



**Saina & 2 others v Mutai & 2 others (Environment & Land Case E006 of 2022) [2022] KEELC 2497 (KLR) (14 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2497 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET  
ENVIRONMENT & LAND CASE E006 OF 2022**

**MN MWANYALE, J**

**JULY 14, 2022**

**BETWEEN**

**HOSEAH KIPROP SAINA ..... 1<sup>ST</sup> APPLICANT  
MIKE KIPNGETICH SAINA ..... 2<sup>ND</sup> APPLICANT  
SAINA KIPLAGAT ELIJAH ..... 3<sup>RD</sup> APPLICANT**

**AND**

**BARNABA MUTAI ..... 1<sup>ST</sup> RESPONDENT  
LABAN RUTTO ..... 2<sup>ND</sup> RESPONDENT  
EDWARD KIPROTICH ALIAS MREFU ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Plaintiff<sup>s</sup>/Applicants have vide their Notice of Motion dated February 21, 2022 sought for injunctive orders against the Defendant/Respondents for orders that;
  - i. Spent
  - ii. Temporary injunction restraining the Defendants jointly and severally whether by themselves acting in person, their servants, Agents, Nominees or Personal and/or Legal Representatives or whomsoever acting on their instructions from moving into any area, part, portion or section of parcel Nandi/Sigot/50 and fencing it off, alienating, ploughing, preparing for planting, planting, evicting or doing anything act or thing or the detriment of the Plaintiffs/Applicants, pending the hearing and determination of this application intepartes or till further orders of the Honorable Court.
  - iii. That there be an order of Temporary Injunction restraining the Defendants/Respondents, jointly and severally, whether by themselves, acting in person or through their servants, Agents,



Nominees or personal legal Representatives or whomsoever acting on his instructions from moving into any area, part, portion or section of the suit land Nandi/Sigot/50 or fencing it off alienating, ploughing, preparing for planting Plaintiff/Applicants pending the hearing or determination of this suit.

- iv. That in the alternative and strictly without prejudice to the foregoing, there be an order of this Honourable Court directing the preservation by status before the forceful entry of the Defendants on the suit Land Nandi/Sigot/50 and as previously occupied and possessed by the Applicants.
2. The application is premised on grounds interalia,
    - a. Applicants have a Grant in respect of this suit, the land in question belonging to their late father.
    - b. Applicants have been in peaceful occupation and possession of the suit land before their father's demise in 2017.
    - c. That there is a forceful entry by the Defendants into a Section of the suit land.
    - d. That Respondents have no claim over any part, portion or section of suit land, as they are not children of the deceased.
    - e. The unlawful and illegal entries, trespass and encroachment has not been done with their consent or known authority, hence the trespass raising confrontations.
    - f. The Defendants remain in trespass and be in wrongful occupation of Nandi/Sigot/50 and the Applicants continue to suffer loss and damage.
  3. The said application is further supported by the Affidavit of Mike Kipngetich Saina who deponed the ground set out above, but further depones that the Defendants claim to be children of the deceased, yet their claim has not been made during the lifetime of their father.
  4. For the above reason, the Applicant seek prayers set out in paragraph 1 above.
  5. The Application and orders sought therein are opposed by the Replying Affidavit of Barnaba Mutai deponed on March 24, 2022.
  6. In the Replying Affidavit, the 1<sup>st</sup> Defendant/Respondent depones that;
    - i. The Applicants are sons of Kipsaina arap Tarus, while he is the son of Kimutai Sum, who was an elder brother to the said Kipsaina arap Tarus, while the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant/Respondents are grandson of Kipkeino Kiptarus Mase (deceased) the eldest brothers to Kipsaina Tarus (Deceased).
    - ii. That Kipkeino Kiptarus Mase, Kimutai Sum and Kipsaina arap Tarus in that order were three (3) brothers to whom their father Kimase arap Chepchoge (deceased) left 30 acres of land to be shared equally with each family /brother getting 10 acres).
    - iii. The 30 acres are comprised in L.R. No. Nandi/Sigot/50 which title is in the name of Kipsaina arap Tarus.
    - iv. That there is pending suit case No. HC E & Land 12 of 2021, and a citation cause No. 15 of 2018 – Estate of Kipsaina arap Tarus, which has not been determined.



