



Chemutai (Suing as the legal representative of the Estate of William Kipsongok Lagat) v Choi & 5 others (Environment & Land Case E002 of 2022) [2023] KEELC 441 (KLR) (6 February 2023) (Ruling)

Neutral citation: [2023] KEELC 441 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE E002 OF 2022
MN MWANYALE, J
FEBRUARY 6, 2023**

BETWEEN

FRANCISCA LAGAT CHEMUTAI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF WILLIAM KIPSONGOK LAGAT) PLAINTIFF

AND

**JANE CHEPKEMBOI CHOI 1ST DEFENDANT
FRANCIS KIPCHUMBA KOGO 2ND DEFENDANT
RAPHAEL KIBET 3RD DEFENDANT
DAVID KIPRONO 4TH DEFENDANT
RICHARD KIPRUTO 5TH DEFENDANT
JULIUS KIBET 6TH DEFENDANT**

RULING

1. By a Notice of Motion application dated July 15, 2022 filed under Order 40 Rule 1,2 and 2A of [Civil Procedure Rules](#) 2010 and section 1A, 1B, 3A and 63 (E) of the [Civil Procedure Act](#) and all other enabling provisions of the law. The applicant is seeking the following orders:-
 1. Spent
 2. Spent
 3. That, pending the hearing and determination of this suit, this honourable court be pleased to grant an order of interim injunction restraining the respondents either by themselves, agents, servants and/or any other person acting under their instructions entering, causing wanton destruction, sub-dividing, causing registration, charging, selling, alienating, interfering in any



way and/or evicting the Plaintiff from a parcel of land otherwise known as L.R. No. Nandi/Ollessos/80, and in particular, a portion of the subject land measuring 7.0 (Seven decimal zero) acres which has been in actual use and/or possession of the plaintiff/applicant.

4. O.C.S. Lessos Police Station do effect the orders.
 5. Costs of this application be borne by the Respondents/respondents
 6. Such further and/or other orders be made as the Court may deem fit and expedient.
2. The motion is premised on the supporting affidavit sworn by Francisca Chemutai Lagat and grounds (a) to (j) set out on the face of the Application. The applicant deposes that;
- a) She has acquired adverse possession rights over a portion of the suit property and is apprehensive that the respondents may alienate and/or forcefully evict her with a view to defeat the applicant's rights.
 - b) The applicant has been in actual, peaceful and uninterrupted occupation and use of the suit land for an over 49 years and the respondents have commenced illegal activities on the suit land.
 - c) The balance of convenience tilts in applicant's favour as she has been in actual use and occupation of suit land for over 49 years and any orders issued herein will not prejudice the respondents herein.
 - d) Since the applicant relies on the suit portion to earn her livelihood, she will suffer substantial loss if the orders sought are not granted.
3. The instant applicant is opposed vide replying affidavits sworn on July 25, 2022 by Jane Chepkemboi Choi alias Kaatharina Chepkemboi Chepkosion and Francis Kipchumba Kogo, the 1st and 2nd respondents herein. They contend that;-
- a) They are the registered proprietors over the suit property hence their legal rights to the property as established under article 40 of the Constitution.
 - b) The applicant has not met the threshold for grant of injunction asset out in the case of *Giella v Cassman Brown* [1973] EA 358.
 - c) As a result the Application ought to be dismissed.
4. In response to the replying affidavits, the applicant filed supplementary affidavit sworn on October 25, 2022. A part from reiterating the contents in supporting affidavit as enumerated herein, the applicant further deposed that; -
- a) Her rights over the suit portion of land for adverse possession did override the proprietary interest being enjoyed by the respondents at the expiry of 12 year limitation period.
 - b) The respondents have not challenged the photographs annexed to the application which show and assert her occupation over 7.0 acres at the exclusion of the respondents.
 - c) This suit was instituted by the Applicant as a legal representative of the estate of William Kipsongok Lagat (deceased) vide limited Grant of Letters of Administration Ad Litem Annexed to the Application.
5. On 12/10/2022 parties agreed to canvass the application by way of written submissions. Both parties complied by filing their respective submissions.



