



**Chepkorir (Suing as an administrator of the Estate of Paul Rotich Ngeny) v Yegon & another  
(Environment & Land Case E018 of 2022) [2023] KEELC 16814 (KLR) (13 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16814 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE E018 OF 2022**

**MC OUNDO, J**

**APRIL 13, 2023**

**BETWEEN**

**NANCY CHEPKORIR (SUING AS AN ADMINISTRATOR OF THE ESTATE OF  
PAUL ROTICH NGENY) ..... PLAINTIFF**

**AND**

**CHRISTOPHER KIPNGETICH YEGON ..... 1<sup>ST</sup> DEFENDANT**

**ABDI KADIR ABDUL ABDULLAHI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Vide an Application by way of Notice of Motion dated November 24, 2022 brought under the provisions of Article 22, 23, 40 and 159 of the Constitution, Order 40 (1), Order 51(1) of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act, Section 68 of the Land Registration Act and all other enabling provisions of the law, the Applicant herein seeks for interim injunctive orders restraining the Defendants, their agents or assignees from further occupying, entering, encroaching, cultivating or in any other way interfering her parcel of land known as Kericho/Chemoibea/967 measuring approximately 0.043 hectares, pending the hearing and determination of the suit and that these orders be enforced by the Officer Commanding Bureti Sub-County. (OCPD Litein)
2. The Applicant further seeks that the suit referenced No Kericho CMCC No E021 of 2020 be called to the court and consolidated with the present suit and for further orders and/or directions as the court may deem fit.
3. The said Application was premised on the grounds on the face of it and supported by an affidavit sworn by the Applicant Nancy Chepkorir on the November 24, 2022 to the effect that the Applicant's deceased husband was the registered and absolute owner of all that parcel of land known as Kericho/Chemoiben/967 measuring approximately 0.043 Hectares having been registered as proprietor in the year 1995.



4. That the Defendants, at various times had trespassed unto the suit property and commenced construction of illegal structures, thereby occupying the Applicant's property illegally and without her authority and/or consent in total disregard to the law and the sanctity of her title to land, where they had remained adamant despite demand by the Applicant to vacate the property.
5. That unless the Defendants were restrained from perpetuating their unconstitutional and illegal acts on the Applicant's land, she would be deprived of her proprietary rights over the said property without any justifiable reason which would be in contravention of Article 40 of the Constitution. That it was therefore imperative that the Defendants be restrained by way of temporary and permanent injunction.
6. That the Applicant had filed a suit referenced as Kericho CMCC No E021 of 2020 in the Magistrates court which was similar to the present suit as it involved the same parties, the same cause of action and questions of law, but which had been struck out on a suspicious technicality.
7. Despite service having been effected upon the Respondents, as per the affidavit of the service sworn on December 15, 2022, there had been no response and therefore the application was considered as unopposed wherein the same was disposed of through written submissions which I shall herein summarize as follows.

#### **Applicant's submissions.**

8. Via her submissions filed on January 13, 2023, the Applicant framed her issue for determination as to whether the court could issue orders of temporary injunction as prayed for in the application.
9. Her submission which was based on the finding in the case of Pius Kipchirchir Kogo vs Frank Kimeli Tenai [2018] eKLLR, was that this was an issue where the court was called upon to exercise its discretion, judiciously and on sound legal principles. The Applicant also relied on the notorious case in Giella vs Cassman Brown & Co Ltd 1973 EA 358, to submit that she had satisfied all the three conditions for granting a temporary injunction.
10. That on the first condition in relation as to whether she had demonstrated a prima facie case with a probability of success, that she had demonstrated that her deceased husband was the lawfully registered and absolute owner of all that property known as Kericho/Chemoiben/967 measuring approximately 0.043 hectares, the suit property as per a copy of the title deed annexed to her supporting affidavit.
11. On the second condition as to whether the Applicant was likely to suffer irreparable harm if injunction is not granted, that she had demonstrated to the court that Defendants at various times had trespassed unto the suit property and commenced construction of illegal structures, thereby occupying the Applicant's property illegally. That there was therefore imminent danger in losing quiet possession of the suit property which would occasion the Applicant irreparable injury.
12. In relation to the third condition, the Applicant relied on the definition of the concept of balance of convenience as was held in the case of Pius Kipchirchir Kogo(supra) to which she submitted that she had shown that the comparative mischief from the inconvenience, which was likely to arise from withholding the injunction would be greater than that which was likely to arise from granting the injunction.
13. That although the Defendants had not demonstrated ownership of the said piece of land, yet they had moved into the property and started putting up structures without the consent of the Plaintiff. That they were in essence, trying to alter the suit property to favour their defence which would be to the detriment of the Applicant and therefore they ought to be stopped or else the Applicant risked losing



her proprietary rights to the suit property. That there would be no prejudice caused to the Respondents should the orders of injunction issue since the Applicant had been in occupation of the suit property.

