



REPUBLIC OF KENYA



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In re Estate of Magdalena Kabon Sawe (Deceased) (Succession Cause E034 of 2023) [2024] KEHC 9228 (KLR) (31 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9228 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE E034 OF 2023
JRA WANANDA, J
JULY 31, 2024**

IN THE MATTER OF THE ESTATE OF MAGDALENA KABON SAWE (DECESED)

BETWEEN

**SUSAN TUITOEK CHEMWENO 1ST APPLICANT
MARY CHEPCHUMBA KIBIWOT 2ND APPLICANT
RUTH JEBET KIMUTAI 3RD APPLICANT
JANE JEPKOSGEI KIYAI 4TH APPLICANT**

AND

JONAH KIPLAGAT SAWE RESPONDENT

RULING

1. The deceased herein, Magdalena Kabon Sawe, died intestate on 15/06/2016 at the age of 79 years. On 3/03/2023, through Messrs ANO Advocates, the 1st Applicant, as a daughter of the deceased, petitioned for a Grant of Letters of Administration over the estate. In the Petition, she listed 6 survivors/children of the deceased, including herself, (5 daughters and 1 son). Several properties, including Tembelio/Kimoning Block1(Cheburbur)/100 (measuring 4.007 Ha) and Mosop/Kaptarakwa/408 (measuring 2.88 Ha), were also listed as comprising the estate.
2. The 1st Applicant, on 21/03/2023 and before the Petition could be acted upon, then filed the Chamber Summons of the same date seeking the following orders;
 - i. [.....] Spent.
 - ii. [.....] Spent
 - iii. That pending the distribution of the Estate of the Deceased, this Honourable Court be pleased to issue preservative orders restraining the Respondent herein either by themselves, their



servants, and/or any other person acting from their authorization or control, be restrained from intermeddling with the estate by erecting permanent structures, fencing, selling, in any manner developing, leasing out to third parties, and in any other manner dealing with the parcels of land known as:-

Tembelio/Kimoning Block 1(Cheburbur)/100

Mosop/Kaptarakwa/408

- iv. [.....] Spent
 - v. That this Honourable Court be pleased to issue an order compelling the Respondent to demolish any fixtures, fittings, buildings and/or structures they have recently erected on the parcels of land known as: -
Tembelio/Kimoning Block 1(Cheburbur)/100
Mosop/Kaptarakwa/408
 - vi. That the Officer Commanding Station Tarket Police Station, the officers in charge of Kaptagat Police Station, Kipkwen Police Station and Tarket Police Station and/or officers under their command to ensure compliance with the Orders of this Court.
 - vii. [.....] Spent
 - viii. That pending the hearing and determination of the instant Succession Cause, this Honourable Court be pleased to issue an order directing that the beneficiaries utilize the parcels of land known as Tembelio/Kimoning Block1(Cheburbur)/100 and Mosop/Kaptarakwa/408 in the manner they have in the last eight (8) years preceding the filing of this succession cause.
 - ix. That this Honourable Court be pleased to make any other orders as it deems just and expedient in the circumstance.
 - x. That costs of this Application be in the cause.
3. The Application is expressed to be brought under Sections 47 and 76 of the Law of Succession Act and Rules 44(1), 49, 63(2) and 73 of the Probate and Administration Rules and “all other enabling provisions”. The Application is premised on the unnecessarily lengthy 28 grounds listed on the face thereof and is further supported by the Affidavit sworn by 1st Applicant.
 4. In the Affidavit, the 1st Applicant deponed that the deceased (her mother), at the time of her death, had 6 children, 4 of whom are the Applicants herein, and that she also had a number of properties which included the parcels of land known as Tembelio/Kimoning Block 1(Cheburbur)/100 and Mosop/Kaptarakwa/408, that the deceased, prior to her death, had bequeathed the Respondent (their brother) herein 10 acres out of the parcel of land Tembelio/Kimoning block 1(Cheburbur)/100 and the Respondent took possession and even obtained a title deed for the 10 acres. She deponed further that, the deceased, prior to her death, had shared her wishes with them (her children) and one of the wishes was that the remaining 10 acres would be distributed equally among the 5 daughters. She deponed further that the deceased had built her home in the remaining 10 acres and there were also other structures thereon, including a stone kitchen, that in line with her wishes, the deceased had granted the Applicants access to the property and allowed them to farm on various portions of the land. She claimed that this commenced prior to the death of the deceased and even after her death and that they have continuously utilized the land without any restrictions and/or challenge from any person.



