

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT SIAYA**  
**ELC CASE NO. E011 OF 2024**

**MIKE OCHIENG  
ONYANGO.....PLAINTIFF**

**VERSUS**

**MAURICE OUMA ONYUNA.....1<sup>ST</sup>  
DEFENDANT**

**NELSON OTIENO OFULA.....2<sup>ND</sup>  
DEFENDANT**

**RULING**

1. This ruling is the subject of application dated 31/05/2024,29/10/2024 and the preliminary objection dated 22/10/2024.

**Application dated 31/05/2025**

2. The application dated 31/05/2024 seeks leave to appeal the judgement of the Land Dispute Tribunal No. SYA/128/2009 adopted in Siaya PMC ELC No. 74 of 2010 out of time and the setting aside, variation and or stay of the orders made thereunder on 12/04/2013. The applicant also craves that the title deed if any issued to Nelson Ofula be cancelled and that he refunds any money received in purchase of the land.
3. The application is supported by the affidavit of Mike Ochieng Onyango the applicant. It is averred that he is

one of the sons of John Onyango (deceased) who died on 25/08/2003. That he had petitioned the court for grant of letters of administration and annexes a copy as MOO1. That his late father purchased plot East Gem/Kagilo/1466 from the 1<sup>st</sup> respondents' grandfather in 1995. That on 12/4/2023 the 1<sup>st</sup> respondent ignored the sale and secretly obtained orders from the Tribunal herein without making a disclosure of the same including the occupation thereof by the applicant's family. That he then later sold the land to the 2<sup>nd</sup> respondent to defeat justice. The applicant states that the illegal orders were kept from him and he only came to know of the same 10 years later after the 2<sup>nd</sup> respondent started fencing the land and that he was not a party to the tribunal proceedings.

4. It is averred that his intended appeal has high chances of success and the family stands to suffer irreparable loss if the prayers are not granted as they stand to be evicted from the land they have worked on for the last 29 years. That in mid October 2024 the 2<sup>nd</sup> respondent hired workers to clear the land and is also apprehensive that the land may have been offered for sale to innocent 3<sup>rd</sup> parties.
5. The applicant further lists at paragraph 14 the grounds upon which he intends to raise in his appeal.

**Replying Affidavit to the application dated 31/5/2024**

6. The 2<sup>nd</sup> respondent responded to the application on behalf of both respondents vide a replying affidavit sworn on 22/10/2024. The supporting affidavit to the application is impugned for material non disclosure. That the application is defective and an abuse of the court process. It is stated that upon accessing the tribunal proceedings as adopted by Siaya Principal Magistrates Court none of the parties in the present matter were parties in the Tribunal. (while the proceedings were stated to have been attached the same were not available in both the CTS and file copy.
7. That the parties in the tribunal proceedings were Grace Awuor Odongo, John Ogumbo Owiti Godia and Leornard Oloo Ofula. It is alleged the respondents herein lack capacity to be sued on behalf of John Ogumbo Ojalo and Christopher Owiti Godia who are deceased as they are not administrators of the estates thereof.
8. It is further stated that Grace Awuor Adongo a sister to the 1<sup>st</sup> applicant and Leornard Oloo Ofula who is the deponents brother are both adults capable of suing and being sued in their own capacity. That failure to enjoin them to these proceedings is irregular. That the applicants father was not a party to the tribunal proceedings. That the applicant is not the administrator adlitem of the estate of John Ogumbo Ojalo against whom the orders were issued and lacks locus standi to bring the current proceedings which should be struck out.

9. It is disclosed that the applicants have previously referred the matter to the Siaya Magistrates Court ELC No. 1 of 2023 which he withdrew voluntarily. Further the orders for cancellation of title are the same orders sought in the said case and that such orders cannot be issued in an application such as is before the court.

### **Preliminary Objection**

10. A preliminary objection dated 22/10/2024 has also been raised in rejoinder by the respondents on the grounds that the applicant has no cause of action against the respondents since they are not legal representatives of the parties to land case No. No. 74 of 2010. Further that the applicant has no locus standi to institute the application dated 31/05/2024.

