



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kiting’u v Makau & 2 others (Environment & Land Case  
E040 of 2022) [2023] KEELC 16103 (KLR) (14 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16103 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE E040 OF 2022**

**CA OCHIENG, J**

**MARCH 14, 2023**

**BETWEEN**

**KIWA KITING’U ..... PLAINTIFF**

**AND**

**JOSEPH KITING’U MAKAU ..... 1<sup>ST</sup> DEFENDANT**

**MAURICE NZIOKI MAKAU ..... 2<sup>ND</sup> DEFENDANT**

**DANIEL KAVOYA MAKAU ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. What is before court for determination is the plaintiff’s notice of motion application dated the 31<sup>st</sup> may, 2022 where he seeks the following orders:
  1. Spent
  2. That upon granting prayer (1), this Honourable Court be pleased to issue interim orders in terms of prayer (3) herein below.
  3. That pending the hearing and determination of the main suit herein, this Honourable Court be pleased to restrain by way of injunction the Defendants herein either by themselves, agents, servants and/or assignees from in any way trespassing, interfering and/or damaging any property on land parcel No. Donyo Sabuk/Komarock Block 1/96849.
  4. That the costs of this Application be provided for.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Kiwa Kiting’u where he deposes that he is the registered proprietor of land parcel number Donyo Sabuk/ Komarock Block 1/96849 hereinafter referred to as the ‘suit land’, which he holds in trust for himself and other beneficiaries namely Philip Makau Kiting’u, Kathukya Kiting’u, Penina Munyiva Mutunga,



Beatrice Kithei Kiting’u and Mwikali Mutua. He explains that, at a meeting held on 16<sup>th</sup> May, 2022 at Kantafu Chief’s office and convened by people claiming to be grandsons of the late Kiting’u Mutua, various issues were discussed including repossession of six (6) acres of land from him. Further, that after the said meeting, the Defendants herein proceeded to the suit land and committed acts of destruction including burning foliage and threatening to beat him up. He avers that unless the orders sought are granted, the Defendants without any colour of right may continue to illegally encroach on the suit land and start working therein.

3. The Defendants opposed the instant Application by filing a Replying Affidavit sworn by the 1<sup>st</sup> Defendant Joseph Kiting’u Makau where he deposes that the said Application is frivolous, defective, incompetent, illogical and an afterthought. He avers that the allegations that they have trespassed on the suit land and interfered with it, is false and misleading. He contends that they are beneficiaries of the Estate of Kiting’u Mutua Kwiliwa (deceased) by virtue of being grandsons and they are entitled to some interests on the said land. He confirms that the Plaintiff is the Administrator of the Estate of the late Kiting’u Mutua Kwiliwa and has been entrusted by the court to ensure the said Estate is distributed as per the law. He claims the Administrator has illegally sold part of the Estate without involving the other family members and/or beneficiaries and used his position to their disadvantage. Further, that a meeting was convened at the Kantafu Chief’s office where they were summoned to seek clarifications in respect to the said sale. He insists the Plaintiff who is holding the suit land in trust for other beneficiaries, has failed to divulge to them, the acreage of the said suit land. He states that the Plaintiff has failed to demonstrate that he is capable of administering the deceased Estate, hence the Court should direct the land to be divided equally among all the beneficiaries. Further, that the Plaintiff has unfairly apportioned the suit land to other beneficiaries by allocating himself a larger portion than others and refused to subdivide it. He denies that they committed destruction including burning foliage and threatening to beat the Plaintiff. He contends that the title of the suit land was processed on 18<sup>th</sup> February, 2021 after they had raised issues about the mother title which was Donyo Sabuk/Komarock Block 1/58 and it was during the year 2020 when they raised a red flag on how the Plaintiff was selling the suit land. He reiterates that as a result of the lack of transparency on the part of the Plaintiff, he registered a caution over title number Donyo Sabuk/Komarock Block 1/88327 but was informed that the same was subdivided into four portions being Donyo Sabuk/Komarock Block 1/96848, 96849, 96850 and 96851 respectively, which they do not know the owners. Further, it is only the suit land registered in the name of the Plaintiff.
4. The Application was canvassed by way of written submissions.

