



REPUBLIC OF KENYA



**Kolum v Mzee & 4 others (Environment and Land Appeal
E001 of 2024) [2025] KEELC 3708 (KLR) (7 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3708 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT AND LAND APPEAL E001 OF 2024
GMA ONGONDO, J
MAY 7, 2025**

BETWEEN

WILLY KIPLAGAT KOLUM APPELLANT

AND

KITUR MZEE 1ST RESPONDENT

RAEL JEMELI SORGOR 2ND RESPONDENT

SAMWEL KIBIWOT SAWE 3RD RESPONDENT

THE COUNTY SURVEYOR, NANDI COUNTY 4TH RESPONDENT

THE LAND REGISTRAR, NANDI COUNTY 5TH RESPONDENT

RULING

1. This ruling is in respect of two applications dated 4th November 2024 and 3rd February 2025 (hereinafter referred to as the 1st and 2nd applications respectively).
2. The 1st application was instituted by way of Notice of Motion dated 4th November 2024 pursuant to, inter alia, Article 159 (2) (b) of *the Constitution* of Kenya, Sections 1A, 1B, 3A, 3 and 63 (c) of the *Civil Procedure Act*, Chapter 21 Laws of Kenya and Order 40 Rules 1, 3 and 4 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, by the appellant/applicant Willy Kiplagat Kolum, acting in person, seeking the following orders;
 - a. Spent
 - b. Spent
 - c. That this Honourable Court be pleased to issue an order of injunction to restrain the respondents, the servants and agents of others claiming through them or others jointly and severally from trespassing, ploughing, tilling, fencing, surveying, erecting structures on,



leasing, charging, cultivating, damaging, destroying, wasting and/or in any manner whatsoever unlawfully dealing with said Nandi/Petty Cheptil/6 (the suit land herein) pending the hearing of this appeal.

- d. That the cost of this application be provided for.
3. The said application is founded upon various grounds including:
 - a. That the applicant is the registered owner of the suit land, having been so registered by way of transmission and a title deed duly issued.
 - b. That the applicant instituted court proceedings against the respondents in Kapsabet Chief Magistrate's Court Environment and Land Case No. E002 of 2021 which came up for judgment on the 26th July 2024 with the claim being dismissed with costs.
 - c. That upon dismissal of the same, the applicant filed this appeal against the said judgment and the same was duly served upon all the respondents.
 - d. That the said trespass and construction of the unlawful fence was in utter contempt of the status quo and denying the applicant/appellant an opportunity to ventilate his appeal without undue interference of the suit premises as it is the law that no party should be allowed to benefit from the blatant abuse of the process of the law.
 - e. That the applicant has an arguable appeal with good chances of success.
 - f. That damages will not be adequate remedy.
 4. Further, the application is anchored on the applicant's supporting affidavit of seventeen paragraphs sworn on even date, alongside the annexed documents marked as WKK 1 to WKK 3 namely; a copy of the plaint in Kapsabet Chief Magistrate's Court Environment and Land Case No. E002 of 2021, a copy of the title deed of the suit land and copies of authorities respectively.
 5. Briefly, the applicant laments that he is the registered owner of the suit land, having been so registered by way of transmission and a title deed duly issued. That on or about 22nd October 2024, the 1st respondent and his workers trespassed onto the suit land and erected a barbed wire fence using posts, thereby violating the status quo that obtained on the 22nd August 2024 when this appeal was filed. That it is imperative that an order of status quo do issue herein so as not to render the appeal nugatory. That he has an arguable appeal with good chances of success and damages will not be an adequate remedy in the circumstances.
 6. The respondents through M/s Kipkorir, Kipkorir C K and Company Advocates filed a Replying Affidavit sworn on 3rd February 2025 by the 1st respondent herein, opposing the application. He deponed that the respondents are purchasers for value of portions of the suit land, and have lived thereon from the year 1980 to date. That the allegations that the respondents have started erecting fences on the suit land are baseless and unfounded since the same have been in existence for a period exceeding 40 years. That the instant application has not met the threshold for grant of an order of injunction and that the respondents will be prejudiced if the orders sought therein are granted.
 7. In his rejoinder, the appellant filed a Supplementary Affidavit dated 10th February 2025 wherein he denied the averments in the Respondents' Replying Affidavit as captured in paragraph 6 hereinabove and affirmed that the 1st application has met the threshold for grant of an injunction order as set out in the case of *Giella vs Cassman Brown & Co. (1973) EA 358*.



