



**Ngeno (Suing on Behalf of the Estate of Elizabeth Akinyi Kikwai) v Chepkwomy  
(Suing Through Patrick K. Chepkwony) & 3 others (Environment &  
Land Case 83 of 2013) [2024] KEELC 5081 (KLR) (4 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5081 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE 83 OF 2013**

**MC OUNDO, J**

**JULY 4, 2024**

**BETWEEN**

**WASHINGTON KIPNG'ETICH NGENO (SUING ON BEHALF OF THE ESTATE  
OF ELIZABETH AKINYI KIKWAI) ..... APPLICANT**

**AND**

**HENRY CHEPKWOMY (SUING THROUGH PATRICK K.  
CHEPKWONY) ..... 1<sup>ST</sup> RESPONDENT**

**MOSES KIPKURUI LANGAT ..... 2<sup>ND</sup> RESPONDENT**

**WILSON KIPLANGAT KIRUI ..... 3<sup>RD</sup> RESPONDENT**

**EMILY CHEROTICH KIRUI ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

- Coming up for determination is a Notice of Motion dated 12<sup>th</sup> July, 2023, brought pursuant to the provisions of Section 1A and 3A of the Civil Procedure Act, Order 51 of the Civil Procedure Rules, 2010 and Land Act, 2012, Article 22,40, 43 of the Constitution and all other enabling provisions of the law wherein the Applicant has sought for an Eviction Order against the Respondents and all persons claiming under them as well as an order of permanent injunction restraining the Respondents and all persons claiming under them from dealing in any way with the suit property herein located at Kericho/Getarwet/210 then to Kericho/Getarwet/702 and 703 which property forms part of the estate of Elizabeth Akinyi Kikwai (Deceased), pending the hearing and determination of the succession cause.
- The applicant seeks that at the OCS of the said locality ensures strict compliance of all parties with the court's orders, and for costs of the application.



3. The Application was supported by the grounds on its face and the Supporting Affidavit of equal date sworn by Washington Kipng'etich Ng'eno, the Decree Holder /Applicant herein who deponed that the suit property had been allocated to the deceased, one Elizabeth Akinyi Kikwai, his mother pursuant to a court's order. That the deceased was survived by four children and eight grandchildren all of whom were still alive.
4. That despite a lawful court order and judgment being in force, the Judgment Debtor/Respondent and his son Patrick K. Chepkwony, his proxies the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants/Respondents had subsequently disposed of his deceased's mother's estate by subdividing the same and fraudulently transferring the legal title in the suit property from the deceased to their names, wherein they were in the process of disposing of the suit property to third parties, with a view of defeating the order of the court. That subsequently, the Defendant/Respondent's aforementioned actions had amounted to intermeddling contrary to the provisions of Section 45 of the Law of Succession Act.
5. That the allegation that their family land, Kericho/Getarwet/210 had been subdivided into Kericho/Getarwet/702 and 703 and later to Kericho/Getarwet/726 and 727 had been an illegality for there had neither been consent to transfer or subdivide the suit property executed by either his late mother or grandmother.
6. That the supporting documents annexed by the Respondent allegedly belonging to the Applicant's family was fatally flawed since the title was marked (at entry No. 4) as closed on 6<sup>th</sup> May, 1993 while the Respondents' father had received his own title on 6<sup>th</sup> May, 1987 contrary to the court's order which had conferred the title upon the Applicant's family, but to be jointly registered in the names of the Applicant's father and grandmother.
7. That Kericho HCC No. 40 of 1998 which had purely been on ownership and which had been determined upon, had not been appealed against. That even upon the demise of his father, mother and grandmother, the suit property had remained intact as he had never caused any subdivision of the suit land in their names and that they were residing on the original parcel where they had been when suit No 50 of 1998 had been determined save that they were now confined to a smaller portion, the larger one having been taken over by the Respondents thus dispossessing him of the right to own property.
8. That since his family had been in occupation of the suit land for over 30 years having inherited the same from their family, who had been the parties in the original cause No. 50 of 1984, the instant application was intended to attain all rights legally and effect the terms of the court. That was in the interest of justice that the instant application be granted as prayed.
9. In response and opposition of the Applicant's Application, the Judgement Debtor/1<sup>st</sup> Respondent filed two Replying Affidavits dated 12<sup>th</sup> October, 2023 and 5<sup>th</sup> December 2023 wherein he deponed that the mother title to the suit land was Kericho/Getarwet/210 measuring about 7.11 acres and was registered in the name of Samwel Kimutai Sang. That in the year 1984, Ruth Cheptonui Kikwai and Jessy Arap Mutai had filed a case in Kericho Resident Magistrate's Court, Misc. App. No. 50 of 1984, against Henry K. Langat wherein the court had on 30<sup>th</sup> October, 1985 ruled that 3 acres from land parcel No. Kericho/Getarwet/210 was to be demarcated and registered in the name of Ruth Cheptoniu Kikwai's name with the balance of 4.11 acres registered in the name of Henry K. Langat. That subsequently, the said land parcel No. Kericho/Getarwet/210 had been subdivided into land Parcel Nos. Kericho/Getarwet/702 and 703 after the mutation forms had been executed by the executive officer of Kericho Law Courts pursuant to the aforementioned ruling.



