



**Baborei v Malakwen (Environment & Land Case . E018 of 2022)
[2023] KEELC 16837 (KLR) (19 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16837 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE . E018 OF 2022
JM ONYANGO, J
APRIL 19, 2023**

BETWEEN

PAULINA JEPKORIR BABOREI APPLICANT

AND

BENJAMIN K. MALAKWEN RESPONDENT

RULING

1. The Applicant filed an Originating Summons dated 18th August, 2022 seeking that she be declared to have acquired title to land parcel number Kapsaret/kapsaret Block 5 (Kapteldon)/123 measuring 13.5 acres and currently registered in the name of the Respondent by way of adverse possession.
2. On 29th September, 2022 the applicant filed a Notice of Motion dated 1st August, 2022 seeking an order of temporary injunction restraining the Respondent whether by himself, his agents servants employees and/or any person acting on his behalf from sub-dividing, and/or surveying, encroaching, trespassing, alienating, occupying, cultivating, claiming, leasing or interfering with the Applicant's peaceful possession, occupation and usage of 13.5 acres of land parcel number Kapsaret/kapsaret Block 5 (kapteldon)/123 pending the hearing of the Originating Summons.
3. The application is based on the grounds set out in the Notice of Motion and the Applicant's Supporting Affidavit sworn on 1st August, 2022.
4. In the said Affidavit she depones that her late husband Wilson Kibitok Borborei purchased the suit land from the defendant pursuant to a sale agreement dated 29.6.1992. Her husband subsequently died on 22.10.1998 leaving her and her three children on the suit land where they have been staying for the last 30 years although the Respondent has refused to transfer the suit land to the Applicant. She further depones that the Respondent has with the sole intention of depriving her of the suit land, caused the same to be enlisted as part of the estate of one Kapkiyai Keter Bungei deceased in Eldoret CM Succession Cause No. E61 of 2020. The grant in the said succession cause was confirmed on 7th



- June, 2020 and she fears that the suit land may be sub-divided and transferred to the beneficiaries of the deceased thus rendering her and her children homeless.
5. The application is opposed by the Respondent through his Replying Affidavit sworn on the 7th October 2022 in which he avers that the suit land is part of the estate of Kipkiyai Keter Bungei –Deceased. He further confirms that grant in respect of the estate of Kipkiyai Keter Bungei was confirmed and a Certificate of Confirmation of Grant issued on 20th July 2022. He avers that he is no longer in control of the suit land as it is now in the hands of the administrators of the estate of Kipkiyai Keter Bungei who are in the process of transmitting the land to the beneficiaries of the deceased. The said administrators have not been joined in this suit. He adds that the Applicant has been listed as one of the beneficiaries of the deceased along with 6 other beneficiaries and she is entitled to a portion of the suit land measuring 5 acres.
 6. The Respondent avers that since the Applicant has not taken out a grant of letters of administration in respect of her late husband one Wilson Kibitok Borborei, she has no locus standi to institute a suit against the estate of Kipkiyai Keter Bungei deceased. He further avers that this court has no jurisdiction to adjudicate on a matter relating to the estate of the deceased as the grant has been confirmed and the Applicant did not file any objection proceedings.
 7. The Respondent denies having entered into a sale agreement dated 29th June, 1992 with the Applicant’s late husband and states that the deceased was erroneously indicated as a purchaser whereas he was merely a witness.
 8. In response to the Replying Affidavit, the Applicant filed a Further Affidavit sworn on 31st October 2022 in which she reiterated that land parcel number Kapsaret/kapsaret Block 5 (kapteldon)/123 is registered in the name of the Respondent and therefore does not form part of the estate of Kapkiyai Keter Bungei. She annexed a copy of the Certificate of Official search as annexure PJB 7. She avers that the court was moved into distributing the suit land belonging to the Benjamin K. Malakwen, the defendant herein who is alive.
 9. The Applicant avers that she was not aware of the succession proceedings leading to the confirmation of the Grant as she was not served with the same and she has since applied for annulment of grant vide HC Misc. Succession Cause No. 41 of 2022.
 10. In addition to the Replying affidavit, the Respondent filed a Notice of Preliminary Objection in which he states that the Applicant lack the locus standi to institute this suit as she has not taken out a Grant of Letters of Administration in respect of the estate of her late husband Wilson Kibitok Borborei and she is therefore intermeddling with his estate contrary to Section 45 of the Law of Succession Act.
 11. The court directed that the Preliminary Objection and Notice of Motion be disposed of together by way of written submissions and both parties filed their submissions which I have considered.
 12. I will first determine if the Preliminary Objection should be sustained.
 13. In his submissions learned counsel for the Respondent contended that the Applicant has no locus standi as she has not applied for a grant of letters of administration in respect of the estate of her husband Wilson Kibitok Borborei yet she has annexed a copy of his death in support of both her Originating Summons and application. It is his submission that since the applicant has not complied with section 82 (a) and (b) of the Law of Succession Act, she is guilty of intermeddling with the estate of the deceased.
 14. On the other hand, learned counsel for the Applicant submitted that in his Replying affidavit sworn on the 12th day of September 2022 the Respondent averred that the suit property is registered in his