5. The 1st Applicant further deponed that since the demise of the deceased, they have on several occasions engaged the Respondent for distribution of the Estate in accordance with the wishes of the deceased but their efforts have proved futile, that until recently, they would freely access and utilize the 10 acres in question and the property Mosop/Kaptarakwa/408 but solely for farming activities such as growing hay and other cash crops and they at no time erected any permanent structures or in any manner restrict the Respondent's access thereto. She deponed that however, the Respondent began interfering with the Applicants' use of the parcels of land, and that the 2nd Respondent has cut down trees, ploughed the land and undertaken several activities thereon. According to the 1st Applicant, the Respondent continues to engage in these illegal acts.
6. She further deponed that the Respondent, since early this year, begun restricting the Applicants from accessing the properties and has threatened them against using the same, that the Respondent has now ploughed all the 10 acres of the first parcel of land ready for planting season which is first approaching, that this was done without the Applicants' involvement or consent, that the Respondent has begun construction on the parcels, he has fenced off the parcels by putting up "mabati" structures and put up a steel gate hence restricting the Applicants from accessing the property. The 1st Applicant contended further that the Respondent has also hired security guards and kept dogs in the properties to deny them access. According to her, the Respondent intends to put up further permanent structures which includes a house in which he intends to reside. She added that the Respondent has shut down all attempts at reaching an amicable settlement, that they have all along been undertaking farming activities on the parcels of land and have been depending on the same as their source of livelihood for themselves and their children and that now, by the actions of the Respondent, they being denied the opportunity to earn a living.
7. She reiterated that the deceased had built her permanent home in the parcel of land Tembilio/Kimoning Block 1(Cheburbur)/100 and they have always had access to the home, that they have even stored their belongings therein and whenever they and their families visit the property, they would spend their time therein and that it is their only ancestral home known to them. She urged that the Respondent's acts in denying them access to the properties means that they cannot access their belongings, they cannot access the home when they visit and have now had to take refuge in neighbours' homes. She added that they also cannot access their livestock and farm produce as the Respondent has locked, within the homestead, 3,000 bales of hay, 3,000 cedar poles (9 feet each), 2 rams and 2 ewes, 2 acres of ploughed out hay, a television set, a radio and some personal effects, that they were therefore forced to report the matter to the police since as it stands they have no control or access to the properties.
8. The 1st Applicant further deponed that all the said acts have occurred from the beginning of the year as the Respondent has not been residing in the parcels of land as he has been residing in Kabarnet where he has been living and working for over 30 years but has now, out of nowhere, began interrupting the Applicants' quiet enjoyment and use of the properties. According to her, since the Estate is yet to be distributed, any action in alienating any of the properties and or erecting permanent structures thereon complicates the process of distribution and leads to protracted litigation and the act of intermeddling is also an offence punishable by law. The 1st Applicant then deponed that no party stands to suffer any prejudice if the orders sought are granted as they will simply be preserving the Estate pending distribution, and that this will enable the parties to carry on their activities as they have been doing peacefully for over 8 years.



