

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT SIAYA**  
**ELCA CASE NO. OS. E029 OF 2022**

**JOHN ODHIAMBO GUMBA**

**(Suing as the legal administrator of all the estate of  
ALOYCE GUMBA  
OLOO.....  
DECEASED**

**VERSUS**

**JOHN ODUOR NENGA alias ODUOR NENGA.....  
DEFENDANT**

**LAND REGISTRAR UGENYA SUBCOUNTY.....  
RESPONDENT**

**AND**

**JOSEPH GUMBA OTHIENO..... INTENDED INTERESTED  
PARTY**

**RULING**

- 1 The application the subject of this ruling is the application dated 25/03/2025 brought by the Defendant.
- 2 The application seeks orders; -
  - 1) THAT the Defendant/Applicant's Advocates, M/s Enock Otieno & Company Advocates, be granted leave to come on record after judgment for the Defendant and

the intended interested party and an order admission the intended party in this suit.

2) THAT Pending the hearing and determination of this application, this Honourable Court be pleased to issue an order staying the execution proceedings against the Defendant/Applicant in favour of the plaintiff/Respondent.

3) That the interim, this Honourable Court be pleased to issue an order of temporary injunction restraining the plaintiff/Respondent, jointly and severally, whether by themselves, their employees, agent servants, assignees and/or whomsoever from forcefully evicting the interested party and his family, trespassing into, transferring or dealing with, in any manner whatsoever in the suit property, obstructing or in any other way whatsoever refusing and/or denying the interested parties access and occupation, use of the suit property pending the Hearing and determination of this application.

4) That this Honourable court be pleased to set aside the Interlocutory Judgment entered herein on 11<sup>th</sup> April 2024 against the Defendant/Applicant and all consequential orders and proceedings thereto.

5) That the costs of this Application be provided for.

3 The application is premised on the grounds listed on its face and is supported by the affidavit of Joseph Gumba Othieno the intended interested party sworn on 25/03/2025. It is deponed that he is suing on his own

behalf and of other legitimate beneficiaries of the Estate of the late Aloyce Gumba Oloo (deceased).

- 4 It is averred that the suit property, known Reference No. North Ugenya/Masat/1779 as 1.2Ha of the land, was legally acquired by my late grandfather and Aloyce Gumba Oloo and Patrick Othieno Gumba (*both deceased*), from the Defendant's predecessors in title, and the same has been in possession and use of his extended family since 1976.
- 5 That contrary to the principles of Justice, equity, and good conscience, the plaintiff /Respondent, through fraudulent misrepresentation, clandestinely instituted court proceedings and obtained judgment in his favour by falsely alleging adverse possession, despite the fact that the land had been legally purchased by my late father. A copy of the judgment is annexed
- 6 That the said judgment was obtained in default and without knowledge or participation of the Defendant and the intended interested parties, who were never served with any pleadings or court documents in this matter.
- 7 That the plaintiff/respondent fraudulently misrepresented to the court that he was acting in the interests of the family, whereas he sought to benefit personally by acquiring the entire suit property to the exclusion of the true beneficiaries. A copy of the letter from Land Registrar is attached.

- 8 That in total disregard of the rights of the beneficiaries of the Estate of the late Aloyce Gumba Oloo, the Plaintiff /Respondent has proceeded to initiate execution proceedings, seeking to evict the rightful occupants and compel the District Surveyor and Land Registrar to sub-divide/partition and transfer the suit property to his sole name.
- 9 That the plaintiff/Respondent's actions amount to an egregious violation of the beneficiaries' proprietary rights protected under Articles 40 and 50 of the Constitution of Kenya, 2010 and the Land Registration Act, No.3 of 2012, which provides that rights to land ownership must be legally acquired and not fraudulently obtained.
- 10 That the said judgment was procured through non-disclosure of material facts, fraud and misrepresentation, hence obtained through fraud and liable to be set aside as it offends the administration of justice.
- 11 That he is advised by his advocate that under section 45 of the Law Succession Act, Cap 160, any intermeddling with the property of a deceased person without due process is illegal, and the plaintiff/Respondent's actions amount to unlawful intermeddling with the estate of my late father.
- 12 That unless this Honourable court intervenes urgently, the plaintiff/Respondent is likely to dispose of or alienate the suit property, causing irreparable loss and grave injustice

to the intended interested parties, who have occupied and developed the land for over four decades.

- 13 That it is in the interest of justice, fairness, and equity that the orders sought herein be granted to safeguard the legitimate rights of the estate beneficiaries and to prevent grave miscarriage of justice.

