REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

CIVIL APPEAL ELCLA NO. E002 OF 2025

CATHERINE ADHIAMBO OJWANG …… APPLICANT

-VERSUS-

TERESA ONYANGO ……1ST RESPONDENT
ISAIAH ONYANGO (Sued on behalf of CHARLES ONYANGO GUCHA)……2ND RESPONDENT
LAND REGISTRAR MIGORI COUNTY ……3RD RESPONDENT
HON. ATTORNEY GENERAL ……4TH RESPONDENT

RULING

1. The Applicant filed a Notice of Motion dated 12th January 2026 in this matter which was already fixed for mention on 26th January 2026. The said mention date was for the Court to confirm whether the Appellants had complied with the orders issued on 30th October 2025 in the presence of counsel for the appellant but absence of the Respondents. The orders of the said date were as follows:

> ***"The appellant is given a Last Chance (underlined) to file both the Record of Appeal and decree in 14 days strictly, in default of which the Appeal is struck out with no further reference to court. Mention on 26/1/2026."***

2. The orders were made following the fact, as the record bears, that since the instant Appeal was filed on 23rd January 2025, no step was ever taken by the appellant until the court took the initiative to cajole the parties to act. Thus, when the matter came up before the learned Judge on 10th July 2025 he directed that the Appellant complies with the Order 42 of the Civil Procedure Rules by filing the decree within 15 days and fixing the Appeal for mention for directions before the Judge within thirty (30) days, in default of which the matter be fixed for Notice to Show Cause for want of compliance. Come 30th July 2025 the appellant had not filed the decree. The Court, nevertheless admitted the Appeal, and directed that, in terms of Order 42 Rules 2 and 11 of the Civil Procedure Rules, the appellant files a Record of Appeal within thirty (30) days and serves, in default of which the same would be fixed for notice to show cause why it should not be dismissed for compliance. The record shows further that the appellant took no such a step. Therefore, when the Appeal was mentioned on 30th October 2025, this order stated above was granted.

3. It appears from the record that despite the Appellant attending court on 30th October 2025 and being graciously granted a chance to correct the mistakes in the procedural process, she still did not do anything.

4. It was until 12th January 2026 when she brought the instant application, under urgency and Vacation Rules. The urgency therein, according to her, was that the 2nd Respondent had died and there was imminent threat to have her body interred on the suit land. It is clear that the death of the said party is what jolted her from slumber hence the application. Thus, she brought the application under Order 40 Rule 1, Order 42 Rule 6 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, Paragraph 32 of the Environment and Land Court Practice Directions, and all other enabling provisions of the law. She sought the following orders:

1. … Spent

2. THAT pending the hearing and determination of this Application inter partes, this Honourable Court be pleased to issue a temporary injunction restraining the Respondents, whether by themselves, their agents,

family members, servants, or any other persons acting under their authority, from conducting or facilitating burial rites, burial ceremonies, interment, or any related activities on Land Parcel No. SUNA WEST/58 and the contiguous parcels SUNA WEST/1473 and SUNA WEST 1476 (hereinafter "the suit property").

3. THAT pending the hearing and determination of the Appeal herein, this Honourable Court be pleased to issue a temporary injunction restraining the Respondents, whether by themselves, their agents, family members, servants, or any other persons acting under their authority, from conducting or facilitating burial rites, burial ceremonies, interment, or any related activities on the suit property.

4. THAT there be a stay of execution and/or further proceedings arising from the judgment and decree of the Migori Environment and Land Court (Magistrate's Court) in ELC Case No. 27 of 2018, to the extent that the same is being relied upon to justify burial or any acts

asserting proprietary rights over the suit property, pending the hearing and determination of the Appeal.

5. THAT the costs of this Application be in the cause.

5. The application was based on the grounds, that she had lodged an Appeal challenging the judgment and decree of the Migori Environment and Land Court (Magistrate's Court), which decision is impugned for having been rendered without jurisdiction and in misapplication (*sic*) (herein understood to mean misapprehension) of settled principles of land law; the Respondents intended to conduct burial rites and interment on the suit property, being land whose ownership is directly contested and is the subject of the pending Appeal; that burial on the suit property constitutes a permanent and irreversible alteration of the subject matter of the Appeal and amounts to an assertion of proprietary rights before the Appeal is heard and determined; unless restrained, the intended burial will render the Appeal nugatory, occasion irreparable harm to the Applicant, and expose the parties and the Court to further avoidable disputes; the balance of convenience tilts in favour of preserving the suit property and maintaining the status quo

pending determination of the Appeal; this Honourable Court has jurisdiction and power under Order 40 Rule 1, Order 42 Rule 6 of the Civil Procedure Rules and paragraph 32 of the Environment and Land Court Practice Directions to issue interim orders preserving the subject matter of the dispute; and it is in the interests of justice that the orders sought be granted.

6. The application was supported by the affidavit of Catherine Adhiambo Ojwang sworn on **12th January 2026**. It largely repeated the contents of the grounds in support of the application save that the Applicant added that if burial took place on the suit land it would be permanently encumbered. She attached photographs of ground preparation for the burial.

7. Before the application could be heard, this Court gave directions that the parties appear before the Judge and address it on the urgency of the matter. They did so on 16th January 2026.

8. One of the central issues that the Respondents placed before the court on the material date was whether or not there was an Appeal still existing in which the application could be filed

hence the urgency be demonstrated therein. It is this issue that this Court sets to determine first before going to the issue of the urgency.

9. Learned counsel for the appellant submitted that upon attending court on the previous date he informed the instructed counsel for the appellant about the directions of the court. Further, that upon reviewing the Appeal, the instructed counsel indicated that he wished to amend the Memorandum of Appeal and he took this step since he did so and filed it on 8th January 2026, filing it together with the Record of Appeal. He added that the reason was that there was a delay in extracting the decree, hence he could not comply with the fourteen (14) days ordered by the court. He sought the discretion of the court in this respect since the appellant had since "complied" (*sic*).

10. He added that he had in his possession (and not in the Court file or the Case Tracking System) a letter he had sent to the process server to use to follow up with the court about the extraction of the court decree. While apologizing for the

inconvenience caused, he sought the indulgence of the court for him to file the correspondence.

11. Learned counsel for the 1st and 2nd Respondents argued that there was no Appeal before the court following the appellant's failure to comply with the orders of 30th October 2025. Upon that failure, the Appeal was struck out. He added that one would have expected the appellants to apply for an extension of time, but they made no such application to the court. Instead, they sneaked in documents to convince the court otherwise. He added that the decree in issue was issued on 23rd January 2025 and an attempt to seek to stay it over a year later was untenable. He added that the correspondence the appellant alluded to was not before the court yet, in an adversarial system as is in our legal system the appellant was under a duty to share the said correspondence with them. But the Respondents were not served on anything of that nature. He closed his argument that since there was no Appeal before the court, there was also no application the court could consider.

12. The learned counsel for the 3rd and 4th Respondent informed the court that they only became aware of the existence of the Appeal the day before, when they were served with the application before the court. They had never been served with a Memorandum of Appeal. The application did not even have the copy of the decree Appealed from annexed to it. She submitted that given that there was failure of the Appellant to comply with the previous orders of the court, there was no Appeal before the court. Therefore, the court could not hear the application.

13. In response, learned counsel for the appellants argued further that since the Court fixed the matter for mention after the orders of 30th October 2025, it meant that those orders were not final. The appellant's counsel intended to regularize the position on 26th January 2026, when the matter would have come up for hearing, but some circumstances occurred which in which one of the Respondents passed away before that time hence he moved the court and sought its indulgence. He added that if the Court were to consider that there was no existing Appeal, the appellant would be forced to file another

application which would, in turn, take judicial time for the court to consider it. He added the court should not deny the Applicant a chance to argue the Appeal which was meritorious.

14. Lastly, regarding the failure to serve the 3rd and 4th Respondents with the Memorandum of Appeal or any other documents earlier, he argued that the said parties were not included in the initial Memorandum of Appeal. Therefore, they could not be served. He attributed that to the fact that the original pleadings received from the previous counsel for the Appellant were incomplete. Therefore, when he made copies of all the pleadings later, he realized that there were other parties who were supposed to be added who were the 3rd and 4th Respondents. It necessitated the amendments made. He attributed the mistake to counsel but added that the failure to serve them had not produced the 3rd and 4th Respondents. Lastly, he argued that the Memorandum of Appeal could be amended without leaving the court since the pleadings are not closed.

15. This court has considered the issue before it. Only one issue lies for determination in this matter at this point. It is whether

there is an Appeal pending before this court, which would form the basis of the instant application.

16. The orders this Court made on 30th October 2025 were clear as to what to be done and when it was to be done. They were that the Appellant was required to file the decree together with the Record of Appeal within fourteen (14) days of the order, failure of which the Appeal would stand struck out without any application to the court. Fourteen (14) days elapsed on the 13th of November 2025. By that time, the Appellant had not filed either the Record of Appeal or the decree or both. It therefore means that by that date the Appeal stood struck out. In the circumstances then, there is no Appeal pending herein before this court.

17. Learned counsel for the appellant filed an application on behalf of the Appellant seeking to stay the decree of the lower court. He also filed a Record of Appeal. He did this on 8th January 2026, which was approximately two (2) months after the Appeal was struck out.

18. In my humble view, since the Appeal had been struck out, it does not lie for the appellant to purport to move the court in

the matter in the manner she did in a nonexistent Appeal. The appellant submitted that the delay in filing the decree and record of Appeal was because of a delay in extracting the decree. Again, from the further submissions made by learned counsel in response to the submissions made by both counsel for the Respondents it became clear that at no point in time did the learned counsel for the appellant or the appellant herself move the court in any way for the extraction of the decree. As a fact, the CTS clearly shows that the last activity in the matter was the filing of the Memorandum of Appeal in this matter. Also, the court record shows that the last activity in the court file was the order of the court made on 30th October 2025. Upon those orders being made, the appellant never took any step whatsoever to move the Appeal forward. Needless to say, they did not attempt at all to comply with the filing of the documents within 14 days of the court's order. This court is inclined to find that the delay and inaction on the part of the appellant was not only unreasonable but unexplained. Even the explanation that the failure to serve the Memorandum of Appeal on the 3rd and 4th Respondent was because of failure to

include them in the initial Memorandum of Appeal is untenable. It was the appellant's mistake not to include them. The appellant knew who the parties in the lower court were. Therefore, the failure to include the said parties in the Appeal was in itself another grave error she committed in the filing of the Appeal herein, which has since been struck out. The argument that the fixing of the Appeal for mention for 26th January 2026 from 30th October 2026 made the orders of the latter date not final is a total misconception. The Court was obligated to fix the matter for mention after the due date of the end of the fourteen (14) days to confirm compliance and close the file if there was none. There is none. This court therefore finds that there is no Appeal that is pending before it since the instant one was struck out. Costs of the Appeal follow the event. Therefore, the application and the Record of Appeal filed in a nonexistent Appeal are, too, struck out with the costs to the Respondents.

19. Orders accordingly.

RULING Dated**, Signed**, and **Delivered** virtually via the Teams Platform this **19th day of January 2026.**

HON. DR. *IUR* NYAGAKA

JUDGE

From 12:55 PM, in the presence of,

Mr. Otieno Advocate holding brief for Rutto for Appellant

Mr. Kisera Advocate for the 1st and 2nd Respondent

Ms. Opiyo State Counsel for the 3rd and 4th Respondent (absent),

Mr. Kisera holding her brief.