



**Kutol v Chepkonga (Environment and Land Appeal 35 of 2022)  
[2023] KEELC 18405 (KLR) (26 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18405 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ITEN  
ENVIRONMENT AND LAND APPEAL 35 OF 2022**

**L WAITHAKA, J  
JUNE 26, 2023**

**BETWEEN**

**TIMOTHY KIPKEMOI KUTOL ..... APPELLANT**

**AND**

**KIPTANUI CHEPKONGA ..... RESPONDENT**

*(Being an Appeal from Hon. R. Koech SPM Eldama Ravine  
ELC No. 10 of 2021 delivered on 9th September 2021)*

**JUDGMENT**

**Introduction**

1. By a plaint dated 10<sup>th</sup> May 2021 and filed on 11<sup>th</sup> May 2021, Timothy Kipkemoi Kutol (hereinafter referred to as the appellant) instituted a suit in the lower court to wit Eldama Ravine CMC ELC Case No E10 of 2021 seeking judgment against the respondent for *inter alia* an order of permanent injunction to restrain the respondent by himself, his agents, servants and/or representatives from entering into, remaining upon, taking possession or occupation of, evicting him or otherwise howsoever dealing in or interfering with his quiet possession of LR No Pokor/Keben/Kures/398 (hereinafter referred to as the suit property).
2. The case was premised on the grounds that at all times material to the suit, the appellant was the lawful owner of the suit property; that sometime in October 2020, the respondent illegally entered into the suit property and destroyed his fence, crops and trees and prevented him from accessing the suit property to undertake the purpose for which he acquired it.
3. The appellant pleaded that he acquired the suit property by way of purchase from its previous owner, Pius Kiprotich Keter.



4. Simultaneously with the plaint, the appellant filed a notice of motion dated 10<sup>th</sup> May 2021, seeking an order of interim injunction to restrain the respondent from interfering with his quiet possession of the suit property pending the hearing and determination of the application and the suit.
5. On 25<sup>th</sup> May 2021, the court issued an order of temporary injunction restraining the respondent by himself, his agents and/or servants from entering into, remaining upon, taking possession or occupation of, evicting the appellant from or otherwise howsoever dealing in or interfering with the appellant's quiet possession of the suit property.
6. Desirous of staying execution of the temporary injunction issued against him and discharging, varying or setting aside the order issued against him, the respondent filed the notice of motion dated 14<sup>th</sup> June, 2021. The motion was premised on the grounds that at the time the orders were issued, there existed other orders issued in Nakuru High Court Succession Cause No 227 of 1997 restraining the person who sold the suit property to the appellant from dealing with the suit property pending the hearing and determination of the suit pending before the High Court.
7. The respondent accused the appellant of obtaining the orders through material non disclosure of information to the court.
8. Terming the orders issued in favour of the appellant contradictory and in conflict with the order earlier on issued by the High Court in respect of the suit property, the respondent complained that the order was being used to forcefully evict him from the suit property.
9. In reply, the respondent contended that he is the absolute proprietor of the suit property; that he conducted due diligence before buying the suit property and established that it had no registered encumbrances.
10. Terming the respondent's claim that he had been in occupation of the suit property misleading, the appellant contended that the suit property does not form part of the estate of the late Kabon Chebon which is the subject matter of the succession cause pending before the High Court.
11. Claiming that the orders issued in the succession cause are not binding on him as they are in personum as opposed to in rem, the respondent contended that the order has no bearing to his case.
12. The respondent further contended that the succession court had no jurisdiction to hear and determine his case because it relates to ownership of land; that the issues raised in his suit are not under consideration in the suit pending before the High court and that issuance of the orders sought would deprive him of the forum to ventilate or canvass the issues in his suit.
13. The respondent was concerned that there is a possibility that the issue of ownership of the suit property may be heard and determined by the High Court where he is not a party without being afforded an opportunity to be heard.
14. Upon considering the cases urged by the parties to the application, the Learned Trial Magistrate (LTM) inter alia stated/held:-

“It is not in dispute that the High court issued orders restraining one Titus ole Tene and Pius Kiprotich Keter from entering, selling, disposing to third parties, advertising, transferring and/or interfering in any way whatsoever with the suit property known as LR Pokor Keben Kures 399, 398 and 376 formerly known as LR Pokor/Keben/Kures/168 and/or intermeddling with the estate of the late Kabon Chebon (deceased).



The above mentioned High Court interim orders were issued pending the hearing and determination of Nakuru High Court succession cause No 277 of 1997. It is clear that the suit property in this case being LR No Pokor/Kebe/Kures/398 forms part of the estate of the late kabon chebon.