name though he had surrendered it to the estate of Kipkiyai Keter Bungei (Deceased) and the same was included as part of the estate of the deceased vide the Certificate of Confirmation of Grant. He wondered why the Applicant should apply for a Grant of letters of administration yet the suit property was not registered in the name of her late husband. He submitted that the Applicant had moved the court by way of Originating Summons seeking to be declared as the owner of the suit property by virtue of adverse possession without reference to the rights that may have accrued to her late husband and she therefore does not need a grant of letters of administration. It is his contention that her claim is based on the fact that she has been in occupation and use of the suit property for a period of more than 33 years and she would have to adduce credible evidence to support her claim for adverse possession in line with the laid down principles.

15. Counsel clarified that the Applicant did not seek to enforce the sale agreement between her late husband and the Respondent as it became void after the expiry of six months for failure to obtain consent of the Land Control Board. Since her husband died before his right to invoke the doctrine of adverse possession could accrue, the Applicant who has been in possession of the suit property has chosen to institute this suit for adverse possession in her own right without reference to the rights that may have accrued to her late husband at the time of his death.
16. I am constrained to agree with counsel for the Applicant that in so far as her claim for adverse possession is based on the fact that she has been in occupation of the suit property for more than 30 years and not on the sale agreement between her late husband and the defendant, she did not need to apply for a Grant of Letters of Administration in respect of the estate of her late husband. It is clear that by the time her husband died, no consent had been obtained from the Land Control Board and the property could not be transferred to the Applicant's husband. However, since the Applicant claims that she has been in possession of the suit property for more than 30 years, she is entitled to institute a claim for adverse possession. If the Applicant is able to prove her case for adverse possession, the suit property will be transferred to her in her own right and not as the administrator of the estate of her late husband. In the circumstances, the issue of intermeddling with the estate of the deceased does not arise as the suit property had not been transferred to his name by the time he died.
17. It is therefore my finding that the preliminary objection is not well founded and the same is dismissed
18. I will now move on to consider whether the Applicant's application for injunction is merited. The principles governing the exercise of the court's discretion to grant an order of injunction were set out in the case of *Giella v Cassman Brown & Company Limited* 1973 E.A358 as follows:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”
19. The first hurdle that the applicant must surmount it to demonstrate that she has a prima facie case with a probability of success.
20. In the case of *Mrao V First American Bank of Kenya Limited* (2003) eKLR Bosire JA (as he then was) stated as follows:

“A prima facie case is one 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”