### **RESPONDENTS REPLY**

- 14 The application is opposed by the plaintiff through the replying affidavit of John Odhiambo Gumba the plaintiff sworn on 21/04/2025.
- 15 The deponent states that he instituted this suit by way of Originating summons. That he did serve the defendant JOHN ODUOR NENGA and took pictures of him receiving and signing on his principal copy and filed an affidavit of service dated 23/12/2022 the same is attached together with its annexures. Thereafter he has been serving the defendant with every court proceeding and has filed dozens of affidavits of service which are on the court record.
- 16 It is averred that the respondent is the son of Aloyce Gumba Oloo and the applicant the grandson and therefore the respondent is having the legal capacity to lead the family on issues relating to assets of the deceased.
- 17 The respondent avers that before filing the suit he filed proceedings to obtain the AD-LITEM to the deceased estate which was granted for purposes of filing suit in

UKWALA PMC SUCC CAUSE NO.64 OF 2022 and there has been no formal objection. A copy of the Limited grant adlitem is attached.

- 18 It is deponed that the Defendant and the Interested party did threaten the Land Registrar and the District Surveyor with the Directions issued by this Court dated 26<sup>th</sup> March 2025 herein and that the said officers have stopped executing the court orders dated 21<sup>st</sup> November 2024 an action which is intended to delay the process even forever. This Court should not be misled to that trap
- 19 That no evidence has been provided by the applicants neither none exists that the respondent is working or planning to evict any one out of the suit land. All family members are utilizing the suit land without any intimidation or threats, save as the titles are missing hence his efforts.
- 20 The application is termed misconceived, malicious, brought by unclean hands, afterthoughts, lies, intended to postpone the survey process even for ever, bad in law and a waste of this Honourable court's precious time. The same should be dismissed with costs and the court to order execution of the court orders to proceed.

### **FURTHER REPLY**

- 21 The Applicant responded further to the above depositions vide an affidavit sworn on 1/12/2025 where he reiterates the averments in the supporting affidavit herein.

- 22 Additionally that this court has Ability to set aside the Judgment deliver be set aside, due to procedural irregularities in the service of summons to enter appearance, the violation of right to fair hearing, and the presence of triable issues requiring resolution.
- 23 That it is only just that the entire proceedings be set aside upon stay of the order being issued first, and all parties accorded a chance of hearing of our respective sides.

### **SUBMISSIONS**

- 24 In its directions dated 26/3/2025 this court allowed prayer No, 2 of the application to the extent that I allowed the applicants advocate to come on record post judgement. However, this court dismissed the application for want of prosecution which I later reinstated vide a ruling dated 18/3/2025. In the ruling I noted that both parties had made substantive submissions on the said application and I proceeded to reserve a date for ruling.

### **ANALYSIS AND DETERMINATION**

- 25 Before I delve into any analysis there are some emerging preliminary issues that I must deal with.
- 26 It has been averred that the application dated 25th March 2025 has very slim or no chances of success at all on grounds that the defendant in the suit JOHN ODUOR NENGA died in early 2025 before the application dated 25th March 2025 could be heard.

27 At paragraph 7 of the Intended Interested Party Response to the Replying Affidavit 11<sup>th</sup> November 2025 the deponent states that the Defendant is now deceased. At paragraph 8 he emphasises that the Defendant being deceased does not mean that justice should not be practiced to the remaining parties.

28 It is therefore not in dispute that the defendant is deceased and I will proceed as such.

29 I think for me the question that arises is what is the implication of the death of the defendant to these proceedings as well as the present application.

30 The Plaintiff has submitted by posing a question as to how the applicant will be able to proceed with the proceedings of the application dated 25/3/2025 or even in the main suit in the absence of the now deceased defendant who died after the filing of the application.

31 Order 24 is on Death and Bankruptcy

32 Order 24 rule 1 provides that 'the death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.'

33 Order 24 Rule 4 is in case of death of one or several defendants or sole defendant

***'Where one of two or more defendants dies and the cause of action does not survive or continue to the surviving defendant or defendants alone or a sole defendant or sole surviving defendant dies and the***

***cause of action survives or continues, the court on application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit'***

34 Arising from the law above it is a statutory requirement that the defendant is substituted with his Legal Representative. This is so because he was the sole/primary defendant in the suit commenced by the plaintiff herein. The course of action survives even in the event the judgement is set aside. The plaintiff cannot purport to speak for the defendant by indicating that he was not served. An interested party cannot be joined to a suit where there is no defendant.

35 For the above reasons I would be hesitant to proceed with the application in the absence of such substitution. The application therefore is struck out.

36 The court notes that the plaintiff and the applicant are relatives as pleaded by both the parties I will make no orders as to costs.

Orders accordingly

**Delivered and Dated at Siaya This 6<sup>th</sup> Day of May  
2026**

**HON. LADY JUSTICE A.E. DENA**

**JUDGE**

**06/05/2026**

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Ochido Holding brief for Odera for the Plaintiff

No appearance for Defendant (deceased)

Joseph Gumba Othieno Intended Interested Party

Court Assistant: Nelima Janephar

ORIGINAL