

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT SIAYA**

**ELC LAND APPEAL NO. E003 OF 2023**

**JACOB APEL MBAGO.....**

**APPELLANT**

**-VERSUS-**

**FRANCIS OOKO MWANZIA OBEL.....1<sup>ST</sup>**

**RESPONDENT**

**ISAYA OMONDI OBEL.....2<sup>ND</sup>**

**RESPONDENT**

*(Being an Appeal against the Judgment of the Magistrates Court of Kenya at Siaya by*

*Honourable Lester Simiyu (SPM) delivered on 12th July 2023)*

**RULING**

1. The court is tasked with determining the Notice of Motion application dated 22/4/2025 which seeks the following orders; -

1) SPENT

2) A temporary injunction be issued restraining the Respondents, their agents, servants, assigns, or any person acting under their instructions from selling, transferring, charging, leasing, or in any way dealing with land parcel **No.**

**UHOLO/UGUNJA/255** pending the hearing and determination of this application inter partes.

- 3) An order be issued directing the Lands Registrar, Ukwala Lands Registry, to reinstate the caution on land parcel No. **UHOLO/UGUNJA/255** pending the hearing and determination of this application and the present appeal.
  - 4) Upon inter partes hearing, the temporary injunction be confirmed, and a permanent injunction be issued restraining the Respondents from dealing with the suit land until the appeal in ELCLA/E003/2023 is heard and determined.
  - 5) The costs of this application be borne by the Respondents.
2. The application is supported by the affidavit of Jacob Apel Mbago sworn on this 22nd day of April 2025. It is deponed that the dispute originated in the suit MCELC/E009/2020 filed by the applicant touching on the suit land. The applicant also lodged a caution on the suit land at the Ukwala Lands Registry to protect his purchasers interest pending resolution of the matter. A copy of the caution is annexed.
3. It is deponed that the lower court ruled in favor of the Respondents, prompting the applicant to file the present appeal, which raises substantial issues of law and fact and has a high probability of success. That the said caution has been in place since July 2020 and at no time has there

been any interference to it even during the pendency of the present appeal.

4. It is averred that on or about 1st March 2024, the applicant discovered that the Respondents had unilaterally discharged the caution on the suit land, despite the appeal pending before this Court. That the discharge was done without any reference or communication to the applicant despite the fact that the deponent is the one who lodged the caution. A copy of the land register extract is attached.
5. The applicant states that the Respondents' actions are unlawful and prejudicial to his rights, as they risk alienating or otherwise dealing with the suit land, which would render the appeal academic and cause him irreparable harm. That he has a prima facie case with a high likelihood of success, and the balance of convenience favors maintaining the status quo by reinstating the caution and restraining the Respondents from dealing with the suit land until this court properly renders itself.
6. The applicant finds it is very suspicious why the Respondents would want to engage in dealings over the land when the court matter is at its tail end being at the stage of Written Submissions. That unless this Court intervenes he stands to suffer irreparable loss, as the suit land is unique and cannot be adequately compensated by damages.

### **Respondents' Replying Affidavit**

7. The application is opposed vide the replying affidavit sworn by FRANCIS OOKO MWANZIA OBEL, the 1<sup>st</sup> Respondent with authority of the 2<sup>nd</sup> Respondent. The respondent rehashed the final orders on the judgement of the trial court both in respect to the appellants claim and the respondents counterclaim therein culminating into the present appeal filed on 2/08/2023. A copy of the judgment is annexed.
8. The deponent also narrates the events that led to the dismissal of the appeal on failure to comply with the courts directions and its subsequent reinstatement on 23/5/2024 and its admission for hearing on 10/2/2025. The deponent states that during this entire period from the date of delivery of the judgment to date, the Appellant has never sought stay of execution of the judgment pending the hearing of the appeal herein. That no legal bar or restraint existed to prevent the Respondents from dealing with the property in accordance with the judgement and as they deemed fit.
9. The respondents assert on advice of their counsel on record in this appeal that the application seeking reinstatement of a caution and injunctive relief are overtly broad, ambiguous, and in excess of the subject matter in dispute, considering that: The dispute before the trial court was confined to a portion of UHOLO/UGUNJA/255; The current application improperly seeks injunctive orders

affecting the entire parcel, contrary to the original claim. A copy of the plaint is annexed.

