

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ELCLA No. E002 OF 2025

BETWEEN

RAPHAEL OGUTA OMEKE
APPELLANT

AND

PAULINE GESARE ONAMI (Suing as the Legal
Representative of the
estate **of** **MOGERE**
SAMOITA) RESPONDENT

(Being an appeal from the ruling and order of the Chief Magistrate's Court at Keroka (Ombija A.C., Senior Resident Magistrate) delivered on 22nd January 2025 in Keroka MCELC No. E015 of 2024)

JUDGMENT

1. Litigation leading to this appeal commenced in the Subordinate Court on 10th September 2025 when the Respondent filed Plaintiff dated 9th September 2024, against the Appellant. She averred in the Plaintiff that Mogere Samoita (deceased) was the registered proprietor of the parcel of land known as Nyaribari Masaba/Bokimotwe I/984 (suit property) and that sometime around the month of August 2024, the Appellant trespassed onto the suit property, took possession of part of it, fenced it and started constructing a permanent house thereon.

2. The Respondent therefore sought judgment against the Appellant for a permanent injunction restraining the Appellant as well as his servants and agents from remaining in occupation of the suit property, eviction of the Appellant as well as his servants and agents from the suit property, general damages for trespass and costs of the suit together with interest thereon.
3. Together with the Plaint, the Respondent filed Notice of Motion dated 9th September 2024 seeking the following orders:
 1. *That the application be certified as urgent and same be heard ex-parte in the first instance.*
 2. *That pending the hearing of the application inter-partes this court be pleased to issue an order of temporary injunction directing the Defendant/Respondent, his agents, servants and/or employees from entering, using, trespassing, enclosing and/or constructing on that parcel of land known as Title No. Nyaribari Masaba/Bokimotwe I/984.*
 3. *That pending the hearing and determination of this suit an order of injunction be issued restraining the respondent, his assignees, agents and/or servants, employees from entering, using, trespassing, enclosing and/or constructing on that parcel of land known as Title No. Nyaribari Masaba/Bokimotwe I/984.*
 4. *That cost of this application be provided for.*

4. Upon hearing the application, the Subordinate Court (Ombija A.C., Senior Resident Magistrate) delivered ruling on 22nd January 2025 where he rendered himself thus:

In the present case, I am of the view that the applicant has satisfied the 1st and 2nd ingredient as was established in Giella v Cassman Brown and therefore the defendant's action of purchasing and occupying the land without a grant of representation are a contravention of Section 45 of the Law of Succession Act - That statute is therefore unlawfully dealing with the estate property, which hereby amounts to intermeddling.

Any proprieted sale and/or transfer of the suit property without a confirmed grant is null and void since the seller had no locus to enter into such transaction. The Plaintiff's case/Application is therefore allowed with costs.

5. Dissatisfied with the outcome, the Appellant filed this appeal through Memorandum of Appeal dated 20th February 2025 and prayed that the appeal be allowed, that the ruling of the Subordinate Court be set aside and that the application be dismissed.
6. The following are the grounds of appeal as listed on the face of the Memorandum of Appeal:

1. *The Learned Trial Magistrate erred in law and in fact holding that the appellant was intermeddling with the estate of a deceased person in disregard of the law and evidence before him.*
2. *The Learned Trial Magistrate erred in law and fact in failing to find that the deceased had bequeathed part of parcel number Nyaribari Masaba/Bokimotwe 1/984 to Isaac Samoita Mogere a legal beneficiary to the said estate who had a right to deal with the allotted share as he did.*
3. *The Learned Trial Magistrate erred in law and fact in issuing injunctive reliefs against the appellant without regard to the well settled principles governing award of temporary injunctive reliefs.*
4. *Costs of the appeal be provided to the Appellant.*
7. The appeal was canvassed through written submissions. The Appellant filed undated submissions on 7th October 2025 while the Respondent filed submissions dated 26th October 2025.
8. The Appellant submitted that the portion of the suit property in dispute formed part of what was bequeathed to Isaac Samoita Mogere by his father Mogere Samoita during his lifetime, which share was then sold to the Appellant. That the seller of the portion was a legal beneficiary of the estate in issue hence entitled to a share of the said estate.