6. The applicant submitted that the instant application meets the threshold for grant of temporary injunction as set out in the celebrated case of *Giella v Cassman Brown* [1973] E.A. 358. They urged this court to allow the application as prayed.
7. On their part, the respondent's Advocate submitted that the applicant has not satisfied the principles for grant of injunction as set out in the *Giella* case (*supra*) as well as the case of *American Cyanamid Company v Ethicom Limited* [1975] A AER 504 where similar principles were noted.

Analysis And Determination:

8. The principles guiding courts handling such an application were laid down in the case of *Giella v Cassman Brown Company Limited* [1973] 358 where the applicant must satisfy the following triple requirements:-
 - i) Establish a prima facie case,
 - ii) Demonstrate irreparable loss if temporary injunction is not granted, and
 - iii) Show that the balance of convenience tilts in their favour.
9. On the first principle, which I shall treat as an issue, as to whether the applicant in this matter has made out a *prima facie* case with a probability of success, I am guided by the Court of Appeal decision in *Mrao Limited v First American Bank of Kenya Limited and 2 others* [2003] eKLR where a prima facie case was defined as:

“a *prima facie* case in a Civil Application includes but is not confined to a ‘genuine and arguable’. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
10. Bearing these decisions in mind and without delving into the intricacies of the case, the applicant claims that she has occupied and has been utilizing 7.0 acres of the suit property for over 49 years. That the suit property is registered in the name of the respondents. That she now seeks to be declared the owner of 7.0 acres of the suit property by the operation of adverse possession.
11. The respondents on the other hand have neither disputed occupation of the suit portion by the applicant nor their proprietorship over the entire suit parcel. Considering these facts, there is not guarantee that at the end of the trial status quo will be obtaining against the register of the suit land or on the ground. I am therefore satisfied that the applicant has established a *prima facie* case at this stage.
12. As regards the second principle on irreparable loss if temporary injunction is not granted, the applicant exhibited photographs of developments on the suit portion of land which exhibits were not denied by the respondents. By the court not granting orders of injunction in such a situation where the applicant is in occupation, there is a possibility of an eviction at his stage which would be premature as it would lead to irreparable loss and damage. The balance of convenience equally tilts in favour of the applicant.
13. Having said all that, this court issued orders of status quo on November 3, 2022 pending hearing of this application. In my considered view, it will be in the interest of justice to maintain the status quo orders pending hearing and determination of this suit in order to preserve the substratum of the matter which is the portion of the suit property. Am ably guided by the Court of Appeal decision in the case of *Mugah v Kunga* [1988] KLR 748 where the practice of issuing status quo orders in and matters was upheld.



14. The view of this court has also been informed by the case of *Texaco Limited v Mulberry Limited* [1972] I WLR 814 where it was held that;

“the end result is that status quo orders will issue not just when the court is prompted by way of formal applications for injunction or conservatory or stay orders, but also when the court is of the view that as a case management strategy it would be more proportionate and appropriate without prejudicing one party to issue a ‘status quo’ order.”

15. Therefore an order of status quo both in the register and on the ground in lieu of temporary injunction as prayed by applicant shall suffice to preserve the suit property without prejudicing any party.

16. For avoidance of doubt, status quo on the ground is that it is the applicant who is in possession of the suit property, she may retain possession of the portion in dispute i.e. 7.0 acres, but ought not erect any additional structures until final determination of this suit. Status quo in the register is that the respondents who names appear as registered proprietors remain so and they should not sell, charge, lease or enter into dealings over the disputed property until finalization of this suit.

17. As regards costs, the same shall be in the cause.

18. It is so ordered.

DATED AT KAPSABET THIS 6TH DAY OF FEBRUARY, 2023.

HON. M. N. MWANYALE,

JUDGE

In the presence of;

Mr. Kiprono for the Applicant

Ms. Chumba holding brief for Mr. Choge for Respondent