8. The 2nd application was commenced by way of Notice of Motion dated 3rd February 2025 brought under, inter alia, Article 50 (1) of *the Constitution* of Kenya, Sections 1A, 1B of the *Civil Procedure Act*, Chapter 21 Laws of Kenya and Order 51 Rule 1 of the Civil Procedure Rules, 2010, by the 1st to 3rd respondents, through M/s Kipkorir, Kipkorir C K and Company Advocates, seeking the orders infra;
 - a. Spent
 - b. That this Honourable Court do order stay of proceedings in this case pending the hearing and determination of Eldoret High Court Succession Cause No. 286 of 1997, In the matter of the Estate of Kipkolum arap Mibei – Deceased.
 - c. That the costs of this application be provided for.
9. The said application is founded upon six grounds which include:
 - a. That the appellant and respondents herein are parties in Eldoret High Court Succession Cause No. 286 of 1997.
 - b. That the subject matter in dispute and for determination in both the cases is the suit land herein.
 - c. That if the proceedings pending before this Honourable Court are not stayed, it is likely to render conflicting decisions over the same subject matter in Eldoret High Court Succession Cause No. 286 of 1997, in which the applicants therein are seeking revocation of grant issued.
 - d. That the applicants have moved this Honourable Court timeously and without delay.
10. Further, the 2nd application is also anchored on the 1st respondent's supporting affidavit of fifteen paragraphs sworn on even date wherein he reiterated the grounds on which the application is founded. He implored the court to grant the orders sought therein.
11. In his a Replying Affidavit sworn on 19th February 2025, the appellant opposed the 2nd application and stated that it is frivolous, scandalous and constitutes an abuse of the process of the court. Thus, he urged the court to strike out or dismiss the same with costs.
12. Hearing of both the 1st and 2nd applications proceeded by way of written submissions.
13. With respect to the 1st application, the appellant/applicant's counsel, K. K. Arap Sego and Company Advocates, filed submissions dated 6th March 2025 and submitted that unless an order of status quo is issued herein, the instant appeal shall be rendered nugatory. That the appellant has established a prima facie case with a probability of success as evidenced by the memorandum of appeal on record. That an award of damages shall not suffice in the circumstances, since the applicant is the registered proprietor of the suit land. That further, the balance of convenience tilts in favour of the applicant as a registered proprietor. Thus, counsel urged the court to allow the instant application as prayed. To fortify the submissions, Counsel relied on various authoritative pronouncements including Giella case (supra) and Nguruman Limited vs Jan Bonde Nielsen and 2 others (2014) eKLR.
14. The respondent's counsel filed submissions dated 14th February 2025 and identified twin issues for determination thus: whether the instant application merits the threshold for granting the orders sought and who should pay costs? Learned Counsel submitted that the applicant has not demonstrated a prima facie case with a probability of success. That the applicant has failed to demonstrate any irreparable harm that he would suffer if the injunction is not granted as the respondents have been in continuous and uninterrupted occupation of the suit land for over 40 years, engaging in farming and residing thereon. That the respondents' said occupation is protected under the doctrine of adverse



possession and the balance of convenience tilts in their favour. That therefore, the applicant has failed to meet the threshold for grant of an interlocutory injunction as established in the cases of Giella and Nguruman (both supra), among others, relied upon to reinforce the submissions.