### **Notice of Motion Application dated 29/10/2024**

11. The applicants also filed an application dated 29/10/2024 seeking orders of temporary injunction restraining the respondents and their agents from disposing of the property East Gem/Kagilo/1466 or dealing with the same in whatever manner and orders of inhibition against registration of any dealings thereof pending the hearing of the intended appeal.
12. The application is premised on grounds on its face and the Supporting affidavit of Mike Ochieng Onyango sworn on 29/10/2024. The depositions largely reiterate those made in the affidavit sworn in the application dated 31/05/2025.

13. Nelson Otieno responded to the above application through a replying affidavit sworn on 22/3/2025 but filed on 30/4/2025. Annexing a copy of a plaint in ELC CM Siaya Case No. 1 of 2022 it is averred that the suit sought cancellation of the respondents title. That also filed was an application dated 11/11/2022 seeking similar injunctive orders and at which time the respondent was already in possession and control of the land having erected a barbed wire fence. That the applicant was granted the injunctive orders pending the hearing and determination of the suit whereupon the deponent stopped further activity but the applicant never regained possession. That the suit was never prosecuted due to numerous adjournments at the instance of the applicant and who was enjoying the orders of injunction. On 16/5/2024 the applicant filed a Notice of discontinuance of suit which was adopted with costs to the defendant which have todate not been paid.
14. It is averred that following the withdrawal which the respondent thought was genuine he in 2024 proceeded to construct the 1<sup>st</sup> floor of his residential home only to be confronted with the present proceedings. That by February 2025 the respondent had contracted a roofing expert. That the applicant has misled the court by failing to disclose the status of construction on the suit property. That having invested millions on the construction orders of injunction will result to serious loss which the applicant has not undertaken to settle should the suit flop.

15. It is averred it is not true that the applicant has had control of the land for the last 20 years. That he does not reside on the property. The respondent states he has no intention of disposing of the land since he is constructing his retirement home thereon. There was no basis for the inhibition since the respondents ownership has not been overturned. That the balance of convenience does not favor the issue of an injunctive order.
16. The plaint, Notice of Motion dated 11/11/2022, Court order dated 30/3/2023, Notice of Withdrawal of suit dated 23/4/2024, Decree dated 16/5/2024 and photos of construction are attached.

The court is invited to dismiss the application.

### **SUBMISSIONS**

17. The two applications and the preliminary objections were canvassed by way of written submissions. The respondents filed submissions on 18/02/2025 addressing the preliminary objection and application dated 31/5/2024. With regard to the application dated 29/10/2024 the respondents relied on their replying affidavit. The applicants' submissions are dated 22<sup>nd</sup> July 2025.

### **ANALYSIS AND DETERMINATION**

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

19. The following issues commend determination; -

**1) Whether the Notice of Motion dated 31st May 2024 is competent.**

**2) Whether the Applicant had Locus Standi to institute the subject proceedings.**

**3) Whether the orders sought in the application dated 31<sup>st</sup> May 2024 should be granted.**

**4) Whether the orders in the application dated 29/10/2024 should be granted**

**5) Who bears the costs**

20. I will start with the preliminary objection which must be resolved at the earliest opportunity. It is trite that a preliminary objection if upheld could resolve a matter without going into the hearing upon merits. However, the same must be properly raised since it must be on a pure point of law.

21. The Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors Ltd (1969) EA 696** where Sir Charles Newbold, JA stated that:

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'A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.'