9. The Appellant further submitted that the Respondent had neither denied that Isaac Samoita Mogere was a beneficiary of the estate nor contested validity of the sale agreement between the Appellant and Isaac Samoita Mogere who the Respondent craftily avoided to include in the proceedings. He contended that the Respondent had acted in bad faith and was selective to his prejudice.
10. The Appellant also submitted that the sale had not infringed the rights of other beneficiaries since it involved only a portion bequeathed to one of the beneficiaries without prejudicing either the estate or shares of other beneficiaries. He contended that harshness of the law should be tempered with the equitable principle under **Article 159** of the **Constitution** which focuses on substantive justice. He concluded by urging the Court to allow the appeal as prayed.
11. On her part, the Respondent relied on **Section 45 (1)** of the **Law of Succession Act** and submitted that the Appellant together with the vendor intermeddled with the estate of the deceased by proceeding to sell and purchase a parcel of land in respect of which no succession had been done and which remained registered in the deceased's name. She relied on the cases of **Benson Mutuma Muriungi vs C.E.O Kenya Police Sacco & Anor [2016] eKLR** and **re Estate of M'Ngarithi M'Miriti [2017] eKLR**.

12.The Respondent further submitted that the Appellant admitted having entered into a land sale contract with Isaac Samoita Mogere who had no capacity to execute such an agreement in the absence of a grant. She contended that the appeal lacks merit and urged the Court to strike it out with costs to her.

13.This being a first appeal, the mandate of this Court is as succinctly stated by the Court of Appeal in **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR:**

This being a first appeal, we are reminded of our primary role as a first appellate court, namely to re-evaluate, re- assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

14.I further bear in mind that an appellate Court should not interfere with the exercise of discretion by an inferior Court unless it is satisfied that the decision of the inferior Court is clearly wrong due to misdirection or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration with the result that it arrived at a wrong conclusion. See **Mombasa Cement Limited v Kitsao & 34**

**others (Civil Appeal E016 of 2020)
[2022] KECA 562 (KLR) (24 June 2022) (Judgment).**

15.I have carefully considered the grounds of appeal and the parties' respective submissions. The issue that arises for determination is whether the orders sought in Notice of Motion dated 9th September 2024 ought to have issued.

16.The Respondent principally sought an injunction pending hearing and determination of the suit. To succeed in such an application, the applicant must establish a prima facie case with a probability of success. Even if she succeeds on that first limb, an injunction will not issue if damages can be an adequate compensation. Finally, if the Court is in doubt as to whether damages will be an adequate compensation then the Court will determine the matter on a balance of convenience.

17.All the foregoing conditions and stages are to be applied as separate, distinct, and logical hurdles which the Applicant is expected to surmount sequentially. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. See **Giella -vs- Cassman Brown & Co Ltd [1973] EA 358** and **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**.

18.A definition of "*prima facie* case" was given by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR** as:

... a case in 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... [it] is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.

19.A perusal of the record reveals that the Appellant filed a replying affidavit in the Subordinate Court in which he admitted that the deceased remained the registered proprietor of the suit property and that he purchased a portion of it from Isaac Samoita Mogere who he contended was a beneficiary of the deceased's estate. He contended that the portion had been bequeathed to the vendor by the deceased in his lifetime.

20.It is not in dispute that the deceased's estate, including the suit property, is yet to be distributed through succession proceedings and that Isaac Samoita Mogere does not letters of administration in respect of the deceased's estate. While neither this Court nor the Subordinate Court are exercising succession jurisdiction in the matter, it remains to be seen whether the vendor's alleged interest will be upheld by the

succession Court. Aware of his situation, the Appellant has urged that harshness of the law be tempered with the equitable principle under **Article 159** of the **Constitution**.

21. In the absence of letters of administration, Isaac Samoita Mogere's capacity to validly sell the portion of the suit property to the Appellant and whether the Appellant has a valid title are matters that will need to be resolved at the trial of the suit. Nevertheless, the Respondent amply demonstrated that there exists a right which has apparently been infringed by the Appellant and that there was need for an explanation or rebuttal.

22. I am satisfied that the Respondent established a *prima facie* case. The Appellant has not demonstrated that the impugned decision of the Subordinate Court is wrong. I find no fault in the Learned Magistrate's exercise of discretion.

23. This appeal is bereft of merit. I therefore dismiss it with costs to the Respondent. The parties should expeditiously prosecute the suit pending before the Subordinate Court. In that regard, the said suit shall be mentioned before the Subordinate Court on 3rd June 2026 for directions towards its hearing and determination.

Dated, signed, and delivered at Nyamira, this 22nd day of April 2026.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

Appellant present

Mr Angwenyi for the Respondent

Court Assistant: B Kerubo