

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT**  
**KAKAMEGA**  
**ELC CASE NO. E039 OF 2025**

**CALISTO ODEMBA OJANGO.....1<sup>ST</sup> PLAINTIFF**

**JOHN ASUTSI ODEMBA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**EMMANUEL OKONDA AKAKA**

**.....DEFENDANT**

**RULING**

**Introduction**

1. This ruling is in respect of the notice of motion dated 20<sup>th</sup> November 2025 filed by the plaintiffs seeking temporary injunction to restrain the defendant by himself, his agents, family members and or any other person acting on his behalf, from burying the remains of his deceased's brother or interring any remains on land parcel No. Kisa/Wambulishe/330 which was subdivided into parcel No.s 2032, 2033 and 2034 (suit property) or making further burial arrangements on the suit property or interfering in any manner with the suit property. Further that the OCS Khwisero to assist

in effecting the orders of this honourable court. They also sought costs of the application.

2. The application was anchored on the affidavit sworn by the 1<sup>st</sup> applicant on 20<sup>th</sup> November 2025. The applicants' case is that they are the registered owners of parcel No. Kisa/Wambulishe/330 subdivided into 2032, 2033 and 2034. That the respondent's brother one Dickson Akaka passed away and the respondent has been cutting trees and erecting structures on the suit property and intend to inter his said brother's remains on the suit property. That in Kakamega ELC 26 of 2024, the respondent had claimed the suit property on the basis of trust. That the same was dismissed on 19<sup>th</sup> November 2025 on the basis that it was res judicata. That if burial on the suit property proceeds they will suffer irreparable loss as it will create emotive cultural claims and alter the character of the land. That unless restrained the defendants will cause a breach of the peace.

3. The application was opposed. The respondent filed replying affidavit dated 26<sup>th</sup> November 2025. He stated

that the application was incompetent, frivolous and misconceived and an attempt to obtain eviction through interlocutory application. That the suit property was ancestral land, first registered in his grandfather Samuel Ochango Mulima's name then later registered in the name of the plaintiff. That his family has always occupied the suit property openly and peacefully for decades. That his father, mother and nephew were buried on the suit property without any objection. That there can be no irreparable harm when there already are existing graves on the land and that the burial of his brother's remains is consistent with family tradition, customary practices and ancestral entitlement. That denying the respondent burial of his brother in the homestead will cause family emotional, cultural and indignity harm. That cutting down trees and erecting temporary structures is normal and does not amount to waste. That the plaintiffs' application is intended to secure a backdoor eviction.

4. In a rejoinder, the plaintiffs filed a supplementary affidavit where they argued that the burial of the

defendant's relatives on the suit property was contested by them and that one of the defendant's family members was buried secretly.

5. The plaintiff filed written submissions and both parties had opportunity to make oral submissions before court, which have been duly considered.

### **Analysis and determination**

6. The court has carefully considered the application, response thereto and submissions. The single issue that arise for determination by this court is whether the applicants have met the threshold for grant of orders sought of temporary injunction pending hearing and determination of this suit.

7. The power of this court to grant injunction is provided for in Order 40 Rule 1 of the Civil Procedure Rules as follows;

**“Cases in which temporary injunction may be granted [Order 40, rule 1]**

**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**

**(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 orders.”**

8. Therefore, where it is demonstrated that the subject matter of a suit is at risk of being wasted, damaged, alienated, sold in execution or removed, in circumstances that may delay or obstruct the execution of the decree that may eventually be made in favour of the plaintiff, the court may issue a temporary injunction.

9. Principles for grant of temporary injunction are well settled. The applicant must demonstrate *prima facie*

case with chances of success, irreparable loss and show that the balance of convenience tilts in favour of granting an injunction. (See **Giella v Cassman Brown [1973] EA 358**)

10. In the instant matter, the applicants argued that this court has already determined questions of ownership of the suit property through ELC 26 of 2024 as the respondents claim based on trust is no longer an issue for determination. The applicants demonstrated ownership by presenting titles to the suit property. This court takes judicial notice of the import of its ruling dated 19<sup>th</sup> November 2025. That decision stated that the claim of the suit property by the respondent and his family members on the basis of adverse possession and trust, was made in a judgment by this court in Kakamega ELC 66 of 2019, which claim was dismissed. I am therefore satisfied that the applicants have demonstrated a *prima facie* case with chances of success.

11. On the issue of irreparable loss, it is true that in many African cultures, a lot of cultural meaning is

placed on graves, a matter confirmed by the respondent in his replying affidavit. It is clear that allowing the respondent to inter human remains on the suit property will change the character of the suit property. The fact that the respondent has in the past buried his relatives on the suit property cannot be the basis for further violating the plaintiffs' apparent rights to the suit property. Therefore, I am satisfied that irreparable loss has been demonstrated by the plaintiffs.

12. The balance of convenience tilts in favour of the applicant because they hold title to the suit property and a court of competent jurisdiction has already found that the respondent and his family have no legal or equitable claim over the suit property. In the premises, I find and hold that the application dated 20<sup>th</sup> November 2025 is merited.

13. The plaintiffs' counsel confirmed that the defendants are on the suit property. Therefore, a prayer for restraining the defendants from being on the suit property would amount to eviction, which cannot be

issued at this stage and through this application, however weak the defendant's counterclaim appears, and in view of the decision in Kakamega ELC 26 of 2024. The plaintiffs sought eviction in their plaint and therefore that can only be issued once the suit is conclusively determined. Therefore, the orders that commend themselves in the circumstances of this case, which I hereby grant are as follows;

**a) A temporary injunction is hereby issued restraining the defendant by himself, his agents, family members and or any other person acting on his behalf, from burying the remains of his deceased brother or interring any other remains on land parcel No. Kisa/Wambulishe/330 which was subdivided into parcel Nos. Kisa/Wambulishe/ 2032, 2033 and 2034 (suit property) or making further burial arrangements on the suit property pending hearing and determination of this suit.**

**b) While the defendant's family have not been evicted from the suit property, they are restrained from further developing or doing anything thereon that may change the character of the suit property, pending hearing and determination of this suit.**

**c) The OCS Khwisero Police Station to assist in effecting the above orders of this Honourable Court.**

**d) The costs of the application are hereby awarded to the plaintiffs/applicants.**

14. It is so ordered

**DATED, SIGNED AND DELIVERED AT KAKAMEGA  
IN OPEN COURT/VIRTUALLY THROUGH  
MICROSOFT TEAMS VIDEO CONFERENCING  
PLATFORM THIS 28<sup>TH</sup> DAY OF NOVEMBER 2025**

**A. NYUKURI  
JUDGE**

**In the presence of;**

Ms. Karimi for the plaintiffs

Mr. Amasakha for the defendant

Court Assistant: Delphine