21. In her Supporting affidavit the Applicant has deponed that her late husband Wilson Kibitok Borborei purchased land parcel no. Kapsaret/kapsaret Block 5 (kapteldon)/123 measuring 6 acres from the defendant pursuant to a sale agreement dated 29.6.1992. He later exchanged an additional 7.5 acres with the defendant making a total of 13.5 acres. The Applicant's husband however died on 21st October, 1998 before the defendant transferred the land to him. She has further deponed that she is claiming the suit land by adverse possession as she has been living thereon with her family since 1992. She has annexed photographs of her homestead which comprises of a permanent four -bedroom house and a two-room semi-permanent house. She has also planted some wattle trees. The Applicant has stated that the defendant who is the registered proprietor of the suit land has with the sole intention of depriving her of the said parcel of land caused it to be listed as part of the estate of Kapkiyai Keter Bungei in Eldoret CM Succession Cause No. E61 of 2020. The Grant in the said Succession cause was confirmed on 7th June 2022 after which the Respondent enlisted the services of surveyor to have the land sub-divided among the beneficiaries of the late Kapkiyai Keter Bungei. She fears that if the Respondent is not restrained by an order of injunction and the suit land is sub-divided, she will suffer irreparable loss as she will be rendered homeless.
22. In his submissions counsel for the Respondent has relied on the Respondent's Replying Affidavit where he depones that the suit property now forms part of the estate of Kipkiyai Keter Bungei and the administrators of his estate have not been joined in this suit in order to defend their rights to the suit property. The Respondent maintains that he is no longer in control of the suit property as the same has been taken over by the administrators of the estate of Kipkiyai Keter Bungei.
23. Although the inclusion of the suit property as part of the estate of Kipkiyai presents a challenge, the court notes that the suit property is still registered in the Respondents name and the Applicant has applied for revocation of the grant issued in CM Succession Cause No. E61 of 2020. This court cannot speculate whether the grant will be revoked or not as that is for the trial court. What is clear is that the Applicant claims that she has been in occupation of the suit land for more than 30 years and this fact has not been controverted by the Respondent. She therefore has a beneficial interest in the suit land which requires to be protected as she pursues her claim for adverse possession as well as her claim against the administrators of the estate of Kipkiyai Keter Bungei. The Court of Appeal in *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR held that:
- “The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.”
24. On the material placed before the court, I am of the considered view that the Applicant has established a prima facie case with a probability of success.



25. The second condition that the Applicant is expected to meet is to demonstrate that if the order of injunction is not granted, she will suffer irreparable loss. It is not in dispute that the Applicant has established her home on the suit land and she has stated on oath that she has been living thereon with her family for the last 30 years. She has also stated on oath that after being served with the Originating Summons, the Respondent took surveyors to the suit property in the company of police officers with the aim of sub-dividing the suit land.
26. If the averments in the Applicant's supporting affidavit are true, then it is clear that if the suit land is sub-divided she will be rendered homeless and these amounts to irreparable loss.
27. With regard to the third factor which is the balance of convenience, I concur with the observation made by the court in *Pius Kipchirchir Kogo vs. Frank Kimeli Tenai* [2018] eKLR where it was held 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.”

28. In the instant case, the Applicant has demonstrated the inconvenience that would be occasioned to her if the injunction is not granted as she has been living on the suit land for the last 30 years. On the other hand, the Respondent has never occupied the suit land nor has he demonstrated what prejudice he would suffer if the injunction was granted. The balance of convenience therefore tilts in favour of the Applicant.
29. Ultimately, I am of the view that it would be in the interest of justice to grant the orders sought so as to preserve the subject matter of this suit pending the hearing and determination of the main suit. I therefore grant the application and make the following orders:-
- a. A temporary injunction is hereby issued restraining the Defendant/ Respondent whether by himself, his agents servants employees and/or any person acting on his behalf from sub-dividing, and/or surveying, encroaching, trespassing, alienating, occupying, cultivating, claiming, leasing or interfering with the Applicant's peaceful possession, occupation and usage of 13.5 acres of land parcel number Kapsaret/kapsaret Block 5 (kapteldon)/123 pending the hearing of the Originating Summons.
 - b. The costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 19TH DAY OF APRIL, 2023.

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J.M ONYANGO

JUDGE

In the presence of;



1. Mr. Lagat for Mr. Bett for the Applicant

2. Mr. Murgor for the Respondent

Court Assistant: Antony Oniala