10. That resultantly, land parcel No. Kericho/Getarwet/702 was registered in the name of Henry K. Langat while land parcel No. Kericho/Getarwet/703 was registered in the name of Ruth Cheptonui Kikwai.
11. He deponed that a perusal of the proceedings in Misc. Application No. 50 of 1984 that had been alluded to by the Applicant showed that the court's orders of 30<sup>th</sup> October, 1985 had clearly stated that Henry Langat was to be registered on the remaining land subsequent to Ruth Kikwai's excising 3 acres from land parcel No. Kericho/Getarwet/210. That on 2<sup>nd</sup> July, 1986, the court had given orders for maintenance of status quo which orders had been disobeyed by Ruth Kikwai whereby the court had issued warrants of arrest against her on 26<sup>th</sup> April, 1989 and subsequently she had been found guilty of being in contempt. That on 12<sup>th</sup> April, 1989, the attorney for Ruth Kikwai had acknowledged that his client was not residing on the contested land as she had other land parcels in Kipkelion and Litein and on 9<sup>th</sup> August 1989, Ruth's Counsel had indicated that the said Ruth had successfully transferred 3 acres to themselves having procured consent from the Bomet Land Control Board thus completing the transfer. That on 5<sup>th</sup> February, 1991, the court had set aside the court summons that had been issued as against the Defendant.
12. That the Applicant was now endeavoring to reclaim the entirety of Kericho/Getarwet/210 notwithstanding clear orders from Misc. Application No. 50 of 1984, ignoring that the land had since been transferred to third parties who were bona fide purchasers for value without notice. That however, when Jessy Mutai and Ruth Kikwai had been alive, they did not contest or raise any issue about the current parcels of land, and upon their demise, they were interred on the land they had acquired in Kipkelion.
13. That notably, Civil Suit No. 40 of 1998 that had been filed by Henry Langat in the Kericho High Court demanding to be registered as the sole proprietor of the whole of parcel No. Kericho/Getarwet/210 had been held to be res judicata since the court in Misc. Application No. 50 of 1984 had already been decided upon, which determination had neither been appealed nor reviewed, leading to the assumption that all parties had been content with the decision. That the Applicant no longer had a claim in the suit parcels of land thus the instant Application was only intended to misled the court.
14. That further, the Applicant had without authority trespassed into parcel No. Kericho/Getarwet/702 registered in the name of Henry K. Langat vide Misc. No. 50 of 1984. That the judgment of 30<sup>th</sup> October, 1985 had been reinforced by the ruling delivered by the High Court Civil Suit No. 40 of 1998 which had indicated that the estate of Ruth Kikwai was only asserting a right to 3 acres and not the entire land parcel No. Kericho/Getarwet/210.
15. That the instant Application did not meet the legal threshold and principles set out for temporary injunction and eviction since the Applicant had not shown and or established a prima facie case with probability of success. That further, the Applicant had not adduced cogent evidence to show that he would suffer irreparable harm, which would not adequately be compensated by an award of damages and that the balance of convenience tilted in his favour.
16. He thus deponed that the instant Application was fatally defective, frivolous, vexatious and an abuse of the court process.
17. The 3<sup>rd</sup> and 4<sup>th</sup> Defendant/Respondent vide their Replying Affidavit dated 5<sup>th</sup> December, 2023 sworn by Wilson Kiplangat Kirui, the 3<sup>rd</sup> Defendant/Respondent herein deponed that the Applicant had un-procedurally joined them in the instant proceedings post judgment without making a formal application. That they would be greatly prejudiced were the instant Application allowed as they would be evicted from their parcel of land without being heard which in turn would be in violation of their



