



Kerich & another v Koskei & another (Miscellaneous Civil Application E041 of 2024) [2024] KEHC 14884 (KLR) (27 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14884 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
MISCELLANEOUS CIVIL APPLICATION E041 OF 2024
JK SERGON, J
NOVEMBER 27, 2024**

BETWEEN

HOWARD KERICH 1ST APPLICANT

EDWIN KERICH 2ND APPLICANT

AND

KIPCHUMBA A KOSKEI 1ST RESPONDENT

PAUL MUTAI 2ND RESPONDENT

RULING

1. The application coming up for determination is a notice of motion dated 25th September, 2024 seeking the following orders;
 - (i) Spent
 - (ii) Spent
 - (iii) That pending the hearing and determination of the present suit the honourable court be pleased to issue an order of injunction restraining the defendant/respondents by the themselves, agent, servants, employees or otherwise from occupying, selling, constructing any building and or doing any other act which prejudices the applicant's of the suit land Kericho/ Kipchimchim/817 until the succession process is done.
 - (iv) That pending the hearing of this application, an order be issued to maintain the status quo of the property until the succession process is done.
 - (iii) That the costs of this application be provided for.



2. The application is supported by grounds on the face of it and the supporting affidavits of Howard Koech and Edwin Kerich the 1st Applicant/Administrator and 2nd Applicant/Administrator of the estate of the deceased respectively.
3. They aver that they are beneficiaries of the suit land Kericho/Kipchimchim/817 being sons of the deceased.
4. They aver that their father the deceased co-owned the suit land Kericho/Kipchimchim/817 with their uncle Kipchumba A. Koskei the 1st Defendant/Respondent herein.
5. They aver that Kipchumba A. Koskei the 1st Defendant/Respondent herein has illegally started disposing off the property to the 2nd Respondent before the succession process is completed.
6. They aver that the 2nd Respondent has illegally continued to interfere with the suit property by constructing on the said parcel despite several demands to stop the same.
7. They aver that there is a restriction over the suit property and therefore no dealings should be done on the suit property until the succession process is completed.
8. They therefore urged this court to issue a temporary injunction restraining the defendant/respondents by the themselves, agent, servants, employees or otherwise from occupying, subdividing, selling, constructing and or doing any other act which is prejudicial to the applicant's quiet occupation of the suit land known as Kericho/Kipchimchim/817 until the matter is heard and determined.
9. They aver that unless the orders sought are granted, the applicants are likely to be prejudiced occasioning them to suffer irreparable loss and damages which may not be adequately compensated in monetary terms.
10. The matter came up for inter partes hearing, Ms. Chelangat the Learned Counsel representing the applicants stated that she served the application and there was no response. She therefore urged this Court to allow the application unopposed. There was no representation on the part of the respondents.
11. This court has considered the application on record and finds that the issue(s) for determination is whether this court should issue a temporary injunction restraining the defendant/respondents by the themselves, agent, servants, employees or otherwise from occupying, subdividing, selling, constructing and or doing any other act which is prejudicial to the applicant's quiet occupation of the suit land known as Kericho/Kipchimchim/817 until the matter is heard and determined and whether this court should issue an order to maintain the status quo of the property until the succession process is done.
12. On the issue as to whether to issue a temporary injunction restraining the defendant/respondents by the themselves, agent, servants, employees or otherwise from occupying, subdividing, selling, constructing and or doing any other act which is prejudicial to the applicant's quiet occupation of the suit land known as Kericho/Kipchimchim/817, this court finds that the application does not meet the threshold in the locus classicus case of *Giella v Cassman Brown & Co. Ltd* [1973] EA. The Court of Appeal in *Nguruman Limited v. Jan Bonde Nielsen & 2 Others* [2014] eKLR restated the law 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) allays 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. Afraba 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."

13. On the issue as to whether to issue an order to maintain the status quo of the property until the succession process is complete, the principles on status quo orders were discussed at length in the case of *Thugi River Estate Limited & another v National Bank of Kenya Limited & 3 others* [2015] eKLR, where Onguto J. stated that an order of status quo can be given by the court exercising its general jurisdiction and that the order need not necessarily be prayed by the parties and in fact, can be originated by the court. The Learned Judge observed as follows;

"Firstly, an order of status quo will issue through a judicial process. Where the court in exercise of its general or statutory jurisdiction grants orders for maintenance in situ of a particular state or set of facts ... the second or alternative order for status quo is the one issued by the court as a case management strategy. It is issued to provide assistance to the case. It also maintains a particular state of affairs or set of facts. Unlike a conservatory order or injunctive order, it is not descriptive. It is originated either by the court or by the consent of the parties. Often the court would not have been moved by either party. The court then expects an existing state of affairs or facts be preserved until a particular occurrence or until the courts' further orders. It is intended to also freeze the state of affairs. State of affairs however do not always remain static, so it is always crucial for the court to be very specific and neat in its description of what state of affairs is to be preserved." In the instant matter, I find that this court cannot grant status quo orders to preserve the substratum of the suit, to wit the suit property, without delving into issues of ownership between the parties. It is the finding of this Court that it does not have the jurisdiction to ascertain whether the suit property Kericho/Kipchimchim/817 constitutes part of the estate of the deceased. The question as to whether the suit property was owned under a joint tenancy and or tenancy in common are issues which can only be determined by the Environment and Land Court pursuant to Article 162(2) of *the Constitution* and Section 13 of the *Environment and Land Court Act*, 2011.

14. Consequently, the notice of motion dated 25th September, 2024 is hereby disallowed in its entirety.

DELIVERED, SIGNED AND DATED AT Kericho THIS 27TH DAY OF NOVEMBER, 2024.

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J.K. SERGON



JUDGE

