



Omayo (Suing as the administrator ad litem and/or personal representative of the Estate of Alfred Cheruiyot Langat (Deceased)) v Sinei & another (Sued as the administrators and/or personal representative of Sarah Cheronno Chesimet (Deceased)) (Civil Suit E005 of 2021) [2022] KEELC 14761 (KLR) (10 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14761 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
CIVIL SUIT E005 OF 2021
MC OUNDO, J
NOVEMBER 10, 2022
IN THE MATTER OF THE REGISTERED LAND ACT (CAP 300) (REPEALED)
IN THE MATTER OF THE LAND ACT, 2012
IN THE MATTER OF THE LAND REGISTRATION ACT, 2012
IN THE MATTER OF SECTIONS 7, 17, 37 AND 38 OF THE
LIMITATION OF ACTIONS ACT (CAP 22 LAWS OF KENYA)
IN THE MATTER OF ORDER 37 RULE 1, 7 AND
14 OF THE CIVIL PROCEDURE RULES, 2010
AND
IN THE MATTER OF LAND PARCEL KERICHO/CHESINENDE/244

BETWEEN
ANGELINA KWAMBOKA OMAYO ALIAS ANGELINE LANNGAT PLAINTIFF
SUING AS THE ADMINISTRATOR AD LITEM AND/OR PERSONAL
REPRESENTATIVE OF THE ESTATE OF ALFRED CHERUIYOT LANGAT
(DECEASED)

AND
ROSEMARY CHELANGAT SINEI 1ST RESPONDENT
NICHOLAS LANGAT 2ND RESPONDENT
SUED AS THE ADMINISTRATORS AND/OR PERSONAL REPRESENTATIVE
OF SARAH CHERONO CHESIMET (DECEASED)



RULING

1. Before me for determination is the Notice of Motion dated 29th September 2021 brought under the provisions of Articles 21, 22, 27, 28, 30, and 40 of the Constitution, Section 1A, 1B, 3, 3A and 63 (b)&(e) of the Civil Procedure Act, Order 40 Rules 1, 2(1), 3(1), 4 and 9 and Order 51 Rule 1 of the Civil Procedure Rules, wherein the Plaintiff/Applicant seeks temporary injunctive orders restraining the Defendants /Respondents either by themselves, agents, servants, employees, workers, assigns, personal representatives, any other person acting on their behalf and/or any third parties claiming through them from trespassing on, cultivating, wasting, constructing on alienating or otherwise interfering or dealing with a portion of land measuring approximately two acres comprised in the parcel of land known as LR No. Kericho/Chesinende/244 pending the hearing and determination of this suit. The Applicant also seeks that the Officer Commanding Chepseon police station and Londiani police station do enforce compliance of the orders so sought, for cost of the application and the any other orders that the court may deem fit to grant in the circumstance.
2. The Application was supported on the grounds on the face of it as well as on an Affidavit sworn by the Applicant, Angelina Kwamboka Omayo, on the 29th September 2021.
3. The application was opposed by the 2nd Respondent's man –made “opposing affidavit” sworn on behalf of the 1st Respondent, on the 15th November 2021 and filed on the 22nd November 2021.
4. On the 22nd November 2021, Parties took directions for the disposal of the application by way of Written Submissions.
5. The Applicant's submission giving a brief history of the matter in question was to the effect that the Respondents have been illegally trying to evict her from the suit parcel of land wherein they have trespassed thereto, chased away the Applicant's sons, removed the cows from the grazing field, and ploughed the farm as if it were their own. The matter was reported to the area Chief and Chepseon police station but fearing for her life, the Applicant fled to safety wherein the Respondents proceeded to cut down the live fence surrounding the compound than used the branches and twigs to block the entrance to her house making it inaccessible.
6. The Plaintiff/Applicant framed her issues for determination as follows;
 - i. Whether or not the Applicant is entitled to the temporary injunction sought.
 - ii. Whether the Defendants should bear the cost.
7. On the first issue for determination, the Applicant relied on the provisions of Order 40(1) (a) and (b) of the Civil Procedure Rules as well as the landmark case of *Giella vs Cassman Brown* [1973] E.A 358 and *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125 to submit that she had lived on the suit land, which she referred to as her matrimonial home for 15 years. That it was only upon the demise of her husband that the Respondents were out to frustrate her and her children whom they had chased out of the suit land. That on 15th August 2011, she had acquired orders from the court to use the suit land pending the conclusion of the Succession Cause. Further orders had been that she be included in the Succession Cause so as to get two acres of the deceased's estate. That she had also procured a special *Grant Ad Litem* on the 19th October 2018 to enable her pursue her late husband's assets.



