



Mulgo ((Suing as the beneficiary and administrator of the Estate of the Late Kimilgo Arap Kukuto)) v Cheronno ((Sued in her personal capacity and as administrators in respect to the Estate of the Late Ezekiel Kibet Bor)) (Environment & Land Case E019 of 2022) [2023] KEELC 18825 (KLR) (13 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18825 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE E019 OF 2022**

MC OUNDO, J

JULY 13, 2023

BETWEEN

**KIPKOECH MULGO PLAINTIFF
(SUING AS THE BENEFICIARY AND ADMINISTRATOR OF THE ESTATE OF
THE LATE KIMILGO ARAP KUKUTO)**

AND

**ANNAH CHERONO DEFENDANT
(SUED IN HER PERSONAL CAPACITY AND AS ADMINISTRATORS IN
RESPECT TO THE ESTATE OF THE LATE EZEKIEL KIBET BOR)**

RULING

1. Before me for determination is a Notice of Preliminary Objection dated the March 7, 2023 filed by the Respondent pursuant to the provisions of Order 51 Rule 14 of the *Civil Procedure Rules* as well as an application seeking interim orders of injunction dated the December 9, 2022. Pursuant to the court's directions of March 9, 2023, both applications were disposed of by way of written submission to which the Applicant submitted that the Plaintiff lacked the Locus Standi to bring any action against her in respect of the property known as Kericho/Kapsuser/439 or any other subsequent subdivision that may have been done on the said property for reason that no documentary evidence had been annexed to the pleading as proof that he was the Legal Representative of the late Kimilgo Arap Kukuto or showing the proprietary interest that his late father held in the suit property as the said suit property was currently registered in the name of the Defendant together with the subsequent sub divisions thereof. Reliance was placed on the decisions in *Law Society of Kenya vs Commissioner of Lands and others Nakuru High Court Civil Case No 464 of 2000* and *Alfred Njau & Others vs City Council of Nairobi [1989] KAR 229*.



2. That since he had not established a prima facie case, the application for interim orders was therefore, frivolous, and vexatious and only intended to waste the court's precious time and should be dismissed with costs to the Defendant. Reliance was placed on the decision in *Giella vs Cassman Brown & Company Limited [1973] EA 358*.
3. In response to the Preliminary Objection, the Plaintiff filed his Replying Affidavit sworn on the March 21, 2023 averring that the Notice of Preliminary Objection was frivolous, vexatious, incompetent an abuse of the due process of the Court, and an attempt to cause confusion. That he had brought the suit in his capacity as the personal representative of the estate of Kimilgo Arap Kukoto pursuant to the letter Ad Litem issued by the court and annexed as KM 1. That the question as to his locus was therefore not an issue.
4. That secondly, his late father had interest in the parcel of land previously known as Kericho / Kapsuser /439 that had formed the institution of the suit to which the merits and demerits of the case could not be litigated as a preliminary issue because it would require a factual determination exercise during the hearing. That the Defendant had approached court with unclean hands because of his continued insistence of not acknowledging the interest of the Plaintiff herein whereas they had settled on the parcel of land for many years. Reliance was placed on the *Mukisa Biscuits Manufacturing Limited vs the West Distributors Limited 1969 EA 700*.

Determination.

5. I have considered the Preliminary Objection raised herein, the submissions by Counsel for both parties as well as the authorities cited. It is not in dispute that the Plaintiff filed suit via a plaint dated the November 30, 2022 as a beneficiary and administrator of the estate of the late Kimilgo Arap Kukuto as against the Defendant seeking orders declaring him to have had beneficiary interest limited to a 5 (five) acre portion, that had belonged to the deceased Kimilgo Arap Kukuto, to be hived off from parcel of land No Kericho/Kapsuser/439 and that all the resultant titles emanating from the subdivisions of the said parcel of land be cancelled.
6. The Plaintiff had further sought for interim orders against the Defendant so as to preserve the subject suit. The Defendant had filed his response to the suit as well as the present Preliminary Objection for which he had alluded that the Plaintiff had no locus standi to file suit on behalf of the estate of the late Kimilgo Arap Kukuto, he not having annexed any documentary evidence. In response to the Preliminary Objection, the Plaintiff had annexed the Letters of Administration ad Litem issued to him in the Kericho CMC Probate and Administration Misc Cause No E338 of 2022 on the October 17, 2022.
7. In the case of *Isaya Masira Momanyi vs Daniel Omwoyo & another [2017] eKLR*, the court had held as follows:

' A party can thereof not commence a suit on behalf of the estate of a deceased person without letters of administration and thereafter obtain the letters of administration subsequently. Where a suit is commenced without letters of administration in respect of a deceased estate such a suit is null and void abinitio and cannot be cured by a party subsequently obtaining the letters of administration.'
8. The instant case I find that the Plaintiff had the locus standi to file suit against the Defendant on behalf of the estate of late Kimilgo Arap Kukuto, this line of argument therefore fails.



