

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC LAND CASE NO.E078 OF 2025

CATHORINE ANYANGO OLIECH and

ANTHONY OJENGA OLIECH (Suing as

Co-administrators of the estate of PIUS

AWUOTH OGOLLA – Deceased) PLAINTIFF/APPLICANTS

VERSUS

BEN OTIENO AKELO1ST DEFENDANT/RESPONDENT

DALMAS ODHENGO

(DALMAS ODHENGO) 2ND DEFENDANT/RESPONDENT

THE LAND REGISTRAR – KISUMU...3RD DEFENDANT/RESPONDENT

FAMILY BANK LTD 1ST PROPOSED INTERESTED PARTY

KEYSIAN AUCTIONEERS 2ND PROPOSED INTERESTED PARTY

R U L I N G

1. This ruling is in respect of the Notice of Motion dated 11th December, 2025, expressed to be brought pursuant to the provisions of Order 40, Rules 1, 2, 4 of the Civil Procedure Rules 2010. The application seeks orders of:-

- (a) Temporary injunction restraining the 1st and 2nd Interested Parties by themselves, their agents,

servants, or assigns from alienating, selling, interfering with, wasting, or further dealing in whatsoever manner with the land parcel known as KISUMU/CHIGA/3807 pending hearing and determination of the suit.

(b) An order staying and/or suspending the exercise of the statutory power of sale by the 1st Interested Party with respect to all that property known as KISUMU/CHIGA/3807 pending the hearing and determination of the suit.

(c) Costs of the application be provided for.

2. The grounds upon which the application was brought are that the suit land originated from land parcel No. KISUMU/CHIGA/635 owned by one Pius Awuoth Ogola (deceased), who died in 1990.

That the 1st Respondent, who illegally acquired the suit land, used the title thereof to obtain a loan facility from the 1st Interested Party.

That the process of using the suit land as security to obtain the loan was flawed and illegal and ought to be stopped by an order of the court.

The application was supported by the averments in the Supporting Affidavit sworn by Anthony Ojenga Oliech on 11th December, 2025.

3. The application was opposed. The 1st Respondent filed a Preliminary Objection on the grounds that the suit was incompetent and an abuse of the court process, citing section 19, Order 5, Rules 1 and 22 Civil Procedure Act, Section 7, 9, and 26 of the Limitation of Actions Act, Section 13 of the Environment and Land Court Act, and Section 150 of the Land Act.
4. The 1st Interested Party filed a Replying Affidavit sworn by Sylvia Wambani on 19th December, 2025, narrating how the 1st Interested Party advanced to the 1st Defendant financial facilities on the security of the suit land.
5. The application was heard by way of written submissions. It was submitted on behalf of the applicant that the applicant has a prima facie case with a probability of success. That the deceased died intestate, leaving behind the land parcel known as KISUMU/CHIGA/1635. That how the land was subsequently transferred to the 1st Defendant and later subdivided into KISUMU/CHIGA/3454 and 3455 is a mystery that can only be

unraveled by the 4th respondent. Counsel submitted further that if the injunctive orders are not granted, the estate of the deceased will suffer irreparable injury, which would not be compensated by an award of damages, as the property may easily change ownership. And that the balance of convenience tilts in favour of the applicant.

6. On behalf of the 1st Interested Party, it was submitted that since the administrators of the estate of Pius Awuoth Ogolla executed the sale agreement in 1985, they are estopped from alleging that the 1st Defendant illegally acquired the charged property. Counsel submitted further that the plaintiffs have engaged in material non-disclosure by failing to disclose the agreement for sale dated 14th April 1985, together with the attendant facts. That the plaintiffs have approached the court with unclean hands and are undeserving of the equitable remedy of injunction. The 1st Interested Party relied on the case of *Fahrenheit Energy Limited vs Boit & another [2015] KEELC 8188 KLR* to support the submission.

7. Counsel submitted that the estate of the deceased has no subsisting interest in the suit property. That the 1st Defendant had an indefeasible title to the charged property under section

26 (1) of the Land Registration Act, 2012. That the plaintiffs do not fall under the ambit of section 103 of the Land Act, which provides for the people who may challenge the exercise of a Chargee's power of sale. That the plaintiffs failed to establish a prima facie case, having not demonstrated that the 1st Interested Party failed to conduct due diligence. That the plaintiffs have also failed to demonstrate the nature of any irreparable harm they are likely to suffer should the court decline to grant the injunctive relief sought. That the balance of convenience tilts against granting the orders sought.

8. I have considered the application and the responses thereto. There is no doubt that at the time of the transaction between the 1st Defendant and the 1st Interested Party, the suit land was in the name of the 1st Defendant. Certificate of official search exhibited by both the Plaintiff and the 1st Interested Party confirms this.

On the face of it, the land belonged to the 1st Defendant. Under section 26 of the Land Registration Act, a certificate of title is conclusive evidence of proprietorship, only subject to the exceptions where the certificate of title can be challenged.

The 1st Interested Party narrated the steps it took in conducting due diligence before accepting the suit land as security for the financial facilities.

9. The 1st Respondent and the 1st Interested Party raise the plea of limitation against the claim by the plaintiff. According to the Applicant, the cause of action arose in the year 2010 when the 1st Respondent caused the original title No. KISUMU/CHIGA/1635 to be transferred in his favour from the deceased, without Letters of Administration in respect of the estate of the deceased registered owner. The claim is for recovery of land, and the same is based on fraud allegedly committed by the 1st Defendant.

Sections 4, 7, and 9 of the Limitation of Actions Act set the limitation period for bringing actions based on fraud and recovery of land. The notice of preliminary objection was filed after directions on the manner of disposal of the application had been taken; hence, no directions were taken on its disposal.

I find that the Applicant has not demonstrated a prima facie case with a probability of success.

The application is dismissed. Each party to bear its own costs of the application.

Orders accordingly.

Ruling dated and signed at Kisumu, read this 19th day of March, 2026, virtually through Microsoft Teams Online Application.

E. ASATI

JUDGE

In the presence of:

Maureen: Court Assistant.

Ndolo h/b for Omondi for the Applicant.

Mshindi for the 1st Respondent.

Edwin Otieno for the 1st Interested Party.