

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND CASE NO. E 024 OF 2025

GEORGE OTIENO RIWA.....
PLAINTIFF

VERSUS

FELIX ODHIAMBO

**(Suing as personal representative and administrator of
the estate of the late JARED OKUMU UYOGA (Deceased)
.....DEFENDANT**

RULING

BACKGROUND

- 1 This suit is commenced by way of plaint dated 30th July 2025. His claim against the defendant is that he the plaintiff on diverse dates entered into various sale agreements with the defendants father **JARED OKUMU UYOGA** now deceased for a portion measuring 5.5 acres to be hived of parcel No.SIAYA/USIGU/2488 registered in the name of the deceased. That he paid the full purchase price on diverse dates to the deceased. The process of transfer was never completed since the plaintiff's father died during the process at the point when they had already obtained the LCB consent but had not surrendered to the land registrar his title for subdivision and transfer.
- 2 It is averred that in breach of the sale agreements the defendant has refused to complete the transaction and forcefully trespassed into the portion sold to the plaintiff destroyed beacons, cut trees and the plaintiffs fence

alleging that the beneficiaries of the estate have objected to the said sale. The particulars of breach are listed under paragraph 12 of the plaint. The plaintiff seeks among others, a declaration that he is the bonafide owner of the portion he bought and for the same to be excised, specific performance of the sale agreements, the defendant to release all transfer documents for purposes of effecting the sale, mesne profits, permanent injunction.

DEFENDANTS RESPONSE.

3 The defendant filed Statement of defence dated 13/11/2025 wherein he admits to being the administrator of the estate of his father. He denies there were any sale agreements between his father and the plaintiff and which he termed as null and void for want of LCB consent. Further that the parcel herein is part of the free estate of the deceased and which was subject to ongoing succession proceedings for distribution in Bondo PMC Succession Cause no. E189 of 2024. Consequently, this court lacks jurisdiction to make orders that would interfere with the said proceedings and the jurisdiction of the family division. At paragraph 13 of the defence the intention to raise a preliminary objection is recorded and which I will refer to later in this ruling.

APPLICATION DATED 1/8/2025

4 Together with the plaint was filed the above application seeking orders of temporary injunction against the defendant and his agents whom he terms intermeddlers

from the acts of trespass and destruction pending the hearing and determination of this suit as well pending final distribution of the estate. The plaintiff refers to himself as a creditor/beneficiary of the deceased estate.

REPLYING AFFIDAVIT

- 5 The application is opposed by the replying sworn by the defendant Felix Odhiambo Okumu. It is admitted the suit parcel is registered to the defendant's father herein. That there is no existence of lawful agreements and also impugns the deposit slips for various reasons. That the land was never subdivided and the deceased remains registered owner as no transfer was executed and therefore the plaintiff has not legal interest over the property which forms part of the deceased estate. That the defendant was never recognized as a creditor or purchaser to the estate. That no formal judgement or decree showing the plaintiff as creditor. The citation proceedings were purely procedural and did not confer proprietary interest.
- 6 It is deponed that the applicant was never appointed as administrator and has never been in lawful possession of the parcel. That the application for injunction is misconceived as the applicants seeks to obtain ownership in the absence of valid sale agreement and the consents earlier highlighted. That the orders if sought will be unjustly deprive the rightful beneficiaries of their

inheritance and impede the administration of the estate. Any alleged developments of improvements were done without authority of their inheritance. Any alleged developments of improvements were done without authority of the deceased or the current administrator and contrary to section 45(1) of the Law of Succession Act.

PRELIMINARY OBJECTION

- 7 True to his word the defendant has raised a preliminary objection dated 13/11/2025 and filed on 16/11/2025 premised on the following grounds; -
- 1) That there are pending succession proceedings which render this suit premature and an abuse of the court process as the question of ownership and transmission of the deceased estate is pending determination
 - 2) The defendant has not obtained grant of letter of administration/grant of probate to the estate of the deceased or transmission of title by the defendant. That the plaintiff claim is outlawed by the provisions of section 45 (1) of the Law of Succession Act.
 - 3) Absence of Grant of Letters of Administration ad litem. The plaintiff ought to have first applied for an obtained a limited grant of letters of administration

for purposes of instituting or defending the proceedings.

- 4) Land sale agreement not backed by spousal consent and land control board consent.

SUBMISSIONS

- 8 The application and the preliminary objection were canvassed concurrently by way of written submissions. The applicants' submissions were filed on 24/01/2026 and the defendants on 2/12/2025 which I have considered.

ANALYSIS AND DETERMINATION

- 9 I will first deal with whether the preliminary objection is merited. I must observe that none of the parties has addressed me on whether the preliminary objection has been properly raised and I will therefore not belabor the point,
- 10 In the case of **Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors Ltd (1969) EA 696** it was held that "A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true

Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."