9. On the second issue in relation to the Application for interim orders of injunction, the Defendant had sought that since the Plaintiff/Applicant had not demonstrated that the deceased Kimilgo Arap Kukuto had any proprietary interest in the said suit property which was currently registered in the name of the Defendant/Respondent together with the subsequent sub divisions thereof, that he had failed to establish a prima facie case and therefore the application ought to be dismissed.
10. There had been no submissions to this effect by the Plaintiff.
11. 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').
12. 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.'
13. The Court has been moved under a Certificate of Urgency, by the Applicant, to issue temporary injunction against the Respondent. 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 or not the Applicant herein has demonstrated that he has a genuine and arguable case or not.
14. The issues that arise for determination herein are two;
 - i. Whether an interim order of injunction should issue against the Defendant.
 - ii. Whether the Plaintiff has established a Prima facie case to warrant issuance of interim orders.
15. In this matter, the Plaintiff in his application seeks for interim injunctive orders restraining the Defendant from entering into, further subdividing, transferring, ploughing, farming, selling, leasing, mortgaging, charging, alienating, and/or in any other way the may (sic) be construed in whatsoever in respect to the parcel of land known as Kericho/ Kapsuser/439 or its subdivision being Kericho/ Kapsuser/ 7498-7503 pending the hearing and determination of the suit. The Plaintiff/Applicant had further sought for an order of inhibition in respect to the parcel of land Known as Kericho/ Kapsuser/439 or its subdivision being Kericho/ Kapsuser/ 7498-7503 during the pendency of suit and for costs.
16. It is now a settled practice under the new constitutional dispensation that filing of written submissions is the norm as written submissions serve the purpose of expedience and amounts to addressing the court on the evaluation of the evidence of each party and analysis of the law. It is therefore trite that an applicant who fails to file his submissions on an application as ordered by the court is deemed as a party who has failed to prosecute his application and therefor that application is liable for dismissal. The filing of submissions having been ordered, and this court having extended time for compliance



without compliance, the failure by the Applicant to exercise the leave granted to them to file written submissions clearly demonstrates inertia and inordinate delay, lack of interest and/or seriousness on the Applicant's part in the prosecution of the matter.

17. The Court of Appeal in *Rowlands Ndegwa and 4 Others vs County Government of Nyeri and 3 Others; Agriculture, Fisheries and Food Authority & Another (Interested Parties) [2020] eKLR*, citing with approval the decision of the High Court in, *Winnie Wanjiku Mwai vs Attorney General & 3 others [2016] eKLR*, observed as follows:

' With regard to dismissal for want of prosecution, there are indeed no hard and fast rules as to the manner in which the inherent power and discretion to dismiss an action for want of prosecution is to be exercised. It is however generally accepted that dismissal will be invited if there should be a delay in the prosecution of the action and the respondent is prejudiced by the delay with attention also being paid to the reasons for the inactivity.

18. The mode of hearing having been chosen by the Applicant and the same having been adopted by the court, and there having been no compliance, I am persuaded to dismiss the main motion, however having noted that the Plaintiff resided on a part of the subdivision, and has laid claim that the estate of the deceased was at great risk of being wasted away by the Defendant, whether or not he will prove his case is not for determination at this stage. Of importance at this stage is the protection of the suit land by letting the interim orders earlier issued herein remain in place pending the hearing and determination of the suit.

19. Indeed in the case of *Films Rover International Limited vs Cannon Film Sales Limited (1986) 3 ALL ER 772* the court held that

'A Court should take whichever course appears to carry a lower risk of injustice should it turn out to have been 'wrong'.

20. In this regard and in order to preserve the substratum of the suit, I believe that the best orders to issue suo moto, in the best interest of justice and in pursuance to the provisions of Section 3A of the *Civil Procedure Act*, would be that the parties shall maintain the status quo prevailing, pending the hearing and determination of the suit.

21. Parties shall now set down this matter for hearing expeditiously by complying with the provisions of Order 11 of the Civil Procedure Rules within the next 21 days upon delivery of this ruling so as to expedite the hearing and determination of the suit.

22. Costs to be in cause.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 13TH DAY OF JULY 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