Replying Affidavits

9. In opposing the Application, the 1st Respondent swore the similarly too lengthy 54-paragraphed Replying Affidavit filed on 25/5/2023. His sister, Naomi Chepkemboi Cheboi also swore her own separate Replying Affidavit filed on the same date.
10. The 1st Respondent deponed that the Applicants cannot on their own motion petition for a Grant of Letters of Administration or file Succession proceedings for the estate without involving him and his sister, Naomi Chepkemboi Cheboi, that at no point has he and his said sister participated in this Succession Cause and they did not sign Form 38 giving consent to the Applicants to administer the estate nor did they consent to the appointment of the 1st Applicant as the administrator. He claimed that the Chief's letter used to file this Cause is full of forgery to the extent that it has neither been signed nor stamped by the said Chief. He added that a certified copy of the title deed to his property known as Tembelio/Kimoning Block 1(Cheburbur)/101 has been attached to the Petition filed herein yet the said property is registered in his name and does not form part of the estate, that a certified copy of his National Identity Card has also been attached to the Petition yet he did not consent to the same, that it is questionable as to how the Applicants obtained his documents and certified the same without his knowledge yet the originals thereof are in his custody and at no time has he ever given them out.
11. The 1st Respondent contended further that the proposed Sureties who executed the Form 11 herein, namely, Stephen K. Biwott and Thomas Kiyai are both relatives of the parties herein due to the reason that the said Stephen Biwott is the son of the 2nd Applicant and therefore, a nephew to the Respondent, that the said Stephen Biwott is an employee of the 4th Applicant's husband who is, in turn, related to the deceased being her son-in-law. According to the Respondent, the Sureties' declaration is an in-house act driven by selfish interests.
12. He further deponed that he lodged a restriction on the parcel of land Tembelio/Kimoning Block 1(Cheburbur)/100 to stop interference/intermeddling and he has not in any way denied the Applicants access into the parcel of land. He deponed further that he was prompted to lodge the restriction because the Applicants had beaoned the property into 5 portions of two (2) acres each. According to the 1st Respondent, the instant Application contravenes the maxim of equity that "he who comes to Court must come with clean hands" since the Applicants' Affidavit is characterized by untrue allegations, that at no point did his late mother (deceased) distribute the estate and neither did she leave any wishes in regard thereto as alleged by the Applicants but only gave them the mandate to till and maintain the properties, pending succession and distribution thereof. He maintained that he has not in any manner intermeddled with the estate as alleged, that he is just legally cultivating the same in order to get food for his family, pending the succession and distribution of the estate. He added that in fact, it is the Applicants who have been intermeddling because the 3rd Applicant, Ruth Jebet Kimutai, planted 500 cypress seedlings on the property Mosop/Kaptarakwa/408 in 2022 and later in April 2023 which matter he reported to the police. He deponed further that in addition, the 3rd Applicant fenced off the property and thus denying the Respondent access thereto.
13. According to the 1st Respondent, the preservatory orders sought by the Applicants cannot be issued because he has been in possession of and have been tilling and maintaining the said parcels of land prior to the demise of his late mother, that the orders of unrestricted access sought by the Applicants cannot be granted because it is them who have the ill intention of beaoning the estate to their own selfish interests as they had already subdivided Tembelio/Kimoning Block 1(Cheburbur)/100 on their own without involving the Respondent. He deponed further that the orders of demolition of his property are not practical because the structures, fixtures, fittings and buildings erected on the properties were supported by the deceased, that the orders of status quo as sought by the Applicant are not applicable