15. In regard to the 2nd application, the appellant’s counsel filed submissions dated 6th March 2025 and urged the court to strike out or dismiss the application with costs. Briefly, counsel submitted that the court lacks jurisdiction to stay proceedings in this matter pending the determination of the preliminary point of law as raised by the appellant in Eldoret High Court Succession Cause No. 286 of 1997 which is distinct from that which is before this court. That thus, this court is seized of jurisdiction to hear and determine the instant appeal as provided for in the *Environment and Land Court Act*. To buttress the submissions, counsel relied on the case of Owners of Motor Vessel “Lillian S” –vs- Caltex Oil (K) Ltd (1989) KLR 1 and Speaker of the National Assembly v James Njenga Karume [1992] eKLR, among other authoritative pronouncements.
16. The respondents’ counsel filed submissions dated 14th February 2025 in support of the 2nd application. Counsel submitted that there exists a strong prima facie case, to wit, Eldoret High Court Succession Cause No. 286 of 1997, which challenges the legality of the grant issued to one Mary Jeptarus Mibey and the subsequent transfer of the suit land to her name. That since the ownership of the suit land is in dispute in the said matter, the instant appeal has been lodged prematurely and risks prejudicing the pending succession proceedings. That therefore, this court ought to stay its proceedings to enable the succession court determine the validity of the grant as the same will ultimately determine the issue of ownership of the suit land. That such stay would also ensure that no conflicting decisions are issued by the High Court and this Court. That the applicants/respondents herein stand to suffer irreparable harm if the orders sought in the application are not granted.
17. Furthermore, Counsel asserted that if the High Court finds that the grant so issued to the said Mary Jeptarus Mibey was invalid, this appeal will be rendered unnecessary. That the estate’s true ownership ought to be first determined in the pending High Court succession case prior to this Court addressing any land disputes arising therefrom. Thus, counsel urged that the 2nd application be allowed as prayed. To reinforce the submissions, reliance was placed on various authorities including Mrao Limited-vs-First American Bank of Kenya Limited & 2 others [2003] KECA 175 KLR and Paul Gitonga Wanjau vs Gathuthi Tea Factory Company Ltd. & 2 others (2016) eKLR.
18. In the foregone, the following issues fall for determination:
 - a. Whether the appellant has proved the conditions set for grant of an order of injunction in the 1st application;
 - b. Whether the 2nd application has met the prerequisites for grant of an order of stay of proceedings of the instant appeal pending the hearing and determination of Eldoret High Court Succession Cause No. 286 of 1997.
 - c. Who should bear the costs herein?
19. On the first issue, it is noteworthy that an injunction is an equitable and discretionary remedy; see Order 40 of the Civil Procedure Rules 2010 and National Bank of Kenya Limited -vs- Shimmers Plaza Limited [2009] eKLR.
20. Notably, the principles of injunctions were enunciated in the Giella case (supra) and as was reiterated in the case of Nguruman Limited (supra) where the Court of Appeal held that;

“in an interlocutory injunction application, the applicant has to satisfy the triple requirements; a) establishes his case only at a prima facie level, b) demonstrates irreparable



injury if a temporary injunction is not granted and c) ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”

21. Further in the case of *Hutchings Biemer Ltd v Barclays Bank of Kenya Ltd & 2 others* [2006] eKLR, the Court of Appeal observed in part that:

“...In our view, injunctive orders are meant to preserve property and maintain the status quo...”

22. The appellant contends that he has established a prima facie case with a probability of success as evidenced by the memorandum of appeal on record herein. That the balance of convenience tilts in his favour as a registered proprietor and an award of damages shall not suffice in the circumstances. That unless the orders sought in the 1st application are issued herein, the instant appeal shall be rendered nugatory.

23. On their part, the respondents averred that the appellant has not demonstrated a prima facie case with a probability of success. That the appellant has also failed to demonstrate any irreparable harm that he would suffer if the injunction is not granted since the respondents have been in continuous and uninterrupted occupation of the suit land for over 40 years, engaging in farming and residing thereon. That therefore, the 1st application has failed to meet the threshold for grant of an interlocutory injunction as sought therein.

