Kiprop v Koross & 113 others (Environment & Land Case 23 of 2022) [2025] KEELC 1325 (KLR) (19 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1325 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 23 OF 2022

CK NZILI, J

MARCH 19, 2025

BETWEEN

SUSAN KOFILO KIPROP ..... PLAINTIFF

AND

JOEL KIPROP KOROSS ..... 1ST DEFENDANT

SIMON KOROSS ..... 2ND DEFENDANT

JASON MARUBE & 111 OTHERS & 111 OTHERS ..... 3RD DEFENDANT

RULING

1. By an application dated 2/8/2024, the defendants/applicants are seeking orders of temporary injunction restraining the respondent/plaintiff from charging, selling, transferring, subdividing, and or interfering or altering the status of Endebess/Endebess/ Block 3/Koitilion/16 measuring 31.44 Ha; and in particular, 5 acres and 4 acres occupied by the 1st and 2nd applicants respectively. The applicants are also seeking leave to amend their defense by introducing a counterclaim.

2. The application is premised on the grounds that the applicants are in possession of 5 and 4 acres in LR No. 9154, respectively, now registered illegally as Endebess/Endebess/ Block 3/Koitilion/16 in favor of the respondent; the amendments are necessary for a just and conclusive determination of the matter as the intended defendants are necessary and shall not suffer prejudice. Attached to the application is the authority to plead as an annexure marked SK-1.

3. Further, in the affidavit sworn by the 2nd applicant on behalf of the applicants, it is deposed that the respondent's late husband had sold 6 acres out of his common share to the 1st applicant from Koitilion Farm, LR No. 9154; the land was owned together with Solomon Muge, Elijah Koross, Daudi Limo and Benjamin Cherono. A copy of the official search certificate and death certificate is attached as SK-2.

4. The applicants aver that the consideration of the 6 acres later reduced to 5 acres through a family meeting, was to cater for medical expenses and school fees incurred by the 1st applicant on mutual agreement. The minutes of 25/1/1997 are attached as an annexure marked SK-3. Again, the 2nd applicant avers that he bought 5 acres from Enock Kibet, which was a share of his bequest from his deceased father in LR. No.9154, which share was also reduced to 4 acres through an agreement dated 30/4/2002 attached as SK-4.

5. The applicants depose that they have been in possession of their respective portions which have their permanent developments, for over 29 and 27 years, respectively, with the knowledge of the respondent and her family. The photographs showing the developments on both portions are attached as annexures marked SK-5 (a-g) and SK-6 (a-h).

6. Additionally, the applicants depose that sometime in 2023, they came to learn that without letters of administration, the respondent surrendered and was registered as the proprietor of the suit land measuring 77.9 acres, inclusive of the applicants' portions. Copies of the surrender, title deed, and draft counterclaim are attached as annexures marked SK-7 (a & b) and SK-8.

7. From the record, the court on 15/8/2024 directed parties to file responses and submissions to the application. It further issued an order of status quo that no party should destroy any property of the other or structures on the suit land or sell, lease, subdivide, or plant perennial crops but only to maintain those on the ground without defacing the suit property. Parties were, however, allowed to plant short-term or annual crops on the portions as they had been doing before coming to court.

8. Fredrick Musyoka Mutie also supports the application through an affidavit sworn on 22/10/2024. He avers that unless the orders sought are granted, the suit will amount to an academic exercise.

9. The plaintiff/respondent, through a replying affidavit sworn on 14/10/2024, opposes the application as frivolous, vexatious, and an abuse of the court process since she was not interfering with the suit land. The respondent deposes that her late husband only leased land to the 1st applicant, which he has been cultivating; hence, she was not aware of any sale transaction in regard to the estate and that the meeting by the clan elders did not agree that the 1st applicant' had any entitlement to the estate otherwise the alleged minutes were only to confirm attendance.

10. Further, the respondent deposes that the alleged sale was illegal given that Daniel was only entitled to a share allocated to the first house at Kipkabus Scheme. The respondent deposes that the land was transferred to her legally, and the intended counterclaim will serve no purpose but to delay the matter.

11. In a written submission dated 30/1/2025, the applicants, relying on Orders 8 Rule 3 and Order 1 Rule 3 of the Civil Procedure Rules, submit that the amendments are necessary for a just and conclusive determination of the matter. On temporary injunction, the applicants submitted that they had met the criteria as set out in Giella -vs- Cassman Brown (1973)EA 358 in that they have been in possession for many years, they stand to suffer irreparable loss should the status of the land change and that the court should exercise its discretion judiciously as held in Kahoho -vs- Secretary General EACJ Application No. 5 of 2012 and Daniel Kipkemoi Siele -vs- Kapsasian Primary School & 2 others(2016) eKLR.

12. The application is brought under the provisions of Order 8 Rule 3, Order 1 Rule 3, and Order 40 Rules 1 and 2 of the Civil Procedure Rules, among others. Order 1 Rule 3 of the Civil Procedure Rules states that all persons may be joined as Defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where if separate suits were brought against such persons any common question of law or fact would arise. On the other hand, Order 8 Rule 3 thereof gives the court powers

at any stage of the proceedings, and on such terms as to costs or otherwise, as may be just to allow any party to amend his pleadings.

13. The Court of Appeal in Joseph Ochieng & 2 others Trading as Aquiline Agencies v First National Bank of Chicago [1995] eKLR laid down principles to consider when determining an application for leave to amend pleadings. The court rendered itself thus; "...powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages) that as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side..."