- because he uses the parcels of land for agriculture in order to get food for his family and livestock, and that he had already planted maize thereon. He deponed that the Applicants cannot be allowed to utilize the property Tembelio/Kimoning Block 1(Cheburbur)/100 and Mosop/Kaptarakwa/408 because they intend to intermeddle with the same as they had already beaoned Tembelio/Kimoning Block 1(Cheburbur)/100 without involving him and planted tree seedlings on Mosop/Kaptarakwa/408.
14. The 1st Respondent deponed further that he has no intention of intermeddling with the estate, that the portion on which he repaired the fence is the same portion where the deceased instructed him to build a homestead prior to her death, and that it is his home, that he did not fence the land but just repaired the already existing fence, that the repair was intended to curb the rampant theft and attack on livestock by wild animals which had loomed the neighbourhood as a result of which he lost 2 sheep. He added that he has not recently constructed any permanent structures as alleged and that the last construction he did was in 2009 when he constructed his main store and the deceased used to supervise the construction. He denied cutting down any trees and maintained that the trees in the compound are still intact. He claimed that it is, in fact, the Applicants who cut down trees and constructed a sheep pen wherein they have kept their sheep. He contended that he has not put any steel gate as alleged and stated that the gate that exists on the property is a “mabati” gate which he constructed prior to the death of the deceased, that immediately after the demise of the deceased, the Applicants’ actions made him to halt activities in the said Tembelio/Kimoning Block 1 (Cheburbur)/100 and Mosop/Kaptarakwa/408 for 3 years during which period the Applicants ploughed all the land and planted grass without any regard to the Respondent’s property and which included livestock and that the Applicants depleted all the grazing sites in the property and confiscated all the movable property in the homes.
 15. The Respondent further deponed that he used to take care of the deceased prior to her death but he was silenced for about 8 years by the activities of the Applicants during which period the Applicants harassed his family, including barring his wife and children from entering the property, that on various dates between November 2021 and March 2022 when he was admitted in hospital, the Applicants went the further step of going to the hospital and harassing him in his hospital bed on matters relating to the property, that the Applicants also falsely accused the Respondent’s children and caused them to be arrested and detained at a police station in January 2023 during which period the Applicants brought a surveyor who subdivided the property Tembelio/Kimoning Block 1(Cheburbur)/100. He denied that the Applicants had at any time approached him for any amicable settlement as alleged, and that there are no items in the property belonging to the Applicants as alleged, and neither has he locked any such properties.
 16. Her deponed further that the Applicants are misleading the Court since the property Mosop/ Kaptarakwa/408 is 7.8 acres and not 10 acres as alleged, that the Applicants did not have free access to the property prior to the demise of the deceased, that the property was not used to plant hay or other cash crops as alleged but it is him and the deceased who used to cultivate it. He denied that he has restricted the Applicants from entering the properties but stated that their acts of beaoning the property, threatening his family and falsely accusing him is a threat to the interest of the estate. He added that the Applicants do not entirely depend on the said parcels of land because he has been living on and cultivating them since the demise of the deceased, and that he will suffer irreparable damage if the orders sought are granted. He maintained that he has been in possession of the property Tembelio/ Kimoning Block 1(Cheburbur)/100 where he developed his homestead in 1987.
 17. In her said separate Replying Affidavit, the said Naomi Chepkemboi Cheboi simply deponed that she was in support of the Replying Affidavit filed by the Respondent.



Further Events in the Matter

18. At the time of filing the Replying Affidavits on 25/05/2023, the Respondent, Jonah Kiplagat Sawe, together with the 5th sister, the said Naomi Chepkemboi Cheboi, through the same Messrs Chepseba Lagat & Associates Advocates also filed the Summons for Revocation of Grant dated 24/05/2023. Filing of the same was strange though since there is no indication in the file that any Grant has been issued so far.
19. Further, on the same date, the “Objection to Making of Grant” dated 24/05/2023 was filed by the 2nd Applicant, Mary Jepchumba Kibiwott through Messrs Koech-Lelei & Co. Advocates. To my understanding therefore, the 2nd Applicant had “jumped ship” and “broken ranks” with the other Applicants as she was now seemingly on the side of the Respondent. In the Objection, she even denied that she had signed any document in favour of the Petition filed herein and claimed that the 1st Applicant had therefore forged the signature.
20. Be that as it may, by the consent dated 13/07/2023, the Summons for Revocation and the Objection were compromised when the parties agreed that Susan Tuitoek Chemweno (1st Applicant), Jonah Kiplagat Sawe (Respondent), Naomi Chepkemboi Cheboi and Jane Kosgei Kipkemei Kiyai (4th Applicant) be all appointed as co-Administrators. I accordingly adopted the consent on 1/11/2023 as an order of the Court.

Hearing of the Application

21. The Application was then canvassed by way of written Submissions. The Court was however informed that Ms. Lelei, Counsel acting for the said Naomi Chepkemboi Cheboi, would not be filing any Submissions as she would be supporting the Respondent’s Submissions
22. Pursuant thereto, the Applicants filed their Submissions dated 4/03/2024. I could not however verify the date of filing. On his part, the Respondent filed his on 8/02/2024.