24. It is noted that the appellant instituted this appeal vide a Memorandum of Appeal dated 22nd August 2024 and lodged herein on even date. The same raises triable issues which call for determination by this court. The appellant has also shown that he is the registered proprietor of the suit land and is likely to suffer irreparable loss, if an order for preservation of the same does not issue herein.

25. Taking into account the application, the response thereto as well as the annexures and the rival submissions, it is my considered view that the threshold for an interim preservation order under Section 13 of the Environment and Land Court, 2015 (2011), has been met subject to the determination of the second issue herein. Undoubtedly, status quo order is envisaged under the said statutory provision.

26. It is trite law that status quo order is meant to preserve the property in question pending the outcome or termination of the case; see *Ogada-vs-Mollin* (2009) KLR 620.

27. Be that as it may, it behoves this Court to address itself to the second issue for determination herein before issuing an order for status quo to prevail upon the suit land.

28. So, has the 2nd application met the threshold for a grant of an order of stay of proceedings of the instant appeal pending the hearing and determination of Eldoret High Court Succession Cause No. 286 of 1997?

29. I associate myself with the finding in *Kenya Wildlife Service Vs James Mutembei* (2019) eKLR, where Gikonyo J. held that:

“...Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without



delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent...”

30. In the Kenya Wildlife Case (supra), Gikonyo J quoted Halsbury’s Laws of England, 4th Edition. Vol. 37 page 330 and 332 that:

“...The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue...”

31. Indeed, stay of proceedings is a discretionary power exercisable by the court upon consideration of the facts and circumstances of each case, as stated by the Court of Appeal in the case of David Morton Silverstein v Atsango Chesoni (2002) eKLR thus:

“...The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2) (b) of the Court’s own rules. But as the court pointed out in the case we have already cited, each case must depend on its own facts and the facts of this particular case before us, as were the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay...”

32. In the present case, the appellant stated that this Court lacks jurisdiction to stay proceedings in this matter since the matter before the High Court is a succession matter and is thus distinct from that which is before this court. That thus, this court is seized of jurisdiction to hear and determine the instant appeal as provided for in law.

33. On the other hand, the respondents who are the applicants in the 2nd application, asserted that ownership of the suit land is in dispute in Eldoret High Court Succession Cause No. 286 of 1997. That hence, there is a risk that hearing of this appeal would prejudice the pending succession proceedings. That therefore, this court ought to stay its proceedings so as to ensure that no conflicting decisions are issued by the High Court and this Court. That furthermore, if the High Court invalidates the grant issued to Mary Jeptarus Mibey, this appeal will be rendered unnecessary. That the estate’s true ownership ought to be first determined in the pending High Court succession case prior to this Court addressing any land disputes arising therefrom.

34. It is common ground that there exists a Succession Cause, to wit, Eldoret High Court Succession Cause No. 286 of 1997 wherein the dispute involves ownership of the suit land herein. To that end, I am persuaded by the submissions by the respondents’ counsel that hearing of this appeal may prejudice the succession proceedings in Eldoret High Court Succession Cause No. 286 of 1997. Also, there is a risk of conflicting decisions emanating from this Court and the High Court in Eldoret.

35. In light of the foregoing, I find the stay orders sought in the 2nd application herein merited.

36. Wherefore, this Court hereby determined the two applications and makes the orders infra:

- a. The 1st application instituted by way of a Notice of motion dated 4th November 2024, be and is hereby disallowed with costs to the respondent.
- b. The 2nd application instituted by way of a Notice of motion dated 3rd February 2025, is hereby allowed in terms of stay of these proceedings as stated in paragraph 8 (b) hereinabove.

37. It is so ordered.



DATED AND DELIVERED AT KAPSABET THIS 7TH DAY OF MAY 2025.

G.M.A ONGONDO

JUDGE

Present

1. Appellant
2. Mr Kutei instructed by Rop learned counsel for the 5th and 6th respondents
3. Mr Walter Kipkorir, Court Assistant