rights as enshrined under the provisions of Article 50 of *the Constitution*. That further, an application for eviction ought to be heard on merits hence a party seeking the same ought to approach the court vide a Plaint especially in cases where there were new parties to the proceedings like in the present case.

18. That there was no nexus between the Applicant herein and the estate of Elizabeth Akinyi Kikwai (deceased) in relation to the suit properties hence the Applicant did not have a locus standi or capacity to bring the present Application. That the mother title to the suit parcel of land Kericho/Getarwet/210 measuring 7.11 acres was registered in the name of Samwel Kimutai Sang.
19. They reiterated the contents of the 1<sup>st</sup> Defendant/Respondent's Replying Affidavit on the history of land parcel No. Kericho/Getarwet/703 to depone that Ruth Cheptonui Kikwai and Jessy Mutai who were joint proprietors had then sold 1.12 hectares of the said land to Moses Kipkirui Langat the 2<sup>nd</sup> Defendant/Respondent (now deceased) herein. That consequently, land parcel No. Kericho/Getarwet/703 had been subdivided into land parcel Nos. Kericho/Getarwet/726 registered in the name of Moses Kipkirui Langat (Now Deceased) and Kericho/Getarwet/727. That Ruth Kikwai then sold land parcel No. Kericho/Getarwet/727 to one John Kipkorir Siele. That thereafter, Ruth and Jessy purchased another property in Kipkelion and relocated therein.
20. That Moses Kipkirui Langat (Now Deceased) sold a portion of the land to Emily Cherotich Kirui and the 3<sup>rd</sup> Defendant/Respondent thus land parcel No. Kericho/Getarwet/726 was closed to give rise to Kericho/Getarwet/1381 and 1382.
21. That the Applicant having no claim on the suit land and having failed to meet the threshold for the grant of temporary injunction and eviction orders, the instant Application was defective, frivolous, vexatious and an abuse of the court process.
22. The application was canvassed by way of written submissions wherein the Decree Holder/Applicant framed his issues for determination as hereinunder:
  - i. Whether the Applicant have a demonstrable interest in the suit.
  - ii. Whether there are judgments in the instant matter and outcome at the Court of Appeal over the subject matter herein.
  - iii. Whether the motion herein is merited.
  - iv. Whether there is a competent response in rebuttal to the applicant's motion.
  - v. Who bears the costs of the application?
    1. The Applicant's submission was that there was no competent response thus the entire Application had been uncontested hence the reliefs sought ought to be granted as prayed. That the order of eviction should issue, the Respondents having failed to give a lawful justification for their continued illegal occupation of land that did not belong to them. That further, the Respondents had sought to introduce new issues which was an afterthought and should not be entertained by the court. That the Judgement Debtor/1<sup>st</sup> Respondent herein could not place reliance and explanation of their own acts of criminality on incompetent third parties.
    2. He maintained that the Respondents had engaged in illegal schemes since their response had been intended to effect fraud and theft of land through fraudulent misrepresentations and abuse of the court process.