Applicant’s Submissions

23. In respect to this Court’s power to issue orders of injunction to preserve the estate pending distribution to the heirs, Counsel cited the case of *Re Estate of Simon Ndungu Thumbi (Deceased) (Succession Cause E040 of 2020) [2022] KEHC 11173 (KLR) (29 July 2022) (Ruling)*, in which the provisions of Section 47 of the *Law of Succession Act*, and Rule 73 of the Probate and Administration Rules were cited and reiterated as giving such powers. Counsel then submitted that it is common ground that the properties in question belong to the deceased, that there are annexed titles and as such, the Applicants have demonstrated that the properties form part of the estate. He submitted further that it is not in dispute that the Applicants are the beneficiaries of the estate and as such, are entitled to inherit from the deceased who is their mother, that they have presented the Petition for Letters of Administration which includes all beneficiaries, inclusive of the Respondent as an Administrator, and that the Petition having been consented by all beneficiaries is thus destined to succeed and that as such, the Applicants’ case is arguable.
24. He submitted further that if the properties are in any manner interfered with or alienated, the beneficiaries will suffer irreparable loss and damage, that the properties are now in the hands of the Respondent who has ensured the Applicants have no access, that he is cutting down trees and utilizing the properties within his sole discretion and interests, and that the properties are in grave danger of being wasted away to the complete prejudice of the beneficiaries of the estate. Counsel further submitted that the balance of convenience tilts in favor of the Applicants owing to the fact that if the



orders are not granted and the properties are wasted away and alienated, the beneficiaries will have lost their inheritance, and that on the other hand, the Respondent will still have his entitlement as the properties will be preserved pending distribution. Counsel therefore submitted that the Applicants have made out a case for the grant of a preservative order.

25. Counsel submitted further that the Court has the requisite jurisdiction to make orders that best serve the ends of justice, that the Applicants as beneficiaries of the estate are entitled to the use of the properties so as to alleviate a situation of having the properties waste away, that the Applicants have demonstrated that the Respondent has, without just cause, stopped them from accessing the properties which they were accessing when the deceased was alive and even after her death until recently, that the Applicants are seeking to have all beneficiaries utilize the properties for their benefit, included the Respondent, that the best interest of the beneficiaries is for access to be granted to all to avoid prejudicing or discriminating any one beneficiary and that therefore the Court should grant access to all beneficiaries. In conclusion, he submitted that the Respondent should bear the costs of this Application.

Respondents' Submissions

26. On his part, the Respondent's Counsel submitted that the parcel of land known as Tembilio/Kimoning Block 1(Cheburbur)/101 belongs to the Respondent, Jonah Kiplagat Sawe, and does not form part of the free estate of the deceased hence not subject to the Succession herein, that the property is registered in the name of the Respondent who possesses its title, and that orders of injunction cannot therefore be issued. Counsel further submitted that the Applicants have not contested the validity of the title deed and neither have they contested the process of its acquisition. He cited Section 24(a) of the [Land Registration Act](#) No. 3 of 2012.
27. He then submitted that the Respondent lives in the property, Tembilio/Kimoning Block 1(Cheburbur)/100, that the Respondent has not intermeddled with the estate as alleged, that the deceased was the registered owner thereof and that is where she lived with the Respondent, that the Respondent was and still is in possession of the parcel of land and that the Respondent has been using the parcel of land for agriculture and for the sustenance of his family's needs. He added that the Respondent has been and still is utilizing the parcels of land and also the property Mosop/Kaptarakwa/408, where he has also resided with the deceased and has been farming thereon. He again denied that the Respondent has intermeddled with the estate and submitted that the deceased had licensed him to farm thereon. In conclusion, he urged the Court to dismiss the Application with costs.

