



**Sano (Suing as the personal representative of the Estate of Mary
Jemuge - Deceased) v Chumba & another (Environment & Land Case
E008 of 2022) [2025] KEELC 167 (KLR) (27 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 167 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE E008 OF 2022
GMA ONGONDO, J
JANUARY 27, 2025**

BETWEEN

**DISMAS SANO (SUING AS THE PERSONAL REPRESENTATIVE OF THE
ESTATE OF MARY JEMUGE - DECEASED) APPLICANT**

AND

CHERUIYOT A CHUMBA 1ST RESPONDENT

SAMMY MUSEE BOR 2ND RESPONDENT

RULING

1. By a Notice of Motion dated 1st June 2024, the applicant through A K Advocates LLP, is seeking the following orders;
 - a. Spent
 - b. Spent
 - c. That the Honourable Court be pleased to issue interim orders of injunction prohibiting, barring and/or refraining the Defendants, their agents, servants and employees from selling, charging and leasing land parcel No. Nandi/Ndalat Settlement Scheme/8 (the suit land herein) to third parties and to further prohibit the Defendants from destroying the trees and other properties on the said land pending the hearing and determination of this application and further pending the hearing and determination of the suit.
 - d. That leave be granted to the Applicant to further amend the amended plaint in terms of the draft further amended plaint.
 - e. That costs of this application be provided for.



2. The application is premised upon grounds (a) to (kk) set out on the face of it alongside the applicant's affidavit of thirty-eight paragraphs sworn on even date and the accompanying documents marked as 'DS-1' to 'DS-4' namely allotment letter, photographs, green card and draft further amended plaint, annexed to the affidavit. Briefly, it is the applicant's allegation that the suit land was registered in the name of the deceased, Mary Jemuge who enjoyed peaceful and quiet possession of the land prior to her death and left it vacant as her only child, Paul Kipsang Songok, was working miles away from home. That the said child/beneficiary of the estate of the deceased did not sell any portion of it to any person. That the respondents unlawfully invaded the suit land and fraudulently got registered as the proprietors' thereof and sold it to the 2nd respondent. That therefore, the beneficiary of the estate of the deceased and subsequent ones are likely to suffer substantial loss thereby.
3. The respondents through Kipkorir Cheruiyot, Chivai and Kigen Advocates, opposed the application by the replying affidavit sworn on 24th September 2024 by the 2nd respondent who stated in part that the instant application is misconceived, frivolous and an abuse of the court process. He averred that due procedure was followed in transferring the suit land to his name. That he has been in possession thereof for more than three decades, established his home and engages in crop and dairy farming thereon. That should the court grant the orders sought herein, his rights under Article 40 of *the Constitution* will be curtailed. That the allegations of destruction of property on the suit land are unfounded since he is in occupation of the same and cannot destroy his own property. That the applicant has not met the threshold for grant of an injunction order and ought to be dismissed with costs.
4. In a further affidavit sworn on 1st of October 2024, the applicant averred that registration of the respondents as proprietors was fraudulent and irregular. That the 1st respondent transferred the suit land to the 2nd respondent during the pendency of the suit. That he is apprehensive that the 2nd respondent could further dispose of the suit land to 3rd parties, thereby defeating his rights and interests thereon and occasioning him harm that cannot be compensated by an award of damages. That the suit land also risks getting wasted. Thus, he urged the court to allow the application as prayed.
5. The application was heard by way of written submissions further to the directions of the court given on 7th November 2024.
6. By the submissions dated 15th November 2024, learned counsel for the applicant made reference to the application, the replying affidavit, the further affidavit and framed issues including whether the applicant has established a prima facie case and whether he is entitled to the orders of injunction sought in the application. Counsel submitted that by allowing the application, the interests of the parties will be protected as the respondents will continue in possession of the suit land. To buttress the submissions, reliance was made on, inter alia, *Giella-vs-Cassman Brown & Company Ltd (1973) EA 358*, *Mrao Limited-vs-First American Bank of Kenya Limited & 2 others (2003) eKLR*, and Order 1 Rule 3 of the Civil Procedure Rules 2010.
7. In the submissions dated 18th November 2024, learned counsel for the respondents, too, referred to the application, the replying affidavit, the further affidavit and identified two issues for determination namely: whether the applicant is entitled to the orders including costs sought in the application. In analysing the issues against the applicant, counsel submitted that the suit land is registered in the name of the 2nd respondent who has been staying on the suit land for over thirty years and that the alleged fraud can only be delved into during the hearing of the suit. That therefore, the application is premature and should be dismissed with costs. To fortify the submissions, counsel cited *Giella and Mrao cases (supra)* alongside *Mwangangi Mutula Mutua-vs-Equity Bank Ltd & 2 others (2019) eKLR*, among other authoritative pronouncements.