3. Regarding the Judgement Debtor/1<sup>st</sup> Respondent's case, he submitted that the same was gravely flawed and pleaded in ignorance of the law since the said judgement debtor had failed to avail a signed consent or authority to act for the rest of the Respondents thus there had been no Response by either the Judgment Debtor/1<sup>st</sup> Respondent or his co-Respondents and the motion should be allowed as prayed.
4. His further submission was that the judgement debtor and his co-Respondents had conceded to acts of trespass and proceeded to state that the cause of action lied in another forum. That further, the Respondents herein had colluded to illegally cause subdivision and transfer of the suit property after the judgement and loss on appeal then claim unfair trial when it had been them who had filed the suit herein against the decree holder.

### **1st, 3rd and 4th Respondents Submissions.**

27. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents vide their submissions dated 5<sup>th</sup> December, 2024 framed their issues for determination as follows:
  - i. Whether the 3<sup>rd</sup> and 4<sup>th</sup> Respondents have been properly joined to present proceedings.
  - ii. Whether the Applicant has the capacity to lodge the instant motion.
  - iii. Whether the 1<sup>st</sup> Respondent has a right of rebuttal having been dragged to court by the Applicant.
  - iv. Whether the Applicant has met the threshold for granting of orders of temporary injunction.
  - v. Whether the Respondents should be evicted.
28. On the first issue for determination as to whether the 3<sup>rd</sup> and 4<sup>th</sup> Respondents had been properly joined to the instant proceedings, reliance was placed on the provisions of Order 8 Rule 5(2) of the Civil Procedure Rules to submit in the negative, to the effect that judgement in the present matter having been delivered, the Applicant could not be allowed to amend his pleadings by bringing in new parties.
29. On the second issue for determination as to whether the Applicant had the capacity to lodge the instant motion, their submission was that it was trite law that one could not represent a deceased's estate without being officially appointed and issued with letters of administration, grant ad litem or undergoing a legal substitution. That the instant motion had been initiated by the Applicant assuming the role of a legal representative for the estate of Elizabeth Akinyi, who had not secured registration for any of the land parcels in question. That subsequently, there had been no legal connection between the Applicant and the estate of the late Ruth Kikwai, which disconnection had rendered the instant motion fundamentally flawed and legally invalid since it had been filed by an individual who was devoid of the capacity to so file the motion.
30. On the third issue for determination, the Respondents submitted in the affirmative to the effect that the 1<sup>st</sup> Respondent was entitled to a defence since the Applicant had dragged him in the present suit. That it was an established principle of law that an individual who had been dragged to court had an inherent right to defend themselves and present all the necessary evidence for their exoneration thus it was unreasonable to suggest that a person brought before court lacked the legal standing.
31. On the fourth issue for determination, reliance was placed on the provisions of Order 40 (1) (a) and (b) of the Civil Procedure Rules 2010 and the decided case of Giella v Cassman Brown & Company Limited (1973) EA 358 on the conditions for the grant of temporary injunction as well as on the