14. The application was brought over two years after the filing of the suit in 2022. The applicants allege that they discovered the change in the ownership of the suit land in 2023 and at paragraph *3*, the plaintiff averred to be the registered owner of the suit land. Be that as it may, the question to be answered is whether the application is filed in good faith to help in a just determination of the issues in dispute. The applicants, as the plaintiffs in the counterclaim, are seeking to sue the respondent, the legal representative on the estate of the deceased, and the land registrar Trans Nzoia County. In the proposed counterclaim, the applicants are seeking an order of cancellation of the title to the suit land in the name of the respondent herein, which is alleged to be unlawful, a declaration that they have acquired their respective portions by adverse possession and registration as proprietors of the said portions.

15. Looking at the plaint dated 26/8/2022, the plaintiff, who is the respondent herein, sought to have the defendants declared as trespassers; to demolish their structures and vacate from her land. The totality of the issues raised by all the parties in both the plaint and the proposed counterclaim revolve around the same issues and same suit property. The justice of the suit will demand that the applicants be allowed to amend their pleadings to include the counterclaim. The parties sought to be joined are necessary parties since their input is paramount in the determination of the suits. The plaintiff's suit is yet to be heard, and therefore no prejudice shall be occasioned if the proposed amendments are allowed at this stage.

16. Regarding temporary injunction, Order 40 Rule 1 of the Civil Procedure Rules provides as follows:

> " Where in any suit it is proved by affidavit or otherwise-
>
> a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit or wrongfully sold in execution of a decree; or
>
> b. that the defendant threatens or intends to remove or dispose of his property in the circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders." Rule 2 thereof provides for an injunction to restrain breach of contract or other injury."

17. From the above provisions, it is envisaged that a party seeking a temporary injunction or any other injunction has to ground the application upon a substantive suit. The applicants, in this case, have no substantive suit where they are seeking, inter alia, permanent orders of injunction against the respondent. In simple terms, the application has no foundation and is based on a vacuum. The applicants are seeking to amend the defense and introduce a counterclaim.

18. In Giella -vs- Cassman Brown & Company Limited (supra) 358, the court expressed itself on the conditions that a party must satisfy to be granted an interlocutory injunction:

> " First, an applicant must show 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 an award of damages would not adequately compensate. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

19. Further, in Paul Gitonga Wanjau -vs- Gathuthi Tea Factory Company Ltd & 2 others [2016] eKLR, the principles in Giella -vs- Cassman Brown (supra) were expressed as whether there is a serious issue to be tried: if the applicant stands to suffer irreparable harm in the absence of an injunction and which party will suffer the greater harm from granting or refusing the remedy, pending a decision on the merits and the balance of convenience.

20. The tests for granting an interlocutory injunction were also considered in the American Cyanamid Co. -vs- Ethicom Limited (1975) All ER 504. The court observed that three requisite elements that must be met are: there must be a serious or fair issue to be tried, damages are not an adequate remedy, and the balance of convenience lies in favor of granting or refusing the application.

21. A prima facie case was defined in Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 others (2003) eKLR as having been established where on the material placed before the court there is a right that has been infringed calling for a rebuttal by the opposite party. Other than the sale agreement dated 30/04/2002 between the deceased and the 2nd applicant, there is no evidence that the sale was completed and full consideration made and acknowledged by the seller. There appears to be no evidence of the alleged purchase by the 1st applicant. On the face of it and guided by the above cases, the applicants have failed to establish a prima facie case on their entitlement to the suit land.

22. What amounts to irreparable loss and damage must be more than mere fear, apprehension, or speculation, as held in Nguruman Limited -vs- Jan Bonde Nielsen & 2 Others (2014) eKLR. In Ithili (Suing as the *Legal Representative of the Estate of Elijah Mithire - Deceased) -vs- John & 12 others (Environment & Land Case 23 of 2022*) [2023] KEELC 15866 (KLR) (1 March 2023) (Ruling), the court held that on irreparable loss and damage the fear expressed by the applicant was apparent, genuine and authentic.

23. In this application, there is no evidence adduced by the applicants that the suit property is in danger of being wasted or is likely to change ownership. It is just a mere apprehension. The respondent has also sworn on oath that she is not interfering with the suit land in any way.

24. Therefore, the balance of convenience in this case does not tilt in favor of granting the injunction, since the applicants have failed to meet the prerequisites to warrant such orders. For that reason, the prayer for a temporary injunction fails. Even if the application had been properly grounded on the proposed counterclaim, it would still not stand for the reasons stated above.

25. In light of the foregoing, the following orders shall issue:-

    a. The application is allowed in terms of the prayer for amendment of the defense to include the counterclaim.

    b. The amended defense to include the counterclaim is to be filed and served on all parties, subject to payment of requisite fees, within 21 days from the date hereof.

c. The orders of status quo issued on 15/8/2024 shall subsist pending the hearing and determination of the main suit and the proposed counterclaim.

d. Parties to comply with Order 11 of the Civil Procedure Rules.

e. Mention on 11/6/2025.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 19TH DAY OF MARCH 2025.

In the presence of:

Court Assistant - Chemutai

Munialo for 1-63 Defendants present

Wanyonyi for the Plaintiff present

Katama for the 1st and 2nd Defendants present

HON. C.K. NZILI

JUDGE, ELC KITALE.