8. In the foregone, the duty of the court is to determine whether or not the applicant has established that he is entitled to the orders sought in the application.
9. I take into account the provisions of the law inclusive of Order 40 of the Civil Procedure Rules 2010 on temporary injunctions and temporary orders, under which the application is originated. Also borne in mind are the triple requirements regarding injunctive relief; see *Giella case (supra)* and *Nguruman Ltd-vs-Jan Bonde Nielsen (2014) eKLR*.
10. So, has the applicant demonstrated a prima facie case with a likelihood of success and that unless the court grants the injunction order, there is real danger he will suffer irreparable harm that will not be adequately compensated by an award of damages?
11. The applicant has demonstrated that the suit land risks getting sold, charged and/or leased to third parties and the trees and property thereon are at risk of getting destroyed. Therefore, the character of the suit land may be altered and the instant suit be compromised thereby.
12. The mandate of this court to grant interim preservation orders is stipulated under Section 13 of the *Environment and Land Court Act* 2015 (2011). The said orders include interim or permanent preservation orders such as injunctions.
13. This court subscribes to the Court of Appeal decision in the case of *Hutchings Biemer Ltd v Barclays Bank of Kenya Ltd & 2 others [2006] eKLR*, where it was noted in part that:

“...In our view, injunctive orders are meant to preserve property and maintain the status quo...”
14. Bearing in mind the application, the response thereto as well as the annexures and the rival submissions filed herein, it is my considered view that the threshold for an interim preservation order under Section 13 (*supra*), has been met.
15. Indeed, in order for the issue of the title to be determined in the main suit, there is need to preserve the subject matter of the suit in accordance with the doctrine of *lis pendens*; see *Ogada -vs- Mollin (2009) KLR 620*.
16. Wherefore, order 3 of the application is hereby granted in terms of interim order of status quo, in lieu of injunction sought, to prevail over the suit land. In particular, the respondents, their agents, servants and employees shall not sell, charge and lease the suit land to third parties and are prohibited from destroying the trees and other property thereon, pending the hearing and determination of the main suit.
17. With regards to the contemplated amendment as sought in the application, Order 1 Rule 3 of the Civil Procedure Rules, 2010 provides 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...”
18. Further Order 8 Rule 1 of the Civil Procedure Rules (2010) stipulates that after close of pleadings, a party can only amend his pleadings with the leave of court; see also Order 8 Rule 3 of the Civil Procedure Rules, 2010.



19. In the instant case, is the applicant deserving of leave to amend the amended plaint dated 9th September 2023 and substitute the same with a further amended plaint as per the draft annexed thereto?

20. In *Institute for Social Accountability & another v Parliament of Kenya & 3 others* [2014] eKLR the court held that:

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings....The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.” (Emphasis added)

21. The Court of Appeal outlined the principles in amendment of pleadings in *Elijah Kipngeno Arap Bii vs Kenya Commercial Bank Limited* (2013) eKLR as follows:

“The law on amendment of pleading in terms of section 100 of the *Civil Procedure Act* and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob’s *Precedents of Pleading – 12th Edition*, in the case of *Joseph Ochieng & 2 others vs. First National Bank of Chicago, Civil Appeal No. 149 of 1991* as follows:

“The ratio that emerges out of what was quoted from the said book is that 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; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.”

22. The legal parameters governing the amendment of pleadings from the above cited decisions can be summed up that the amendment should:

- a. Not introduce new or inconsistent cause of actions or issues;
- b. Be made timeously;
- c. Not affect any vested interest or accrued legal right and
- d. Not prejudice or cause injustice to the other party.



23. Thus, it is my considered view that this application has met the threshold for grant of leave to amend pleadings as highlighted in the Institute for Social Accountability & another and Elijah Kipngeno Arap Bii cases (both supra). The same is hereby allowed as prayed.
24. With respect to Order 5 sought by the applicant, it is my considered view that this court ought not to delve into investigations as that would amount to judicial overreach by taking the functions of a law enforcement agency namely the Directorate of Criminal Investigations. Besides, the onus is on the applicant to prove his case to the requisite standard; see Sections 107 to 109 of the Law of Evidence Act, Chapter 80 Laws of Kenya.
25. In the foregone, the application is hereby partially allowed in terms of order 3 and 4 sought therein and as specified in paragraphs 16 and 23 hereinabove.
26. Costs be in the cause.
27. It is so ordered.

DATED AND DELIVERED AT KAPSABET THIS 27TH DAY OF JANUARY 2025

G. M. A ONG'ONDO

JUDGE

Present;

Muga Faith Aketch holding brief for Kigen, Learned Counsel for the defendants/respondents

Walter, Court Assistant

