

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VIHIGA

ELCL (OS) CASE NO. E021 OF 2025

**IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CAP 22 LAWS
OF KENYA (Section 7)**

BETWEEN

ROSEMARY NEKESA MWALE PLAINTIFF

VERSUS

EBBY KAVAYA JOEL (Suing as an Administrator

of the estate of SARAH MBIGULA MIGASA

alias SARAH MIGASA(Deceased) DEFENDANT

RULING

This ruling is in respect of the Notice of Motion application dated 25th November 2025 brought by the applicant pursuant to the provisions of Order 40 Rules 1, 2, & 3, Order 51 Rule 1 Civil Procedure Rules and sections 1A, 1B, 3A Civil Procedure Act and sections 7 and 38 of the Limitation of Actions Act.

The application seeks for an order of temporary injunction to restrain the respondent from exhuming the remains of the applicant's late husband one CHARLES MWALE from the suit property known as

KAKAMEGA/KEDOLI/179 pending the hearing and determination of the suit. The application also seeks for an order that costs of the application be provided for. The grounds upon which the application is brought are that the applicant together with her late husband have had continuous, open, exclusive, uninterrupted and hostile possession of the suit land for 48 years since the year 1977 and that the respondent now threatens to exhume the remains of the applicant's husband contrary to law, dignity, customs and the applicant's constitutional rights. That exhumation is an irreversible act. That the applicant has established a strong *prima facie* case under section 7 of the Limitation of Actions Act and the principles of adverse possession.

The application was supported by the averments in the Supporting Affidavit of Rosemary Nekesa Mwale sworn on 25th November 2025 and the annexure thereto. The application was heard by way of written submissions. Written submissions dated 7th January 2026 were filed on behalf of the applicant by the firm of Vusha Onsembe & Mambiri Advocates. Similarly, written submissions dated 16th January 2026 were filed by Makonjio, Nyaberi & Co Advocates. I have considered the rival submissions.

The substantive relief sought is an order of temporary injunction. In order for the application to succeed, the applicant needs to demonstrate a *prima facie* case with

a probability of success. Under Order 40 Rule 1 Civil Procedure Rules pursuant to which the application was brought, an order of temporary injunction is granted to stop the subject matter of the suit from being wasted, alienated or destroyed pending hearing of the suit.

It is clear from the Supporting Affidavit that the suit land is the subject matter of various litigation some of which is still active.

The applicant deposes in paragraph 18 of her Supporting Affidavit that the exhumation which the application herein seeks to restrain is the subject of an application in VIHIGA ELC APPEAL NO. E024 of 2024. Hence according to the applicant, what constitutes the threat to exhume the body of the deceased is the application in Vihiga ELC Appeal No E024 of 2024. In other word the applicant is seeking an order of temporary injunction in this matter to stop an action in another court matter. No explanation has been given why the order was not sought in the said appeal.

Having considered the totality of the material placed before this court I find that the applicant has not met the threshold for grant of an order of temporary injunction as set in the case of Giella -vs Casman brown (1973) EA 358.

I further find that to the extent that the application is intended to challenge an existing application in a different matter file, the application is misconceived.

The application is dismissed. Costs to the respondent.

Judgement dated and signed at Vihiga, delivered virtually this 12th day of February 2026.

**E. ASATI,
JUDGE.**

In the presence of:

Ajevi--Court Assistant.

Muthoki h/b for Onsembe for the Applicant

Mbetera for the Respondent.