8. That she would suffer irreparable loss if the orders sought were not granted since she was a widow and a small subsistence farmer working from hand to mouth, with a few cattle for milk and a small portion for her crops, to fend for herself and her children.
9. The Applicant relied on the decided case in *KENLAB Construction Limited vs New Gatitu Service Limited & Another* [1990] eKLR to submit that she had an equitable or legal right which required protection by injunction. The Applicant sought for the application to be allowed with costs.
10. In opposition to the Applicant's application, the Respondents' submission was to the effect that they were the administrators to the estate of the late Sarah Cherono Chesimet who was the proprietor of the suit land Kericho/Chesinende/244. That the Applicant is the wife of the deceased Alfred Cheruiyot Langat who now lays claim of 2 acres to the suit land. That the said claim amounted to intermeddling with the deceased's property whereas there were succession proceedings ongoing at the Kericho High Court in Succession Cause No. 311 of 2015.
11. That the sale agreement in which the Applicant sought to rely on was made between one Nelson Tengek and Alfred K Langat on a different parcel of land and was not linked to the suit land herein. That the Applicant therefore was asking for the court to assist her in propagating an illegality.
12. The Respondents submitted that the Applicant had not satisfied the threshold requirement for issuance of an interlocutory injunction. That the 1st Respondent was the registered proprietor of the suit land and therefore he had absolute and indefeasible title and rights to the land. That the Applicant was a stranger to the suit land and had no legal or equitable rights to the same.
13. The Respondents further relied on the *Giella case (supra)* to submit that the Applicant had not satisfied the principles laid therein for the grant of the interlocutory injunction sought. That the court had to weigh the relative strength of the party's case. The seriousness of the question like the strength of probability depended on the nature of the rights asserted and the practical consequences likely to flow from the interlocutory orders sought. That in determining whether or not to grant an interlocutory injunction the Court ought to take whichever course appeared to carry the lower risk of injustice. That the suit property was subject of Kericho High Court in Succession Cause No. 311 of 2015 wherein her application had been dismissed as she was neither a child nor a dependent of the estate of Sarah Cherono Chesimet. (Deceased) The Respondents thus submitted that the Applicant had not made out a Prima facie case
14. The Respondents further submitted that the Applicant had not demonstrated that she would suffer irreparable harm that could not be adequately compensated by way of damages, should the orders sought not be granted.
15. On the issue of a balance of convenience, the Respondents submitted that where there was doubt, the court ought to take into consideration the nature of injury the Respondents would suffer if the injunction was granted and they ultimately turned out to be right versus the injury the Applicant would suffer if the injunction was refused. That the burden was upon the Applicant to show that the injury to be suffered would be greater if the application was refused than if it was been granted, the burden which the Applicant failed to discharge and therefore the burden of convenience did not lie with her.
16. That the Applicant based her application on an allegation that her late husband had purchased the parcel of land from one Nelson Tegek (deceased) was neither a beneficiary in the estate of Sarah Cherono Chesimet nor a purchaser of the said estate. The Respondents sought for the application to be dismissed with costs.



Determination.