Determination

28. Before I delve into making determinations, and as I had already pointed out, the pleadings filed herein by both parties are unnecessarily too lengthy. As a result, the pleadings are convoluted, verbose, and annoyingly repetitive. Much of what has been put on paper is mere duplication adding no value to the strength of the respective cases presented, but only serving to unnecessarily clog and consume the Court's precious judicial time in having to rummage through the same. Of course, the level of the gift of articulation and eloquence in drafting differs from one Counsel to another, but surely, Counsels should practice how to present arguments in a short, clear and abridged manner and with brevity. After all what matters is the quality of the argument, not the quantity.
29. Moving on, the question that arises for determination is "whether the Applicants have established sufficient grounds to warrant grant of a temporary order of injunction to restrain the Respondent from erecting permanent structures, fencing, selling, developing or leasing out the two parcels of land



the subject hereof, and also an order compelling the Respondent to allow the Applicants to access and utilize the estate properties, pending the distribution of the estate herein”.

30. What the Applicants are seeking are basically orders of interlocutory injunction. It is now agreed, as was held in the case of *Floris Piezzo & Another –vs- Giancarlo Falasconi* (2014) eKLR, that a Probate Court has powers under Section 47 of the *Law of Succession Act* and also Rule 73 of the Probate and Administration Rules to grant temporary injunctions.

31. Section 47 of the *Law of Succession Act* provides as follows:

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”

32. On its part, Rule 73 of the Probate and Administration Rules provides as follows:

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

33. The principles guiding the handling of Applications for temporary injunctions are now well settled and are as was set out in the case of *Giella vs. Cassman Brown & Co. Ltd* [1973] EA 358 and also in *American Cyanamid Co. v Ethicom Limited* (1975) A AER. Following the said cases, the Court of Appeal in *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR stated as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.”

34. The question that therefore arises is whether the instant Application meets the threshold laid for the granting of orders of temporary injunction.



35. The Court of Appeal, in the case of *Mrao Ltd v First American Bank of Kenya and 2 others* (2003) KLR 125, which it also cited with approval in its subsequent case of *Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others*, (2014) eKLR, defined a prima facie case as follows:

“ A Prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

36. In this case, it not disputed that the parcels of land described as Tembilio/Kimoning/Block 1 (Cheburbur)/100 and Mosop/Kaptarakwa/408 belong to the estate of the deceased as they are still registered in her name. It is also evident that the separate parcel of land known Tembilio/Kimoning/Block 1 (Cheburbur)/101 is registered in the name of the of the Respondent and as such, does not form part of the estate of the deceased.

37. There have been allegations and counter-allegations from the both parties with respect to intermeddling of the estate. Both parties also claim the right to be in control of and utilize the properties. The easy way out for the Court would be to direct that the status quo prevailing prior to, or at the date of, the death of the deceased be preserved. Unfortunately, the parties have given conflicting accounts on which of them have been in occupation of or have been utilizing the properties at the material time. Each side is claiming to have been the one in occupation and utilizing the land. As it stand therefore, the Court cannot, on Affidavit evidence, conclusively determine the status quo prevailing prior to the death of the deceased.

38. I however discern from the different Affidavits that the parties have all been utilizing respective portions of the two parcels land. In confirming the above, the following is what the Respondent stated at paragraph 16 of his Supporting Affidavit:

“ At no point did my late mother distribute his (sic) estate, neither did she leave any wishes in regard to the distribution of the estate as alleged by the Applicants but only gave us the mandate to till and maintain the same, pending succession and distribution thereof.”

39. In the circumstances, I see no reason why the same arrangement should not continue, pending distribution of the estate. Even assuming that not all parties were or have been utilizing the land, being their mother’s property, they would all be entitled to make use of it. It however appears that at the moment, the Respondent has taken the sole, exclusive and full benefit of the two properties to the exclusion of the Applicants. Besides being unfair, this is selfishness and is not equitable. Distribution of the estate has not yet been done and the Respondent has not given any justification why his siblings (all sisters) should be locked out of the properties.

40. In light of the matters and circumstances recounted above, I find that the Applicants have sufficiently established a prima facie case within the meaning ascribed in the case of *Giella v Cassman Brown* (supra).

