



Kandie & 2 others (All Suing in their Capacity as the Administrators of the Estate of Edward Peter Kipyator –Deceased) v Cheyator & 2 others (Environment & Land Case E005 of 2023) [2023] KEELC 22326 (KLR) (18 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22326 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E005 OF 2023
JM ONYANGO, J
DECEMBER 18, 2023**

BETWEEN

**ANTONINA JEROTICH KANDIE 1ST PLAINTIFF
COLLINS KEMBOI AYABEI 2ND PLAINTIFF
CLAIRE JEBET AYABEI 3RD PLAINTIFF
ALL SUING IN THEIR CAPACITY AS THE ADMINISTRATORS OF THE
ESTATE OF EDWARD PETER KIPYATOR –DECEASED**

AND

**RAYMOND KEITANY CHEYATOR 1ST DEFENDANT
FRED KIPTARUS CHEPYATOR 2ND DEFENDANT
ALBERT KIRUTOCHEPYATO 3RD DEFENDANT**

RULING

1. The Plaintiffs herein filed a Notice of Motion dated 8th February 2023 seeking orders that this Honourable court be pleased to grant an order of injunction restraining the defendants jointly and severally by themselves, their servants, workmen/workwomen, agents and/or any other person working under their instructions or otherwise howsoever from entering or re-entering into, ploughing, working on, planting crops on, erecting any structure or buildings, interfering with or in any other way or manner dealing with the parcel of land comprised in title No. Karuna/ Sosiani Block 2 (Progressive)/91 or any part thereof pending the hearing and determination of this suit.
2. The application is based on the grounds set out on the face of the Notice of Motion and the supporting affidavit of Antonina Jerotich Kandie (1st Plaintiff/Applicant) sworn on the 8th February 2023. In the said affidavit she deposes that she is the only widow of the late Edward Peter Kipyator while the 2nd and



- 3rd plaintiffs are her children. The Defendants/Respondents are brothers of the deceased and therefore her brothers-in-law.
3. The Applicant deposes that she got married to the deceased in the year 2001 and they established their matrimonial home on land parcel no. Karuna/ Sosiani Block 2 (Progressive)/91 which is registered in the name of the deceased. After her husband's demise the Applicant continued cultivating the suit property until 8th January, 2023 when the defendants unlawfully and in the company of hired goons cut the fence and trespassed onto the suit property. They then caused it to be surveyed and curved off 7.5 acres claiming that they were entitled to the same.
 4. The Applicant reported the incident to Karuna Police Post and her was advised to file a civil suit. In the meantime, the defendants returned to the suit property, burnt husks thereon fenced off the 7.5 acres and ploughed the said portion.
 5. It is the applicant's deposition that as a result of the defendant's unlawful activities, she fears that she will be deprived of the use and benefit of the said portion of land and she will lose her source of livelihood. She is also apprehensive that unless the defendants are restrained from interfering with the suit property by this Honourable court, the estate of her late husband will be wasted and the rights of his widow and children will be violated.
 6. In opposing the application, Fred Kiptarus Chepyator, (2nd defendant) filed a Replying Affidavit sworn on the 20th February denying the 1st Plaintiff's averments.
 7. He deposed that on 27.12 .2022 they had a family meeting attended by the plaintiffs where they discussed the shareholding of the parcels of land registered in the name of the deceased and held in trust by him before his death.
 8. The gist of his affidavit is that him and his sister Dina contributed some money towards the purchase price of the suit property which measures approximately 30 acres but it was resolved that the entire parcel would be registered in the name of the deceased. In particular, he deposed that he is entitled to a portion measuring 7.5 acres out of the suit property as he contributed a sum of Kshs.100,000. Regarding Dina's share of 7.5 acres, he averred that since the Keiyo traditions prohibited a brother and sister living next to each other, the deceased had bought her an alternative parcel of land of equivalent size elsewhere in exchange for her share in the suit property.
 9. He further deposed that the defendants had been ploughing the 7.5 acres until 2022 when the 1st Plaintiff started stopped them from utilizing the land. He avers that the 1st plaintiff was aware that the he contributed Kshs.100,000 towards the purchase of the suit property but she now claims that the deceased owned the entire parcel.
 10. He pointed out that in Eldoret HC P&A E038 of 2022 where the 1st Plaintiff has applied for a Grant of Letters of Administration, the defendants have filed an Objection as they are of the view that part of the properties forming the estate of the deceased were held in trust for them. He is therefore of the view that they should be allowed to continue cultivating and utilizing the portion of the suit property measuring 7.5 acres.
 11. In response to the replying Affidavit, the 1st Plaintiff filed a Supplementary affidavit refuting the 1st Defendant's allegations. She deposed that the deceased left behind only three beneficiaries being herself and her children. She denied having sold any of the deceased's properties. She wondered why the defendants had not raised the fact that the deceased was indebted to them during the memorial service.
 12. She deposed that the defendants had soon after her late husband, rushed to obtain his death certificate without involving him and filed a succession cause at Iten Senior Principal Magistrate's court.