17. The often cited case of *Giella -vs- Cassman Brown & Company Ltd* (1973) EA 358 is the leading authority on the conditions that an Applicant needs to satisfy for the grant of an interlocutory injunction. An Applicant needs, firstly to establish and demonstrate they have prima facie case with a probability of success, secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and third in case the Court is in any doubt in regard to the first two conditions the Court may determine the matter by considering in whose favor the balance of convenience tilts.
18. In the present matter, there is no dispute that one Sarah Cheronno Chesimet(deceased) was the registered proprietor of land parcel LR No. Kericho/Chesinende/244 the subject matter herein and to which the Plaintiff/Applicant has laid claim of adverse possession of 2 acres comprised therein having lived on the same for a period of over 15 years.
19. The bone of contention herein is that the Respondents are the administrators to the estate of the late Sarah Cheronno Chesimet who was the proprietor of the suit land Kericho/Chesinende/244. That the Applicant is the wife of the deceased Alfred Cheruiyot Langat who now lays claim of 2 acres to the suit land. That the said claim amounts to intermeddling with the deceased's property wherein there are succession proceedings ongoing at the Kericho High Court in Succession Cause No. 311 of 2015.
20. Applying the above principles in the *Giella case* (supra) I shall frame my issues for determination therein. I have considered the present application and the documents adduced in evidence in support thereof vis a vis the Respondents 'opposing' affidavit. Looking at the facts of this case as submitted, 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.
21. The Court is not required to determine the merit of the case, but by virtue of the fact that the Applicant is seeking 2 acres of the Deceased's estate comprised in Kericho/Chesinende/244 by adverse possession, and further having considered the award issued in Kipkelion Land Disputes Tribunal in claim No. 19 of 2011, which award was adopted as the judgment of the Court in the Kericho Chief Magistrate's Court in Misc Application No. 32 of 2011 and which order was not appealed from, I find that the Applicant has established a prima facie case as was held in the case of *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125.
22. There is no doubt that the present suit was instituted by the Applicant vide her Originating Summons dated 16th April 2021 wherein the hearing is yet to proceed. Since it is not disputed that the Applicant/Plaintiff has been utilizing part of the suit parcel of land, and all that she seeks is an injunction against the Respondents restraining them either by themselves, agents, servants, employees, workers, assigns, personal representatives, any other person acting on their behalf and/or any third parties claiming through them from trespassing on, cultivating, wasting, constructing on alienating or otherwise interfering or dealing with a portion of land measuring approximately two acres comprised in the parcel of land known as LR No. Kericho/Chesinende/244 so as to preserve the suit land from wasting, pending the hearing and determination of this suit, I see no harm in allowing the said application.
23. As I understand it, the orders sought by the Applicant would in my view be the existing state of affairs where it is intended to also freeze the state of affairs. I have balanced all the factors and circumstances in the instant suit



24. The Applicant has clearly described the state of affairs existing which state of affair has been denied by the Respondent herein, to which that the Applicant has laid claim of part of the suit land by way of adverse possession. That during the pendency of the suit, the Respondents herein have proceeded to trespassed thereto, chase away her sons, remove the cows from the grazing field, and ploughed the farm as if it were their own and to cut down the live fence surrounding the compound than used the branches and twigs to block the entrance to her house making it inaccessible.
25. The Applicant now seeks for orders to preserve the suit land from further activities by the Respondent that may be detrimental to her proprietary rights in the suit land. It is certainly worth pointing out that since the *status quo* orders assist in case management, the court must always keep an eye on the fundamentals to know the state of affairs being kept in situ.
26. The Court of Appeal in the case of *Mugab-v- Kunga* [1988] KLR 748, held that in land matters status quo orders should always be issued for purposes of preserving the subject matter. The court’s practice directions vide Gazette Notice No. 5178/2014 Practice direction No. 28(k) gives the court the leeway and discretion to make an order for status quo to be maintained until determination of the case.
27. With this in mind, and whilst cautioning myself on the preservation of the status quo so as to ensure that no party is prejudiced. I would therefore interfere in a limited manner by clearly defining the status quo herein to the effect that:
- i. An order of *status quo* is herein issued to be maintained by all the parties in that it must be understood that the Plaintiff /Applicant is still in possession of the portion of land in parcel LR No. Kericho/Chesinende/244, land that she was in at the time of filing the Originating Summons.
 - ii. There shall not be any further trespass thereto, chasing away the Applicant or her sons from therein, removing the cows from the grazing field, and ploughing of the farm by the Respondents or interfering with parcel registration LR No. LR No. Kericho/Chesinende/244 for that matter.
 - iii. Such *status quo* is to be maintained by all parties until the matter is finally heard and determined.
 - iv. The cost of the application dated the 29th September 2021 shall be in the cause.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 10TH DAY OF NOVEMBER 2022.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