10. Additionally, that the orders of permanent injunction cannot be issued at this stage of the suit noting that a permanent injunction is only granted upon hearing of the suit as it fully determines the rights of the parties before the court, and thus a decree of the Court.
11. It is reiterated that the trial court in Siaya CM ELC Case No. 9 of 2020 rightly dismissed the Appellant's suit in its entirety on several legally sound grounds. That critically found that the Appellant failed to demonstrate any genuine or equitable interest in the land. Instead, the evidence reveals that the Appellant colluded with third parties, including one Maurice Onyango Otieno, in an attempt to unlawfully alienate the estate's only asset during the pendency of succession proceedings, without asserting any legitimate claim therein. The applicants conduct speaks to bad faith and abuse of court process.
12. Further that the alleged agreements were also analyzed by the Court in High Court Succession Cause No. 71 of 2015; In the Estate of the late Michael Obel Ochola [2019] eKLR where Hon. Lady Justice Aburili impugned them.
13. That owing to the above and in the absence of any order of stay of execution in respect of the judgment and or decree, the respondents proceeded to apply for and successfully undertook the subdivision of the subject parcel of land into ten (10) sub-plots of varying acreage.

The said subdivision was lawfully processed and duly approved by the relevant authorities. The Mutation Fforms and resultant title deeds to the respective plots are attached.

14. It is averred that in light of the findings of the trial considering the fact that the Appellant's appeal arises from a judgment that dismissed his claim on multiple independent legal grounds, the Respondents assert that the Appellant has not demonstrated any prima facie case to warrant the grant of injunctive relief, temporary or otherwise. That the applicant has failed to satisfy satisfy the three limbs of the test for grant of temporary injunctive orders.
15. That any purported claim by the Appellant, if ever proved on appeal, can easily be compensated by an award of damages, assuming any loss is demonstrated at all which he has not done. That the balance of convenience undeniably tilts in favour of the Respondents since the Respondents are the registered proprietors, with indefeasible title under the Land Registration Act; They obtained judgment in their favour, which has not been stayed or overturned; The appeal is at the tail end of the process, the parties have already filed written submissions, and judgment is pending delivery;
16. It is deponed that there is no valid stay of execution pending appeal, and the Appellant has taken no steps to protect the status quo since judgment was delivered over

a year ago. The application is termed an afterthought, and the court is invited to dismiss it.

### **Submissions**

17. The court gave directions as to the disposal of the application on 26/6/2025 by written submissions. There were no submissions on record on the application.

### **ANALYSIS AND DETERMINATION**

18. I have read the affidavits sworn in support of the application and in reply. The main issue for determination is whether the application is merited to warrant the grant of the prayers sought.
19. The application is brought under the provisions of Order 40 Rules 1,2 and 4 of the Civil Procedure Rules, 2010 and Sections 1A, 1B and 3A of the Civil Procedure Rules.
20. Order 40 Rule 1 of the Civil Procedure Rules 2010 gives the court discretion to grant an injunction as the court thinks fit where a property is in danger of being wasted, damaged, alienated, sale and disposition until the determination of the suit or until further orders of the court.
21. Principles have also been set down by the courts to guide on the exercise of this discretion starting with the celebrated case of **Giella vs Cassman Brown (1973) EA 358** that an applicant must show a prima facie case with a probability of success, the applicant must demonstrate

that they will suffer irreparable injury that cannot be adequately compensated by an award of damages if the court does not intervene by granting the injunction and where in doubt, the court will weigh and grant the orders based on the balance of convenience. All the conditions must be met separately.

22. I think I must first address whether the suit property is in danger of being alienated and or wasted. I have taken this approach because this is the substratum of the grant of orders of injunction pending the hearing and determination of a case. The present proceedings are an appeal against the decision of the trial court as enumerated herein before.
23. The applicants main concern is firstly that he had lodged a caution against the suit property claiming purchasers interest which caution he states it has been subsisting since the year 2020 until in March 2024 that the same was removed unilaterally by the respondents decree holders. While a copy of the green card is stated to be annexed as JAM2 I did not come across it. However, annexure JAM2 is the mutation forms. The respondents do not deny the existence of the same and confirm that they have subdivided the land into 10 portions and have also annexed the same to their replying affidavit.
24. The respondents state that there was nothing barring them from proceeding with dealing with the property in the manner they have done as there were no orders of

stay of execution of the decree of the trial court which was in their favor. I respectfully agree with this argument as the applicants have not presented to this court any such orders. The only orders of stay of execution I have come across were the 60 days stay of execution issued by the trial court on 12/7/2023 after delivery of the judgement and which did lapse. In any case a lawful decree of the court would in my view override the caution. The respondents claim that titles in respect of the mutations have issued and are annexed as FO3 though I did not see them.

25. What is however clear is that the caution no longer exists and as indicated above I will not lay any blame upon the respondents. What is not clear is the purpose for which the subdivisions have been made. The appellants apprehension is that the property risks being alienated and will render the appeal nugatory. Moreover, there is also the contention that the applicant has sought blanket orders to cover the entire piece of land yet he has clearly pleaded in the plaint he purchased just but a portion. The courts dilemma is that I have nothing to show the portion that is allegedly being claimed by the appellant.
26. The court must then look at the balance of convenience and where it tilts. The respondents claim they hold a valid decree and that the judgement of the trial court was sound. That the appeal stands no chances of success. However, this goes to the merits of the appeal that is

before me. I cannot delve into this discussion at this juncture.

27. While it is contented by the respondent that the mandatory criteria for granting of orders of an injunction have not been met. I think each case is decided on its merits. The court must look at the course that will bear the lesser risk of injustice. In this regard I will be guided by the case of **Jan Bolden Nielsen vs. Herman Phillipus Steyn alias Hermannus Phillipus Steyn & 2 Others (2012) eKLR** where the learned judge stated thus: -

***'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”....”***

28. Since the objective of Order 40 is to preserve the suit property then the balance of convenience should be in favor of maintaining the status quo. The court finds guidance in the persuasive dictum 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 issue 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..'***

29. 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. Moreover, this court notes and as rightly observed by the respondents the appeal is at its tail end directions on its disposal as having issued by this court and partly complied with. I see no prejudice in maintaining the status quo on both the ground and the register of the mother title if not yet closed and the registers opened based on the mutations.
30. On the order for permanent injunction sought I respectfully agree with the respondents contention that the same cannot issue at interlocutory stage. In this regard I'm emboldened by the case of **Kenya Power & Lighting Co. Limited v Sheriff Molana Habib [2018]**

**eKLR where** the court pronounced itself as follows with regard to what constitutes a permanent injunction; -

*“A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected”.*

31. Applying the above to the present case I decline the invitation to grant orders of permanent injunction.
32. The applicant is also desirous that the caution is reinstated. I also decline to grant this prayer as the status quo orders will suffice.
33. The following orders therefore issue to dispose of the application dated 22<sup>nd</sup> April 2025;-

**1)The status quo on the land parcel No. UHOLO/UGUNJA/255 and its attendant subdivisions as at the date of this ruling shall be maintained both on the ground and the land parcel registers kept at the Ukwala land registry.**

**2)The respondents decree holders shall maintain the status quo on the suit property**

**and there shall be no sale, further subdivision, charge, lease against the land parcel No. UHOLO/UGUNJA/255 and its attendant subdivisions.**

**3) The Land Registrar Ukwala shall not register any further transactions against the land parcel No. UHOLO/UGUNJA/255 and any of its attendant subdivisions.**

**4) The above orders shall subsist pending the determination of this appeal.**

**5) The costs of this application shall abide the outcome of the appeal.**

Orders accordingly

**HON. JUSTICE A. E. DENA  
JUDGE  
04/12/2025**

**Ruling delivered virtually through Microsoft Teams  
Video Conferencing Platform in the Presence of:**

Omondi Were for the Appellant

Ms. Kinyua Holding Brief for Mr. Sagana

Court assistant: Ishmael Orwa

ORIGINAL