14. In addition to the prayer for interim orders of injunction, the Applicant submitted that despite the Respondents having clearly taken over her land whereby they had constructed on it, they had opined that the dispute pertaining the suit property was a boundary dispute which had been the basis upon which the lower court had struck out her suit in Kericho CMCC No E021 of 2020. That her attempt to take the boundary route through the District land Registrar vide a Notice of Intention to Ascertain Boundaries dated October 13, 2020 herein marked as annexure 'NC 6' bore no fruit as the Respondents had obstructed the Land Registrar.
15. That the striking out of the suit in Kericho CMCC No E021 of 2020 was an injustice visited by the lower court on the Plaintiff. That there was a difference between encroachment and a boundary dispute. That an order for survey of the suit property, by the court would resolve the dispute and save on precious judicial time. The Applicant urged the court to allow her application as the same was merited.

### **Determination**

16. The celebrated case of *Giella vs Cassman Brown (1973) EA 358* sets out conditions for the grant of an interlocutory injunction as follows:-
  - i. Is there a serious issue to be tried( prima facie case)
  - ii. Will the Applicant suffer irreparable harm if the injunction is not granted;
  - iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (Often called 'balance of convenience').
17. On the first issue as to whether the Plaintiff/Applicant in this matter has made out a prima facie case with a probability of success, I am guided by the case of *Mrao vs First American Bank of Kenya Limited & 2 Others (2003) KLR 125*, where a prima facie case was described as follows:

' A prima facie case in a Civil Application includes but is 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 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.'
18. The Court has been moved under a Certificate of Urgency, by the Applicant, to issue temporary injunction against the Respondents. At this stage, the Court is only required to determine whether the Applicant is deserving of the Orders sought. The Court is not required to determine the merit of whether the Applicant herein has demonstrated that she has a genuine and arguable case or not.
19. The issues that arise for determination herein are two;
  - i. Whether an interim order of injunction should issue against the Respondents.
  - ii. Whether this court has jurisdiction over this matter in lieu of the finding in Kericho CMCC No E021 of 2020.
20. In this matter, the Plaintiff/Applicant in her application seeks for interim injunctive orders restraining the Defendants, their agents or assignees, whom she claims have trespassed onto the suit land, from further occupying, entering, encroaching, cultivating or in any other way interfering with her parcel of land known as Kericho/Chemoibebe/967 measuring approximately 0.043 hectares pending the hearing and determination of the suit. She also seeks that these orders be enforced by the Officer Commanding



Bureti Sub-County (OCPD Litein) for the reason that she was entitled, by virtue of the certificate of confirmation of grant to her late husband's estate, the deceased having been the registered owner of that land and as a necessary incident of that ownership, to have full and exclusive possession of the suit land against the Respondents.

21. I have anxiously considered the Applicant's Application herein and further considered the fact that by her own admission that the Respondents are in occupation of the suit land herein, I find that issuing the orders so sought would amount to an eviction which is premature at this stage. To this effect, I find that the Applicant has not established a prima facie case herein.
22. That having been said, I need not consider the other two conditions for the grant of temporary injunction as established in the Giella case (supra) as the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a prima facie case had been established. The Court of Appeal in the case of *Kenya Commercial Finance Co Ltd –vs- Afraba Education Society (2001) IEA 86* cited by Gitumbi, J with approval in the case of *Joseph Wambua Mulusya –vs- David Kitu & Another (2014) eKLR* observed as follows:-

' The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied'.
23. I therefore find that the balance of convenience does not tilt in favour of granting the injunctive orders sought and therefore the order that best commends itself in the circumstances of this case is an order of status quo, to this effect, parties shall maintain the status quo prevailing pending further directions of the court.
24. I have also noted that the Applicant conceded to having had earlier filed a similar suit in the Magistrate's court being Kericho CMCC No E021 of 2020 which had been struck out on a 'suspicious technicality' that it was a boundary dispute following which, the Applicant had sought leave from this court to file an Appeal out of time wherein a ruling, annexed to her application as 'NC4', was issued on April 22, 2022.
25. Curiously, the Ruling referred to herein that sought leave from this court to file an Appeal out of time which was allegedly delivered by this court on April 22, 2022 and is annexed to as 'NC4' to the Applicant's Application, is a ruling on Party to Party costs delivered by Hon EK Makori (as he then was) dated the April 24, 2022 in the Chief Magistrate's Court at Kericho in Civil Case No E021 of 2021. At para 3 of the said ruling, the court had found that the determination of the matter had been after a Preliminary Objection had been raised that the same was a boundary dispute which was to be determined by the Land Registrar. The ruling is therefore of no consequence in the present application.
26. The Applicant did not deem it fit and or/courteous to attach the proceedings leading to striking out of the suit and/or the impugned decision so as to enable the court to make a determination of the same. It is trite that under Section 18 (2) of the Land Registered Act this court has no jurisdiction to try boundary disputes. The discovery from the Applicants pleading that the Magistrates' court had held that this was a boundary dispute has created doubt in the court's mind to which I now direct as follows:
  - i. The Deputy Registrar of this court shall call for and place before me File No CMCC Kericho Civil Case No E021 of 2021 within 14 days of this ruling.
  - ii. The Parties herein shall address the court on this point (boundary dispute) on a date to be issued at the mention date.



iii. Costs to be in cause.

**DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 13<sup>TH</sup> DAY OF APRIL 2023.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