22. I have reviewed the grounds raised in the preliminary objection and it is my view that the same is not properly raised on pure points of law. Firstly, almost all of the orders sought are upon the discretion of the court. The power to enlarge time under the provisions of section 79G is discretionary and so is the power to set aside and including grant of interim orders of injunction. It is therefore the finding of this court that the preliminary objection is not properly raised.
23. But having stated the above the grounds raised in the preliminary objection can still be argued as normal grounds of opposition having also been raised within the respondents affidavit. I will therefore proceed in that manner.
24. The first question that I must pose is whether the proceedings as commenced are competent. It stated by the respondent that the application is meant to circumvent rules of law and procedure. It is submitted that a Notice of Motion is an interlocutory application and cannot stand on its own nor can substantive orders be given in such an application.
25. Prayer No. 2 of the application dated 31/5/2024 seeks the leave of this court to appeal the judgement of the Land Dispute Tribunal adopted in Siaya PMC ELC No. 74 of 2010 out of time. This is a prayer for enlargement of time and I do not see any other way the application would have been brought other than anchoring it under Miscellaneous

proceedings. I agree with Counsel for the applicants that Order 51 guides on the filing of applications by way of Notice of Motion.

26. The power of the court to grant leave is donated by section 79G of the Civil Procedure Act. The applicant has instead invoked the Court of Appeal jurisdiction instead of the jurisdiction of this court sitting as a court of equal status with the High Court. This is defective but I would invoke my inherent jurisdiction and look at the substance of the application to wit the prayer for enlargement of time. I will revert to the merits of this prayer later since it is dependant upon whether the applicant has locus standi.
27. It is asserted by the respondents that the applicant has no locus standi to present this suit since he claims to have brought the present proceedings on behalf of his deceased father but the letters of administration has not been attached. However, I have seen the Limited Grant of Letters of administration ad litem dated 24/06/2022. This grant donates the powers to prosecute and bring proceedings for purposes of the estate of John Onyango Oloo. My understanding of the grant adlitem as issued under the provisions of Rule 73 of Probate & Administration Rules is to arrest a situation which largely would be to protect the estate of a deceased party. The letters of administration are expected to come later.
28. I will now proceed to consider the application on its merits and whether the orders sought should be granted.

29. **Section 79G of the Civil Procedure Act** provides that:  
*Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.*
30. Arising from the law therefore an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good and or sufficient cause for doing so.
31. In **Daphne Parry vs. Murray Alexander Carson [1963] EA 546** the court had this to say on sufficient reason; -  
'although the provision for extension of time requiring "sufficient reason" should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of causing injustice and hardship to the appellant.'

32. The main reason advanced is that the applicants were not aware of the tribunal proceedings and only found out after the respondent went ahead to fence the land. It is noteworthy that the court has not had seen the Tribunal proceedings and the orders emanating therefrom neither have I seen a proposed Memorandum of Appeal.
33. Further the respondent has refuted the allegations stating that he took possession of the suit property when it was vacant and that the plaintiffs have never been in occupation. There was no evidence placed before this court by the applicants to show their long occupation. Moreover want of bonafides has been imputed upon the applicant who have failed to make material disclosure of the suit they withdrew and the status of the occupation on the suit property.
34. Guided by the case law above I find no sufficient reason to exercise the discretion to grant the leave to file the appeal out of time.
35. The applicant also craves that the title deed if any issued to Nelson Ofula be cancelled and that he refunds any money received in purchase of the land. Cancellation of a title is a grave matter. It is trite that the registration of a person as a proprietor of land is prima facie evidence that the person registered is the owner of the land unless it proved that the same has been obtained fraudulently, through misrepresentation or a corrupt scheme- See Section 26 of the Land Registration Act. These are issues

that cannot be canvassed by way of an application but through a full hearing on merits based on proper pleadings. I agree with the respondent's submission that such substantive orders cannot issue in the manner brought before this court.

36. Having declined to grant the leave to appeal out of time I see no basis upon which to make a determination on the application dated 29/10/2024. The same collapses.
37. The upshot is that I find that the application dated 31/5/2024 lacks merits and the prayers sought are denied and the entire proceedings dismissed.
38. The award of costs is discretionary as held in **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR**, each party shall bear its own costs.

Orders accordingly.

**HON. JUSTICE A. E. DENA**

**JUDGE**

**18/12/2025**

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

No appearance for the Applicants

Mr. Ooro E. for the respondents

Court assistant: Ishmael Orwa

ORIGINAL