- v. That the deceased Kipsaina arap Tarus obtained a title in his name in 1975, but refused to transfer the 10 acres to each of the families.
  - vi. That on 6/10/2011, the District Land Tribunal had deliberated over the dispute involving Nandi/Sigot/50 and made a verdict that 30 acres be hived from Nandi/Sigot/50 and be subdivided to the 3 brothers Kipkeino Kiptarus Mase (10 acres), Kimutai Sum (10 acres) and Kipsaina arap Tarus (10 acres), since this was family land.
  - vii. That out of the 103.246 (41.8 Acres) of Nandi/Sigot/50, the 1<sup>st</sup> Respondent is entitled to 10 acres while the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are equally using 10 acres and they have no claim over the remaining portion.
7. For the above reasons, the Defendants prays that the interim orders be set aside and the application be dismissed.
  8. Parties were directed to file written submission on the application.
  9. In their submissions for a temporary injunction the Applicant has set out the law for grant of an injunction as set out under order 40 (1) (a) and (b) of the *Civil Procedure Rules 2010*.  
The Applicant further cite the decision in *Paul Gitonga Wanjau v Gatbutbi Tea Factory Company Ltd & 2 others* [2016] eKLR which captures the principles as set out in *Giella v Cassman Brown* [1973] EA 358 to with is there a serious issue to be tried “will the Applicant suffer irreparable harm if the injunction is not granted which party will suffer the greater harm from granting and/or refusing the remedy pending a decision.”
  10. The Applicant further submits that it has a prima facie case with probability of success as the basis for seeking the injunction.
  11. The Applicant submit that they have meet the conditions to grant of injunction as set out in *Giella v Cassman Brown*. In that there is danger of the Applicant’s losing the property; which is registered in their father’s name, as the Respondents have no relation to the said deceased.
  12. On their part, the Respondents submits that the disputed area in the suit property is about 30 acres, which belonged to their late grandfather Kimase arap Chepchoge, but the Applicant’s father registered as his own.
  13. They submit that the Applicant’s late father obtained title and annexed the 30 acres to his title.
  14. The Respondent submit that the Applicants have not taken out the Letters of Administration in respect of the Estate of the deceased; and that this suit is Res judicata as there is another suit pending in Court to wit; HC ELC No. 12 of 2021.
  15. The Respondent further argue that the orders granted herein were obtained by based on false information given to the Court by the Plaintiff’s Applicant and argue the Court to dismiss the motion.
  16. Indeed the Applicants have not exhibited the Grant of Letters of Administration, although they have exhibited an email from Court that the Grant Ad Litem had been issued.
  17. Without the Grant being exhibited it appears that the locus of the Applicant is wanting. Although the Plaintiff may exhibit the same in the main suit through filing a list of documents, having not exhibited the same before Court, and noting from the response of the Respondents, that there is a related suit, involving the same parcel, which the Applicants had not disclosed in their pleadings, hence a material



non-disclosure. The Applicant has not made out a prima facie case with probability of success, to warrant the grant of the orders sought.

18. Having found that the Applicant has not established a prima facie case with probability of success I disallow the application. However in order to preserve the suit property against possible transfer by the Applicant and invasion by the Respondents, the Court invokes Rule 28 (k) of the practice direction issued vide Gazette Notice 5178/2014 and Orders the parties herein to maintain status quo obtaining now.
19. For avoidance of doubt, the Applicant shall not transfer the suit property whilst the Respondent shall not cultivate the suit property pending hearing and determination of this suit.
20. Costs in the cause.
21. Orders accordingly.

**DATED AT KAPSABET THIS 14<sup>TH</sup> DAY OF JULY 2022.**

**HON. M. N. MWANYALE,**

**JUDGE.**

In the presence of;

Mr. Choge for Plaintiff/Applicant

No appearance for Mr. Miyiinda

