

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELCLC NO.E061 OF 2025

1. MARIA AUMA ONYANDO
2. FRANCIS OTIENO ONYANDO (as administrators and legal representative of the estate of
THOMAS ONYANDO OMIERI PLAINTIFFS

VERSUS

1. LEOTINE MALALA
2. MILLICENT MALALA
3. CHIEF LAND REGISTRAR
4. DIRECTOR,
LAND ADJUDICATION & SETTLEMENT DEFENDANTS

R U L I N G

The Notice of Motion application dated 9th October, 2025, seeks orders that;

- (a) Pending hearing and determination of the suit, the Respondents, their heirs or agents or servants or hirelings be restrained from having any dealings whatsoever with the suit properties being KISUMU/KORU/280 and KISUMU/KORU/680 respectively.
- (b) Pending hearing and determination of the suit, there be stay of proceedings and execution of the judgement in

TAMU MC Land Case No.E02 OF 2017 and stay of proceedings in KISUMU MC LAND CASE E176 OF 2023 and TAMU E024 OF 2024.

The application was supported by the averments in the Supporting Affidavit of Francis Otieno Onyando, the 2nd Applicant, sworn on 9th October, 2025.

The application was opposed by the 1st and 2nd Respondents vide the averments contained in the Replying Affidavit sworn by the 1st Respondent on 10th November, 2025.

When the application came up for hearing on 29th January, 2026, which date had been taken by consent, only Counsel for the respondent was present. Counsel submitted that the application had not met the threshold for grant of the order of injunction sought. That the respondents were the registered owners of the suit lands. That the issue of ownership had been determined in a previous case, and an eviction order issued against the applicants. That there are other cases filed by the applicants seeking similar orders. That the application is an abuse of the court process. Counsel urged the court to dismiss the application with costs.

I have carefully considered the application and read the documents placed before court by both parties.

The first relief sought in the application is for an order restraining the respondents from interfering with the suit lands. Order 40 Rule 1 provides for grounds under which such order can be granted namely; that the applicant must prove by Affidavit or otherwise that the property the subject matter of the 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 that the defendant threatens or intends to dispose of the property in a manner to obstruct or delay execution of any decree that may be passed against the defendant. This has been amplified in case law including in Giella vs Cassman Brown Co. Ltd (1973) 358 where the grounds for grant of an order of temporary injunction were stated to be that the Applicant must establish a *prima facie* case with a probability of success, secondly, an interlocutory injunction will not normally be granted unless the Applicant would suffer irreparable injury which would not adequately be compensated in damages and finally that when the court is in doubt, it will decide the application on a balance of convenience, and Mrao Ltd vs First American Bank Kenya Ltd & 2 Others [2003] eKLR that defined a *prima facie* case as

“ a prima facie case in a civil Application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

The case of the Applicants is that the Respondents filed the suit at Tamu Court and proceeded with it to the exclusion of the Applicants yet the Applicants are the heirs of the late Thomas Onyango Omieri. That the 1st and 2nd Respondents have also filed KISUMU MC Land Case E076 OF 2023 against some of the Applicants herein. That the Respondents have no legal or Constitutional right to claim and possess, occupy or use the suit lands. That the Respondents are in the process of selling the land to some other persons.

The Respondents' case, as contained in the Replying Affidavit, is that the suit lands were bought by the husband of the 1st Respondent, one John Malala Ojung'a, deceased, from Thomas Onyango Omieri. That the 1st and 2nd Respondents hold titles to the

suit lands, and that the Applicants have never resided on the suit lands.

It is clear that the suit lands have been the subject of numerous litigation, some of which have been concluded and judgment delivered, and others still pending hearing and determination. Some of the actions complained of are acts of execution of the decisions in the cases and can only be addressed in the said cases. I find that the applicants have not demonstrated the grounds for the grant of an order of temporary injunction.

Regarding the prayer for stay of execution and stay of proceedings in the various cases cited, no grounds have been demonstrated in support of grant of the same. Under Order 42 Rule 6 (2)

“No order for stay of execution may be made under sub rule (1) unless-

- a) The court is satisfied that substantial loss may result to the Applicant unless the order is made and that the Application has been made without unreasonable delay and**
- b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”**

The applicants have not demonstrated that they shall suffer substantial loss if the order of stay is not granted, that the application has been made without unreasonable delay and that they are willing to give such security as the court may order.

For stay of proceedings it has not been disclosed at what stages of trial the suits sought to be stayed are. No grounds have been demonstrated for making the order. In *Kenya Wildlife Service Vs James Mutembei (2019) eKLR*, it was held that:

“Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on the right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceedings is high and stringent”.

In the circumstances, it will be inappropriate to grant the orders sought. The applicant has recourse, where applicable, in the other existing cases.

The result is that the court finds that the application lacks merit and hereby dismisses it.

Costs to the 1st and 2nd Respondents who opposed the application.

Orders accordingly.

Ruling dated and signed at Kisumu, read virtually this 5th day of March, 2026 through Microsoft Teams Online Application.

**E. ASATI,
JUDGE.**

In the presence of:

Maureen: Court Assistant.

Odhiambo for the Applicants.

Akira for the Respondents.