41. As regards the second condition for grant of a temporary injunction, namely, whether the Applicants stand to suffer “irreparable injury” “loss” or “harm” that cannot be easily compensated in any alternative manner, not even by damages, the test is set out in *Halsbury’s Laws of England*, Third Edition, Volume 21, page 352 as follows:

“ Where the court interferes by way of injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds; first that the injury is irreparable



and second that it is continuous. By irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages, an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter.”

42. As aforesaid, the Respondent does not deny that he is exclusively and solely utilizing both the two parcels of land to the exclusion of the Applicants. The same being their mother’s property, just like the Respondent, the Applicants are entitled to utilize them in any manner that they wish, as long as such use is for a lawful purpose, reasonable and not a violation of the rights of other beneficiaries. In this case, the Applicants state that they wish to cultivate the land for purposes of harvesting produce that they would use for their sustenance and of their families. This is an understandable request and declining it would be tantamount to denying the Applicants a living. Just like the Respondent, they too, would still be within their rights even if they were to cultivate the properties for economic purposes. This right will not be affected by the fact that the Applicants, and even the Respondents, may have other properties elsewhere to cultivate.
43. In the circumstances, I agree with the Applicants that locking them out of their mother’s said properties and barring them from cultivating the same while at the same time allowing the Respondent to continue with exclusive possession and use thereof, apart from being discriminatory and unequitable, will also cause them “irreparable harm”. “Irreparable harm” may also be caused to the Applicants since there is no evidence that Respondent has been accounting to other beneficiaries for his sole use and cultivation of the properties. I am of the view that allowing unabated and unchecked sole or exclusive use of the properties by the Respondent may lead to wastage and dissipation of the properties and thus depreciate the Applicant’s share of their inheritance.
44. Regarding “balance of convenience”, I refer to the holding of Ombwayo J in the case of Pius Kipchirchir Kogo vs. Frank Kimeli Tenai [2018] eKLR where he stated as follows:
- “..... the meaning of “balance of convenience” in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.”
45. In light of my earlier findings above, I am satisfied that the “balance of convenience” also tilts in favour of granting the orders of injunction since it is also a constitutional requirement that all the beneficiaries be treated equally, without any discrimination. I am therefore satisfied that refusal to grant the injunction will be discriminatory and will cause greater harm to the Applicants than it will cause the Respondent.
46. I therefore find that the Petitioner has satisfied all the three conditions necessary for the grant of a temporary injunction. In the circumstances, I find that the 1st Applicant has made out a case to



warrant the granting of orders of injunction for protection and/or preservation of the estate pending distribution of the estate and for access and right to utilize the properties.

47. Each of the 6 siblings should therefore be allowed to continue utilizing proportionate and equal share of the two properties pending the final distribution of the estate. Being 6 in the family, to avoid conflicts, each one should identify 1/6 portion of the properties for his/her use. Since I believe that the parties are now well guided, I will first give them a chance to go for Court annexed mediation for the purposes of exploring their own home-negotiated amicable settlement on the best formula under which they can equally and proportionately utilize the properties.
48. Before I pen off, I may state that the Applicant's pleadings on the acreage and use of the property Tembelio/Kimoning Block 1(Cheburbur)/100 has caused me some confusion. The confusion arises because at paragraph 6 of her Supporting Affidavit, the 1st Applicant has deponed as follows:

“prior to her death, the deceased had bequeathed the Respondent herein 10 acres out of the parcel of land known as Tembelio/Kimoning Block1(Cheburbur)/100. The Respondent consequently took possession and even got a title deed for the 10 acres”.
49. However, a perusal of the exhibited copy of the said property Tembelio/Kimoning Block 1(Cheburbur)/100 reveals that the same measures 4.007 Hectares which is approximately 20 acres, and not 10 acres as stated in the Affidavit. Further, the property is exclusively in the sole name of the deceased. The statement that the Respondent is registered as owner of 10 acres thereof is therefore not supported by any evidence. My understanding is that if at all the said property was sub-divided and 10 acres carved out therefrom, then two new separate titles with different title numbers would have issued and the initial title number Tembelio/Kimoning Block 1(Cheburbur)/100 would have ceased to exist.
50. Reading the said statement quoted from the Affidavit with the rest of the Submissions made by the parties, and comparing the same with the documents exhibited, trying the best that I can, I form the opinion that that what the Applicants could have meant is that the two properties, Tembelio/Kimoning Block 1(Cheburbur)/100 and Tembelio/Kimoning Block 1(Cheburbur)/101 used to perhaps be one larger property measuring 20 acres before it was subsequently sub-divided to create the two equal sub-plots and that upon such sub-division, Tembelio/Kimoning Block 1(Cheburbur)/100 measuring 10 acres remained in the name of the deceased while Tembelio/Kimoning Block 1(Cheburbur)/101 also measuring 10 acres was registered in the name of the Respondent.
51. The conclusion and directives made herein are arrived at on the basis of my above understanding of the meaning intended under paragraph 6 of the 1st Applicant's Supporting Affidavit. In the event that I have misconstrued the scenario put forward at paragraph 6 as set out above, then any party aggrieved is at liberty to move the Court for Review, if merited.
52. Lastly, the Applicant has asked this Court be to issue an order compelling the Respondent to demolish any fixtures, fittings, buildings and/or structures that he has have recently erected on the said parcels of land. I decline that request at this stage as in my view, doing so before the share of each party has been identified and distributed will be unjust. It has also not been demonstrated that the Applicants will suffer any serious prejudice or irreparable damage if the structures are left intact for now. I will therefore not interfere with the structures at least for now but will bar the Respondent from erecting or putting up any further fresh permanent structures.

Final Orders

53. In the end, I hereby order as follows;



- i. Pending the hearing and determination of this Succession Cause, a declaration is hereby made that each of the 6 survivors, heirs or children of the deceased herein – Magdalena Kabon Sawe – is entitled to equal use of the two estate properties, Tembelio/Kimoning Block1(Cheburbur)/100 and Mosop/Kaptarakwa/408, including entitlement to tilling and cultivating them. However, to avoid conflicts and misunderstandings, and considering that the survivors, heirs and children are 6 in number, each should only take control, possess and utilize 1/6 of the two aggregate properties. Each of the 6 survivors, heirs, or children should as much as possible continue to utilize the same portion or section that he/she has been or was utilizing prior to the filing of the Application herein.
- ii. To give the parties the opportunity to discuss and amicably agree on the best and/or most workable formula for equally sharing at 1/6 proportions of the two properties for utilization amongst the 6 heirs, survivors or children of the deceased as set out in (i) above, I now refer this matter to Court annexed Mediation. In view thereof, this matter shall now be set down for Mention before this Court on a date after lapse of sixty (60) days to review progress of the Mediation.
- iii. In the interim and pending the hearing and determination of this Succession Cause, an order of injunction is hereby issued restraining the Respondent - Jonah Kiplagat Sawe - by himself, servants, agents or any person acting under his authorization or control, from stopping or blocking the Applicants from accessing the said properties, Tembelio/ Kimoning Block1(Cheburbur)/100 and Mosop/Kaptarakwa/408 and also from leasing out the properties to third parties or erecting or building any fresh permanent structures or buildings thereon, save for general routine repairs and maintenance works.
- iv. The parties are reminded that since no distribution has been made by the Court so far, the estate is yet to vest unto any person or beneficiary. Until then, all parties have the duty and obligation to preserve the estate and to protect it from waste. The parties must therefore ensure that they do not engage in any acts that could be deemed to amount to “*intermeddling*”. Any party is however at liberty at any time to move the Court accordingly for permission to carry out any substantive or necessary action that may need to be undertaken for the benefit of or to protect or to preserve the estate.
- v. This being a family matter. I make no orders as to costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 31ST DAY OF JULY 2024

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WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Mr. Lagat for some of the Petitioners

Mr. Mwachofi for other Petitioners

N/A for Objector

Court Assistant: Brian Kimathi

