



**Cherono & another v Kimurgor & 3 others; Elgeyo Border Investment Limited (Interested Party)
(Environment & Land Case E037 of 2022) [2023] KEELC 16782 (KLR) (13 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16782 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E037 OF 2022**

**EO OBAGA, J
APRIL 13, 2023**

BETWEEN

SUSAN JELAGAT CHERONO 1ST PLAINTIFF

**IAN KWAMBAI CHERONO (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF THE LATE JOSEPH TOROITICH CHERONO) 2ND PLAINTIFF**

AND

MUSA KIMURGOR 1ST DEFENDANT

JAMES MALAKWEN CHEMJOR 2ND DEFENDANT

ALEX KANGOGO 3RD DEFENDANT

SUSAN KOMEN 4TH DEFENDANT

AND

ELGEYO BORDER INVESTMENT LIMITED INTERESTED PARTY

RULING

1. The Plaintiffs/Applicants filed a notice of motion dated 6th July, 2022 in which they sought the following reliefs: -
 1. Spent.
 2. Spent.
 3. That pending the hearing and determination of this suit the honourable court be pleased to issue a temporary order of injunction, restraining the Defendants, their agents, servants or whomsoever is claiming on their behalf from trespassing, encroaching, entering, ploughing, planting, harvesting or in any manner dealing with land parcel designated as E77 or E38 as the



case may be which land was to be excised from Land Reference Number 10930 (Originating Number 901/1/1, Land Reference Number 6802 and Land Reference Number 75557/2.

4. That costs of this application be provided for.
2. The Applicants are legal representatives of the Estate of Joseph Toroitich Cheronu (Deceased) who was a director of the interested party. The interested party is owner of LR. Nos. 10930, 6802 and 75557/2 measuring about 1200 acres.
3. On 15/6/2015, the interested party entered into a sale agreement in which it intended to sell 5 acres to the Deceased to be excised from the company's property. The land to be excised was known as plot E77. The purchase price was Kshs 2, 250,000/= The entire purchase price was to be paid on execution of the sale agreement.
4. The Applicants contend that the entire purchase price was paid by the deceased who took possession. The deceased died on 18/12/ 2019. On 7/3/2022, the 2nd Defendant/Respondent wrote to the Applicants asking them to vacate plot No. E38. It turned out that the 2nd to 4th Defendants had fraudulently renamed plot E77 as E38.
5. The Applicants further learned that the 2nd to 4th Respondents had sold plot E77 to the 1st Respondent. The 1st Respondent has tried to enter plot E77 but the Applicants have been repulsing him. The Applicants contend that since the deceased died, he has never been replaced as a director and that the 2nd Respondent is masquerading as chairman of the Interested party. It is on this basis that he Applicants are seeking injunctive orders against the Respondents.
6. The Applicants' application was opposed by the Respondents based on a replying affidavit sworn on 19/7/2022 and grounds of opposition filed on the same day. The Respondents contend that the Applicants' application is an abuse of the process of court in that the Applicants had filed similar suit being ELC 205 of 2021 before the Chief Magistrates court. The Applicants applied for injunctive order but the application was dismissed.
7. It is after the dismissal of the application before the lower court that this suit was filed. The Respondents contend that in a bid to get an injunction, the Applicants have annexed copies of payment slips which do not specify the plot for which the payment was made.
8. The Respondents further argue that plot E38 which the Applicants claim is the same as Plot E77, is fully occupied by Sally Kibet and Francis Kiseria and that plot E77 is intact. The Respondents further argue that what the Applicants ought to have done was to appeal against the dismissal of the application for injunction and not to bring another suit.
9. The Respondents state that the Applicants' father was supposed to pay Kshs 2,250,000/= on execution of the agreement but he neither executed the agreement nor paid the required amount.
10. In a supplementary affidavit which is undated but was filed on 2/8/2022, the Applicants state that ELC No 205 of 2021 was withdrawn and that it has no bearing with ELC No E023 of 2022 which has totally different parties. The Applicants contend that parcel E77 and E38 are one and the same parcel and that parcel E38 has been superimposed on parcel E77 and a surveyor can confirm this.
11. Parties were directed to file written submissions in respect of the application. The Applicants filed their submissions on 11/10/2022. The Respondents filed their submissions on 8/12/2022. I have carefully gone through the Applicants' application as well as the opposition to the same. I have also gone through the submissions by the parties herein. The only issue for determination is whether the Applicants have made out a prima facie case to warrant issuance of an injunction.



12. The principles for grant of an interlocutory injunction were well set out in the case of *Giella –Vs- Cassman Brown & Co Limited (1973) EA 358*. First, an Applicant has to demonstrate that he has a prima facie case with probability of success. Second, an injunction will not issue unless the Applicant will suffer injury which will not be compensated in damages. Third, if the court is in doubt, it will decide the application on a balance of convenience.
13. *A prima facie* case was described in the case of *Mrao Ltd –Vs- First American Bank of Kenya Limited (2003) eKLR* as follows:-

“...in civil cases, it is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
14. I have looked at the materials placed before me. I notice that the sale agreement was signed by three directors of the interested party. The applicants’ father who was a purchaser did not execute the sale agreement in his capacity as a purchaser. He did not pay the 2,250,000/= on execution of the agreement as it was intended. This being the case, I do not see what prima facie case the Applicants have to warrant issuance of an injunction.
15. The Applicants have annexed a copy of a debt authority from their father in favour of the interested party as proof of payment of purchase price. It is important to note that the authority was made on 23/4/2015. The authority was for Kshs 1,000,000/= only. The other payment was made on 18/8/2021 by the 1st Applicant. This was long after the father had died. There was another payment of Kshs 100,000/= which was made on 18/12/2015 after the date of agreement. These two payments were made in contravention of the express terms of the agreement which was in any case not signed by the Applicants’ father as a buyer.
16. Even if it is found that the payments made after the date of agreement were meant for the agreement of 15/6/2015, these monies can be refunded and the Applicants will not suffer any loss which will not be compensated in damages.
17. I have no doubt in my mind as to consider the balance of convenience. This is a matter which is within the jurisdiction of the Chief Magistrates court. I proceed to dismiss the Applicants’ application with costs to the Respondents. I direct that this file be transferred to the Chief Magistrates court for hearing and determination.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET on this 13th day of April, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Kimaru for Mr. Nyamweya for Plaintiff/Applicant.

Court Assistant –Kimathi

E. O. OBAGA

JUDGE

13th APRIL, 2023