13. She averred that if the Applicants were to be harmed, the defendants should be held responsible.
14. The application was canvassed by way of written submissions and both parties filed their submissions which I have carefully considered.

Analysis And Determination

15. The only issue for determination is whether the Applicant has met the conditions for the grant of a temporary injunction set out in the case of *Giella V Cassman Brown & Company Ltd* 1973 EA 358 which are as follows:

“First, the applicant must show that he has 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 would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”

16. In the case of *Mrao v First American Bank of Kenya Limited* [2003] eKLR Bosire JA (as he then was) stated as follows:

“A prima facie case is one 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.

17. The first issue I have to determine is whether the plaintiffs have established a prima facie case. In this regard the 1st Plaintiff annexed a copy of a Grant of Letters of Administration in respect of the estate of Edward Peter Kipyator – Deceased. She also annexed a copy of the title deed for land parcel number Karuna/ Sosiani Block 2 (Progressive)/91 in the name of the deceased. There is no dispute that the deceased had established his home on the suit property and that is where the plaintiffs live. The question as to whether the Respondents have a beneficial interest in the suit property can only be determined at a full hearing.

18. The Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR held that:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”

19. From the material presented before the court, the plaintiffs have demonstrated that they have a prima facie case with a probability of success.



20. The second condition that the Applicants have to meet is to demonstrate that if the order of injunction is not granted, they will suffer irreparable loss. The test for irreparable loss is defined in *Halsbury's Laws of England*, Third Edition Volume 21, P.352 as follows:

“Where the court interferes by way of injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds; first that the injury is irreparable and second that it is continuous. By irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages, an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter.”

21. It is not in dispute that the 1st Applicant has her matrimonial home on the suit property and she has stated on oath that she been cultivating a portion of it as her source of livelihood. She annexed photographs of the maize she has planted on the suit property to her Supplementary affidavit. She has expressed the fear that if the order of injunction is not granted and the Respondents effect their threat of hiving off 7.5 acres of the suit property, the Applicants will be deprived of their source of livelihood and they will thus suffer irreparable loss. Although the respondents claim that they have also been cultivating a portion of the suit property, they have nothing to show for it. In the circumstances it is my finding that Applicants have demonstrated that if the order of injunction is not granted they will suffer irreparable loss.
22. The third condition that the Applicants have to satisfy is that the balance of convenience lies in their favour. As to what constitutes the balance of convenience, the court in the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR held as follows:

“The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer” In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.”

23. In the instant case, the Applicants are the ones in occupation of the suit property. The Respondents have their homes elsewhere although they staking a claim in the suit property as they allege that the deceased held 7.5 acres of the land in trust for them. As I have pointed out earlier in this ruling, the question as to whether the Respondents have a beneficial interest in the suit property cannot be determined at this early stage on the basis of affidavit evidence. The court will require to hear the case in full before making a determination on that issue.
24. On the material placed before the court so far, I am persuaded that the prejudice that would be caused to the Applicants if the order of injunction is not granted is greater than any prejudice or inconvenience that may be caused to the Respondents and therefore the balance of convenience tilts in favour of the Applicants.



25. As the Applicants have satisfied all the above-mentioned three conditions, it is my finding the application has merit and I grant it and make the following orders:

- a. A temporary injunction is hereby issued restraining the defendants jointly and severally by themselves, their servants, workmen/workwomen, agents and/or any other person working under their instructions or otherwise howsoever from entering or re-entering into, ploughing, working on, planting crops on, erecting any structure or buildings, interfering with or in any other way or manner dealing with the parcel of land comprised in title No. Karuna/ Sosiani Block 2 (Progressive)/91 or any part thereof pending the hearing and determination of this suit.
- b. The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 18TH DAY OF DECEMBER 2023.

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J.M ONYANGO

JUDGE

In the presence of;

1. Mr. Wafula for the Applicant

2. Miss Kosgei for the Respondent

Court Assistant:

