It is intended to also freeze the state of affairs. State of affairs however do not always remain static, so it is always crucial for the court

to be very specific and neat in its description of what state of affairs is to be preserved.”

33. Applying the above to the present circumstances it is the view of this court that the status quo orders will suffice in this instance. The same will not only help in the preservation of the suit property but will also ensure that no party suffers any prejudice if the orders sought are granted.

34. The following orders therefore issue to dispose of the application dated 24th April 2025.

(i) That the status quo on the parcel registers of UHOLO/ SIGOMERE/ **37**, UHOLO/SIGOMERE/1190,1191, 1193,1194 and 1195 shall be maintained.

(ii) That pending hearing and determination of the main suit an order of inhibition is hereby issued restricting the registration of any disposition in the registers of land parcels UHOLO/ SIGOMERE/ **1190**, UHOLO/ SIGOMERE/ **1191**, UHOLO/ SIGOMERE/ 1192, UHOLO/ SIGOMERE/ **1193** UHOLO/ SIGOMERE/ 1194, UHOLO/ SIGOMERE/ 1195, UHOLO/ SIGOMERE/**2408** or any other property that was derived from UHOLO/ SIGOMERE/ **37**,

(iii) Costs shall abide the outcome of the main suit.

Orders accordingly

**Delivered and Dated at Siaya This 27th Day of
November 2025**

HON. LADY JUSTICE A.E. DENA

JUDGE

27/11/2025

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

Mr. Amondi for the plaintiff

Mr. Nyandiki for 1st, 2nd & 3rd defendants

N/A for 3rd & 4th defendant

Court Assistant: Ishmael Orwa