- decided case of *Mrao Ltd v First American Bank of Kenya & 2 others* (2003) KLR to submit that the documentations that had been provided showed that the case in question had previously been resolved. They reiterated the contents of their Replying Affidavit as regards the orders that had been made in Kericho Magistrates Resident Magistrate's court in Miscellaneous Application No. 50 of 1984 to submit that pursuant to the said orders the land parcel No. Kericho/Getarwet/210 had been partitioned resulting in land parcel Nos. Kerichoo/Getarwet/702 and 703 registered in the names of Henry Langat and Ruth Kikwai respectively.
32. That the said order had never been appealed against and all the subsequent disputes on the same had been declared *res judicata* hence the Applicant's attempt to secure temporary injunction against them was unfounded and demonstrated bad faith, lacking a compelling case with an unlikely chance of success. That the same was an abuse of the court process as the Applicant could not seek to restrain the parties who were currently in possession, by virtue of the aforesaid court's orders.
  33. That further, Ruth Kikwai had sold land parcel No. Kericho/Getarwet/703 to third parties who were rightfully occupying and had significantly developed the property which fact the Applicant had not disclosed. Reliance was placed in the decided case of *Kalya Soi Farmers' Cooperative Society v Paul Kirui & Another* [2013] eKLR to submit that the Applicant had not established a *prima facie* case and was just forum shopping for favorable orders.
  34. As to whether the Applicant would suffer irreparable injury, reliance was placed on the decided case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR to submit that the Applicant was merely claiming to have an interest on the subject parcel of land by being a legal representative of the estate of Elizabeth Akinyi who was a daughter in law to the late Ruth Kikwai. That further, the said Ruth had never raised an issue about the sale of land parcel No. Kericho/Getarwet/703 to third parties and that it was only the beneficiaries who were trying to reclaim the same from the said third parties who had been in occupation therein for the past 30 years and had made substantial developments on their respective portions. They thus submitted that in the alternative, they were the ones who were likely to incur substantial losses were the orders sought herein granted.
  35. The Respondents then relied on the decided case of *Paul Gitonga v Gathuthis Tea Factory Company Ltd & 2 others* [2016] eKLR to submit that having established that the Applicants had approached the court with unclean hands and material non-disclosure knowing fully well that the suit properties had been disposed of legally and transferred to third parties, the balance of convenience lay in their favour as they would suffer more harm if they were denied access to their homes and developments as registered proprietors to the suit parcels of land herein, should the orders sought be granted.
  36. As to whether they should be evicted, their submission was that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents had not been parties to the proceedings of a ruling dated 14<sup>th</sup> March 2017 in Kericho ELC No. 83 of 2013. That were the orders of eviction granted, they would be greatly prejudiced as they would be evicted and condemned unheard. That further the said ruling had held that by virtue of Kericho PMC Misc. Application No. 50 of 1984, the suit had been *res judicata* and the same had been dismissed. No orders to vacate the suit property had been issued nor was there a finding that the subject parcels of land belonged to the Applicant's grandmother Ruth Kikwai.
  37. That further, the Application for eviction had to be heard on merits hence a party seeking eviction ought to approach the court vide a plaint especially in cases where there were new parties to the proceedings like in the present case where the 3<sup>rd</sup> and 4<sup>th</sup> Respondents never participated in previous proceedings including the instant suit. That the Respondents had only been brought in by the Applicant in the present Application contrary to the mandatory provisions of Order 3 Rule 1 of the Civil Procedure Rules, 2010. Reliance was placed in the decided case of *Lynette Nasimiyu Wafula v*



David Mwangi & 4 others [2022] eKLR. They thus submitted that the mandatory orders sought in the instant application were contrary to the provisions of Order 40 of the Civil Procedure Rules and could not be granted by the court hence the eviction orders sought could not lie.

38. In conclusion, they submitted that the Applicant had not met the threshold for the grant of a temporary injunction and eviction hence the instant Application should be dismissed with costs.

#### **Determination.**

39. I have considered the Applicants' application, its opposition, the submissions by parties, the law as well as the authorities therein cited. The Applicant's application seeking eviction orders against the Respondents and all persons claiming under them as well as an order of permanent injunction restraining the Respondents and all persons claiming under them from dealing in any way with the suit property herein located at Kericho/Getarwet/210 then to Kericho/Getarwet/702 and 703 which property forms part of the estate of Elizabeth Akinyi Kikwai stems from a holding in Kericho HCC Misc. Application No. 50 of 1984.
40. To put the matter into perspective, I shall adopt its summary as was done by my sister Justice J. Onyango in her ruling dated the 10<sup>th</sup> October 2017 in which she had stated as follows;

“In 1984, a dispute arose between the defendant's mother in law Ruth Cheptonuj Kikwai-Deceased, and her husband Jessy Mutai filed a case against the plaintiff (Henry Chepkwony Langat). The plaintiff claimed that he had bought land parcel No. Kericho/Getarwet/210 from the defendant's father in law. The said dispute was decided by a panel of elders whose decision was adopted by the court in Kericho PMC Misc Application No. 50 of 1984.