It is apparent that Pius Kiprotich sold the suit property to the respondent in violation of conservatory orders issued by the high court in succession cause No 277 of 1997. The respondent cannot therefore claim ignorance of the high court orders as his claim over the suit property flows from the proprietary rights of the vendor who sold him the land.

I do agree with the applicant that the respondent did not make material disclosures while seeking the interim injunctive orders issued to him on 25<sup>th</sup> May, 2021. The order issued to the respondent was contrary to other orders issued by the high court on 19<sup>th</sup> January, 2021 and the same cannot stand in the light of the orders issued by the superior court.

In the circumstances, I do allow the application dated 14<sup>th</sup> June 2021 in terms of prayers 3, 4 and 5. Prayer 3 is granted to the extent that the orders granted to the respondent on 25<sup>th</sup> May 2021 are hereby vacated. The respondent shall pay the applicant's costs which shall abide the cause".

15. Dissatisfied with the decision of the LTM, the appellant appealed to this court on seven (7) grounds of appeal which can be reduced to one broad ground namely the LTM erred by allowing the respondent's application dated 14<sup>th</sup> June 2021.
16. Pursuant to directions given on 9<sup>th</sup> March 2023 that the appeal be disposed off by way of written submissions, parties filed submissions which I have read and considered.

### **The Appellant's submissions**

17. In his Submissions filed on 26<sup>th</sup> April 2023, the appellant has identified the following as the issues for the court's determination:-

#### **i) Whether the Trial Court misapprehended the Jurisdictional Limits of the Succession Court to deal with Germane Issues Pertaining to Land;**

18. With regard to this issue, it is pointed out that the issue before the lower court is ownership of land and trespass to land and submitted that the LTM misapprehended the jurisdictional limits of a succession court to determine land ownership notwithstanding the allegation that the suit property forms part of the estate of the deceased. In that regard, reliance is placed on the decisions in the following cases *Re Alice Mumbua Mutua (Deceased)* [2017] eKLR; *Marriam Mathias Mwasi v Rama Adam* [2020] eKLR; *Estate of M'Murianki M'Mugwika (Deceased)* [2019] eKLR; High Court Succession Cause No 864 of 1996 [2015] eKLR; High Court Succession Cause No 515 of 2010-*Re Geoffrey Rotter Mbutia (Deceased)* (unreported) and *Joseph Koori Ngugi v Stephen Ndichu J Mukima* [2017] eKLR. The legal principle emanating from those decisions is that a succession court has no jurisdiction to determine issues relating to ownership of land.
19. In reply, the respondent submits that under Section 2 as read with Section 47 of the *Law Succession Act*, Cap 160 laws of Kenya, the succession court has power to determine all matters relating to property relating to the estate of a deceased person.



20. The respondent further submits that the appellant has directed his anger to the wrong party. According to the respondent, the appellant should have sued Pius Kiprotich Keter for selling to him land which is subject to court proceedings.
21. It is the respondent's case that the lower court lacks jurisdiction to determine a matter that is pending determination in the High Court.

**ii) Whether the Orders of the High Court in Succession Cause No 277 of 1997 were Orders in Personam and not Binding on the Appellant?**

22. Concerning that issue, the appellant points out that the orders issued in the High Court case were directed to Titus Ole Tene and Pius Kiprotich Keter and not him; that he was not aware of the orders until the application which forms the subject matter of this appeal was filed and submitted that the appellant is not bound by the orders issued in that cause because he is not a party to that cause. The appellant further submits that if the orders affected him, the respondent ought to have served him with the orders.
23. He maintains that the orders issued in the succession cause were personal in nature, hence not binding on him. In that regard, reliance is placed on the decisions in the cases of *Gitau & 2 others v. Wandai & 5 others* [1989] KLR 231; *Nzila Muangi v Safari Lodges & Hotels Ltd* [2008] eKLR.
24. Based on the decision in *Macfoy v United Africa Co Ltd* [1961] 3 All ER 1169 where Lord Denning (as he then was) said:-

“If an act is void, then it is a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceedings which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”, the appellant submits that the lower court was not bound by the order given in the succession court as it was issued per incuriam.
25. In reply, the respondent has submitted that the orders were not in personum but in rem as it determined the status of the property as opposed to the status of ownership of the suit property.
26. Based on the decision in the case of *Republic v Independent Electoral Boundaries Commission & 2 others ex parte Wavinya Ndeti* [2017] eKLR where it was *inter alia* held that there are orders or judgments which bind the whole world by determining the state of affairs rather than the rights of the parties before the court, it is submitted that the injunction orders issued in the succession cause were binding upon the person against whom they were issued and the entire world. According to the respondent, the lower court is not in a position to determine the status of the suit property until the high court proceedings are over. Because the High Court has supervisory powers over the lower courts, it is submitted that the lower court cannot make orders that are aimed at embarrassing the High Court. For that reason, it is submitted that the issue as to whether the order issued by the High Court is in personum or in rem is irrelevant.
27. It is submitted that because the suit property was sold and transferred during the pendency of the suit in the High Court, the seller, Pius Kiprotich Keter did not have a good title to the suit property which he could transfer to the appellant.



### **iii) Whether the Appellant's Rights to be heard were Violated?**

28. Because the appellant was is not a party to the succession cause where the order restraining dealing with the suit property was issued, it is submitted that applying those orders to him is tantamount to condemning him un heard and denying him the opportunity to be heard before a decision adverse to him or likely to affect him is made. Based on Article 50 of the Constitution of Kenya, which protects the right to a fair hearing, the appellant submits that execution of the orders of the High Court against him when he was not a party to the matter in which it was issued, offends his constitutional right to a fair hearing and the rules of natural justice.
29. In reply, the respondent has submitted that the appellant was given latitude to prosecute his case and that the order issued was sparingly used to avoid having a situation where different courts would come to different determination of the proprietorship of the suit property. The respondent further submits that there is likelihood of miscarriage of justice if the two courts were to proceed with the matter and make conflicting decisions in respect thereof-the decisions would be incapable of implementation/enforcement.
30. The respondent further submits that the appellant's right to be heard on his case was halted because of reasons beyond the trial court and for good cause.

### **iv) Whether the Trial Court failed to take into Consideration the Doctrine of Innocent Purchaser for Value without notice and the Principles of Indefeasibility of Title and Sanctity of title.**

31. With regard to this issue, it is pointed out that the appellant conducted due diligence before buying the suit property and submitted that the impugned orders violated his rights as the registered owner of the suit property and as an innocent purchaser for value without Notice.
32. On this issue, the respondent submits that the issue is irrelevant for purposes of this appeal because the suit property is subject matter of a case pending in court, in which case, orders have been issued restricting dealing with it.
33. It is reiterated that Pius kiprotich Keter did not have a good title which he could pass to the appellant because the suit property was the subject matter of an active court case.
34. The respondent urges this court to declare the action of the respondent of filing the suit in the lower court with a view of defeating the orders issued by the High Court abuse of the court process.
35. On costs, it is submitted that costs should follow the event-that is to say should be awarded to the successful party.

### **Analysis and Determination**

36. The broad issue arising from the grounds of appeal and the submissions is whether, the LTM erred by allowing the respondent's application dated 14<sup>th</sup> June, 2021.
37. As pointed out herein above, the respondent filed the application dated 14<sup>th</sup> June 2021 seeking stay of execution and/or variation or setting aside of the temporary injunction issued in favour of the appellant on 19<sup>th</sup> May 2021 principally on the ground that the order contradicted and/or was in conflict with an earlier order issued by the High Court vide Nakuru High Court Succession Cause No 277 of 1997.
38. It is not in dispute that the High Court issued an order restraining dealings with the suit property pending the hearing and determination of the suit pending before it. Whilst it is true that the appellant is not a party to the suit pending before the High Court, both he and the respondent have an interest



in the suit property in that the respondent claims that the suit property belongs to the estate of Kabon Chebon which estate he represents in the suit pending before the High Court.

39. The question as to whether the suit property belongs to the estate of the deceased is a question that the Succession Court has jurisdiction to determine. The succession court has jurisdiction to preserve the subject matter of the proceedings before it before the issue of entitlement to is determined.
40. Whilst it is true that a succession court lacks jurisdiction to determine issues relating to ownership of land, I do not agree with the appellant that the lower court should have ignored the order issued by the superior court on the ground that it was by a court lacking jurisdiction to hear and determine the issue before it. The proper and neater way of dealing with the issues the appellant has raised concerning the order issued by the Superior court, is to move the Superior to vary or set aside the order it issued on the ground that it was issued without jurisdiction and/or without considering that it affects persons who are not parties to it, like the appellant.
41. I agree with the respondent that the lower court lacked jurisdiction to determine whether or not the order issued by the High Court was issued with or without jurisdiction. For purposes of orderliness, the appellant, if upon discovery that there was an order issued by the High Court restraining dealing with the suit property ought to have moved the High Court for setting aside of the order in order to proceed with his case as proceeding with the case when aware of the decision of the High Court would amount to being in violation of Section 6 and 7 of the *Civil Procedure Rules*.
42. I think I have said enough to demonstrate that this appeal lacks in merit and is for dismissal. Consequently, I dismiss it with costs to the respondent.
43. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KABARNET THIS 26TH DAY OF JUNE, 2023.**

**L. N. WAITHAKA**

**JUDGE**

Judgment delivered virtually in the presence of:-

Mr. Lorot for the Appellant

Mr. Kibet for the Respondent

Court Asst.: Christine