- 11 In the case of **Oraro Vs. Mbaja (2005)eKLR. J.B.Ojwang J** remarked, anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.
- 12 On the issue of the lack of jurisdiction I would make a finding that the preliminary objection is properly raised since should I find that this court lacks jurisdiction to entertain the plaintiffs claim then the court will have to terminate the proceedings without recourse to full hearing.
- 13 But I must quickly add that some of the grounds I must eliminate since they will require the ascertainment through facts and would not be pure points of law. This will become clearer later in this ruling.
- 14** Does this court lack jurisdiction to hear and determine the Plaintiff Claim sitting under its jurisdiction as the ELC

- 15 The discourse of the jurisdiction of the High Court and the Environment and Land Court as it relates to intersection between the probate court and this court was settled by the Court of Appeal in the case of **Diasproperty Limited & Others Vs Githae & 10 Others (2024) KECA 318 KLR** where the court stated thus; -

36. Under Article 165(5)(b) of the Constitution, the High Court shall not have any jurisdiction in respect of matters within the jurisdiction of the Environment and Land Court. Under Article 162(2) of the Constitution and section 13 of the Environment and Land Court Act, 2012, all matters relating to land, its ownership, use, tenure, boundaries, and so on, are reserved for the Environment and Land Court.

37. It is notable that under Rule 43(1) of the Probate and Administration Rules, made under the Law of Succession Act, where, in succession proceedings, a party claiming that he was beneficially entitled to a parcel of land that the deceased left in his name, or there is a general dispute relating to the ownership of a parcel of land registered in the name of the deceased, such dispute has to be adjourned and be determined in originating summons in a separate court. It is when such a determination is made that the succession court can confirm the grant, bearing in mind the

determination. Of course, with the Constitution and the Environment and Land Court Act, such a dispute has to be referred to the Environment and Land Court for resolution.'

- 16 As for jurisdiction on matters dealing with intestate and testamentary succession and the administration of estates of deceased persons and for purposes connected therewith and incidental thereto the probate court including the High Court and Magistrates courts have statutory jurisdiction to entertain such disputes as envisaged under the Law of Succession Act.
- 17 Under the above the probate courts would be dealing with the free property of a deceased person which is usually the property the deceased was legally competent to freely dispose off during his life time and in respect of which his interest had not been terminated by death.
- 18 It is not in dispute that before his death the parcel was registered in the name of the deceased on 10/9/09. The deceased enjoyed rights to the property under section 25 of the Land Registration Act and which was subject to overriding interests pursuant to the provisions of section 28 of the same Act. This would remove the suit from the umbrella of a free property. Further that the plaintiff as I see it alludes to a constructive trust by dint of the sale agreement and which if proved is an overriding interest. The dispute would therefore fall under the jurisdiction of this court.

- 19 Moreover I must note that this suit is not about the distribution of the deceased property as the Counsel on record for the defendant would want this court to believe. Based on the pleadings the plaintiff wants to be declared the lawful owner of the portion he is claiming to have purchased from the plaintiff's father. This is a dispute that the probate court would be divested of jurisdiction as its jurisdiction is limited to distribution of the free property of the deceased as already seen in **Diasproperty Limited & Others** (supra). I have also seen the ruling delivered by Hon Maiyo on 2nd July 2025 in MCSUCC/E189/2024, which emphasized this position and the probate court rightly made a finding that the plaintiffs claim should be handled before this court.
- 20 The jurisdiction of this is further challenged on the basis that there are pending succession proceedings which render this suit premature and an abuse of the court process as the question of ownership and transmission of the deceased estate is pending determination. I think my above analysis speaks to this issue. I have already noted that the probate court has no jurisdiction to entertain issues of ownership of land. As long as the plaintiff claims a portion of the land and which the respondent contests then this must be resolved first before distribution. The ELC will determine ownership which will then inform distribution before the probate court.

- 21 The above also addresses the defendant's contestation that the plaintiff claim is outlawed by the provisions of section 45 (1) of the Law of Succession Act. This is a wrong application and interpretation of the said provisions against the facts of this claim.
- 22 It is further urged on behalf of the defendant that the plaintiff ought to have first applied for an obtained a limited grant of letters of administration for purposes of instituting or defending the proceedings. This court respectfully disagrees with this position for the reason that the plaintiff states at paragraph 3 of the plaint that he is the one who entered into an agreement with the deceased and is therefore suing on his own behalf and did not require any grant of letters of administration adlitem.
- 23 Assuming that the counsel for the defendant is referring to the citation proceedings the ruling of the probate court was very clear authorizing the plaintiff to commence these proceedings and noting very well the citation filed before the said court. If counsel had any reservations to this then the proper forum would have been an appeal and not before this court but the High Court.
- 24 I will without belaboring the point eliminate the grounds touching on illegality of the sale agreement, fraud, lack of spousal consent, whether any interest passed to the plaintiff in the absence of a formal transfer. All these are matters of evidence to be ascertained after this court has

heard the parties on merit. They are not pure points of law.

25 I think I have said enough to demonstrate why the preliminary objection must fail.

APPLICATION DATED 1/8/2025

26 I will now consider whether the orders sought in the Notice of Motion Application should issue. The orders sought are basically seeking injunctive reliefs pending the distribution of the deceased estate.

27 The provisions of **Order 40 Rule 1(a)** of the **Civil Procedure Rules** which speak to the grant of orders of temporary injunction as follows; -

1. Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a 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

(b)..... the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

28 The principles of granting temporary injunction are very clear and well enunciated in the celebrated case of **Giella**

vs Cassman Brown & Company Limited (1973) E A 358 where the court stated the conditions for grant of interlocutory injunctions as follows;

“The conditions for the grant of interlocutory injunction are now I think well settled in East Africa. First an applicant must show a prima facie case with probability of success. Secondly an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt, it will decide an application on the balance of convenience.”

- 29 I have seen the title in respect of the suit property and it is still in the name of the deceased person. The applicant lays a claim on a portion of the same. I think in the circumstances of this case the court must be guided by the balance of convenience and take the course that appears to carry the lower risk of injustice pending the hearing of the main suit.
- 30 Justice Hoffman in the English case of Films Rover International cited in **Jan Bolden Nielsen vs. Herman Phillipus Steyn alias Hermannus Phillipus Steyn & 2 Others (2012) eKLR** made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781:-

“A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong””

31 In my view preserving the suit property which in essence is the core objective of the provisions of order 40 will suffice in the circumstances.

32 **The Black’s Law Dictionary**, Butter Worth’s 9th Edition, defines status quo as a Latin word which means **‘the situation as it exists’**.

33 The purpose of an order of status quo has been articulated in many court case as highlighted here below; -

34 In the case of **Kenya Airline Pilots Association (KALPA) v Co-operative Bank of Kenya Limited & another [2020] eKLR**, the court stated:

“... By maintaining the status quo, the court strives to safeguard the situation so that the substratum of the subject matter of the dispute before it is not so eroded or radically changed or that one of the parties before it is not so negatively prejudiced that the status quo ante cannot be restored thereby rendering nugatory its proposed decision.”

35 In the case of Fatuma Abdi Jillo v Kuro Lengesen & another [2021] eKLR. In Republic Vs National Environment Tribunal, Ex-parte Palm Homes Limited & Another [2013] eKLR, Odunga J [as he then was] quotes various decisions in a bid to distinguish status quo from injunctive orders, stated;

“When a court of law orders or a statute ordains that the status quo be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining status quo is meant to preserve existing state of affairs...Status quo must therefore be interpreted with respect to existing factual scenario...”In TSS Spinning & Weaving Company Ltd Vs Nic Bank Limited & another [2020] eKLR, the unpacked the purpose of a status quo order as follows: ***“In essence therefore, a status quo order is meant to preserve the subject matter as it is/existed, as at the day of making the order. Status quo is about a court of law maintaining the situation or the subject matter of the dispute or the state of affairs as they existed before the mischief crept in, pending the determination of the issue in contention.In Murithi Jin Boabab Beach Resort as quoted by F. Tuiyot Saifudeen***

Abdullahi & 4 Others in Mombasa High Court Misc. Civil Cause No. 11 of 2012, described the nature of a status quo order as follows: “In my view, an order to Status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is a substantive equitable remedy granted upon establishment of a right, or at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof. It does not depend on proof of right or prima facie case. In its effect, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or the eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint.” (Emphasis is mine).

- 36 My understanding of the status quo is that the applicant is in occupation of the portion he allegedly purchased from the deceased. He took possession immediately. As to whether the possession is unlawful this is a matter that

must await the hearing. Therefore, this possession is what is to be preserved pending the determination of this case and to ensure that the character of the portion claimed is not changed by wasting it dispossessing and even construction of new structures thereon pending the resolution of the ownership of the portion herein. Let each party for the time being continue to occupy the areas they occupy and desist from interfering with such occupation.

37 I have noted the respondent's contention that this court will be interfering with the administration of the estate. For the avoidance of doubt this court has not stopped the proceedings of the succession court which are stated to be pending. The court is aware that there is the option for the applicant to approach the succession court under Rules 73 and 41(3) of the Probate and administration Rules where the said court has inherent powers to set aside certain assets of the deceased estate until a dispute thereon has been determined such as the present one. In this respect I will decline to issue any orders of inhibition against the Land Registrar.

38 The following orders therefore issue to dispose of the application dated 1/8/2025 and the preliminary objection;-

- 1) The preliminary objection dated 13/11/2025 lacks merit and is dismissed
- 2) That the status quo on the portion of parcel SIAYA/USIGU/2448 currently in occupation and use by the plaintiff shall be maintained including quiet possession

thereof. The plaintiff shall also not undertake any construction of the said portion or commit any acts that will waste or change the character of the portion pending the hearing and determination of this suit.

- 3) That the respondent and his agents as well as the plaintiff shall keep the peace.
- 4) The costs of the application shall abide the outcome of the main suit.

Orders accordingly.

Ruling dated signed and delivered this 7th day of May 2026

HON. JUSTICE A. E. DENA
JUDGE
7/05/2026

**Ruling delivered virtually through Microsoft Teams
Video Conferencing Platform in the Presence of:**

Ms. Otuma for plaintiff Applicant

Mr. Odhiambo B.F for the Defendant

Court assistant: Nelima Jeniphar