The judgment was to the effect that three acres be excised from the suit land and be registered in the names of Ruth Cheptonui Kikwai and Jessy Mutai both deceased who were the defendant's mother in law and husband respectively, while the remaining portion was to be registered in the name of Henry K. A Langat. Pursuant to the said judgment the suit land was transferred to the said Ruth Cheptonui Kikwai and later sub-divided into land parcels number 702, 726 and 727. In 1998, the plaintiff filed Kericho HCCC No. 40 of 1998 against the defendant's brothers in law alleging that the said Ruth Cheptonui had fraudulently sub-divided land parcel number Kericho/Getarwet/210 into the above-mentioned three parcels and transferred them to third parties. The case was decided on a preliminary point whereby the court held that the suit was res judicata as the dispute relating to land parcel the Kericho/Getarwet/210 had already been determined by the court in Kericho RM Misc Application No 50 of 1984.....

.....The plaintiff then instituted the present suit in which he seeks to evict the defendant from land parcel number Kericho/Getarwet/702. It is clear from the proceedings that the suit land is derived from the subject matter in Kericho HCCC No. 40 of 1998.....”

41. It is against this background that I find that the present application herein seeks to effect a decree in terms of the court order made in Kericho Resident Magistrate's Court, Misc. App. No. 50 of 1984 wherein its outcome had been published in the Gazette Notice No. 186 of 22<sup>nd</sup> January 1988 registering Ruth Cheptonui Kikwai as the proprietor of land parcel No. Kericho/Getarwet/210.
42. Section 4(4) of the Limitations of Actions Act states as follows:

“ An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent Order directs



any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due”.

43. In the case of *Isaac Olang Solongo v Gladys Nanjekho Makokha (Being the administrator of the Estate Antonina Makokha (Deceased) & another* [2021] eKLR which is persuasive in nature, the court had held as follows:

“The proper position in law is therefore that it is not mandatory to substitute a deceased decree holder. If the non-execution of the decree was premised on the demise of the judgment debtor per se, and the 12 year limitation period expired during the lifetime of the judgment creditor, a court would having regard to the provisions of Order 24 Rule 10 be justified to reject the attempted execution and declare the decree stale. The decree holder should not wring his hands in helplessness owing to the demise of a judgment debtor or undertake lengthy succession proceedings to facilitate substitution. He should by simply accessing the premises take possession while holding the decree as evidence of his right as against the whole world, which would terminate the execution.”

44. Secondly, in *M’ikiara M’rinkanya & Another vs Gilbert Kabeere M’mbijiwe* [2007] eKLR the Court of Appeal had held as follows;

“From the above analysis, it is clear that a judgment for possession of land should be enforced before the expiry of the 12 years limitation period stipulated in section 7 of the Act. If the judgment is not enforced within the stipulated period, the rights of the decree holder are extinguished as stipulated in section 17 of the Act and the judgment debtor acquires possessory title by adverse possession which he can enforce in appropriate proceedings. So, quite apart from the authority of *Lougher v Donovan*, which we consider as still good law in this country, and the previous decisions of this Court, there is a statutory bar in section 7 of the Act for recovery of land including the recovery of possession of land after expiration of 12 years. It follows, therefore, that, to hold that execution proceedings to recover land are excluded from the definition of “action” in section 4 (4) of the Act would be inconsistent with the law of adverse possession.

... For the foregoing reasons, the Notice of Motion dated 15<sup>th</sup> November, 2001 and filed in court on 16<sup>th</sup> November, 2001 for warrant of eviction was, for all intents and purposes, an “action” upon a judgment to recover possession of land. The proceedings to recover land having been filed nearly 18 years after the final judgment of the Court of Appeal were statute – barred.”

45. It is thus clear that the purpose of Section 4(4) of the Limitations of Actions Act is to eradicate stale claims and stop the vexing of litigants. Where a judgment creditor elects to sleep on a decree, he is estopped from waking up from his slumber after 12 years have lapsed to claim his right. The law bars such claims. In this case the Applicant seeks to execute a decree that was issued in 1984 or 1988 (the Applicant had cleverly failed to disclose the date when the ruling was delivered in Kericho Resident Magistrate’s Court, Misc. App. No. 50 of 1984) which is 39 or 35 years respectively which in my humble opinion would be statute barred. In the end, I accordingly dismiss the application dated 12<sup>th</sup> July, 2023 with costs.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 4<sup>TH</sup> DAY OF JULY 2024**



**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