### **Analysis and Determination**

5. Upon consideration of the instant Notice of Motion Application including the respective affidavits, annexures, and rivalling submissions, the only issue for determination is whether the Plaintiff is entitled to an order of temporary injunction restraining the Defendants from interfering with the suit land, pending the outcome of this suit.
6. The Plaintiff in his submissions contend that he has established *prima facie* case as he is the registered owner of the suit land which he holds in trust for himself and for the other beneficiaries namely Philip Makau Kiting’u, Kathukya Kiting’u, Penina Munyiva Mutunga, Beatrice Kithei Kiting’u and Mwikali Mutua. He insists that he never sanctioned a meeting convened at the Chief’s office in Kantafu. He contends that the Defendants herein have ambiguously stated that they are beneficiaries of the Estate of the late Kiting’u Mutua Kwiliwa without demonstrating their entitlement to the same. He reiterates that the Defendants’ actions of interfering with the suit land will occasion him including the other beneficiaries whom he holds the land in trust for, irreparable loss. To support his averments, he has



relied on the following decisions: *Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & Another* (2019) eKLR; *Giella Vs Cassman Brown & Company Limited* (1973) EA 358; *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others* (2016) eKLR; *American Cyanamid Co. vs Ethicom Limited* (1975) AER 504; *Paul Njau Kimutia v Dickson Mbugua Njau* (2011) eKLR and *Priscar Bosibori Peter v Cecilia Nyangara Mokaya & Another* (2013) eKLR.

7. The Defendants in their submissions reiterated their averments as per the Replying Affidavit and insist that the Plaintiff has not established a prima facie case and has not demonstrated that he shall suffer from irreparable harm or damage if the orders sought are not granted. They insist that as grandsons of Kiting’u Mutua Kwiliwa, they are entitled to use the suit land. To support their averments, they have relied on the case of *Giella Vs Cassman Brown & Company Limited* (1973) EA 358.
8. In line with the principles established in the case of *Giella Vs Cassman Brown & Company Limited* (1973) EA 358, I will proceed to decipher whether the Plaintiff is entitled to the orders as sought in the instant Application.
9. As to whether the Plaintiff has established a prima facie case, I will rely on the definition of the same as stated in the case of *Mrao Ltd v First American Bank Limited* (2003) K.L.R 125 where the Court described it as follows:

... 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. In this instance the Plaintiff confirms he is the registered proprietor of the suit land which he holds in trust for himself and for the following beneficiaries: Philip Makau Kiting’u, Kathukya Kiting’u, Penina Munyiva Mutunga, Beatrice Kithei Kiting’u and Mwikali Mutua. The Plaintiff has annexed a copy of the Certificate of Title which confirms this position. The Defendants claim to be the beneficiaries of the Estate of the late Kiting’u Mutua Kwiliwa hence have a right to the suit land. I note the Defendants are not listed as any of the beneficiaries in the Certificate of Title which was presented in Court. Further, the Defendants have not provided any documentary proof to confirm they are beneficiaries to the Estate of Kiting’u Mutua Kwiliwa. They have further not indicated whose children they are. As per the *Law of Succession Act*, the direct beneficiaries of a deceased person are the children but grandchildren only become beneficiaries when the Children are not there. In this instance, I opine that the issues the Defendants are raising herein should actually have been canvassed in the Court dealing with the succession cause as this Court is devoid of the jurisdiction to handle them. However, at this juncture, the issue before court concerns interference with the suit land. It is my considered view that since the Plaintiff holds the Certificate of Title with other named beneficiaries who are not the Defendants herein, I find that he has indeed established a prima facie case to warrant the orders as sought.
11. As to whether the Plaintiff will suffer irreparable harm that cannot be compensated by way of damages, I note the Defendants claim a right over the suit land as beneficiaries. Further, I note from the Certificate of Title that the suit land is owned by several persons and the Defendants have not indicated whether any of the said beneficiaries named therein, are their parents. Further, the Plaintiff claims the Defendants have continued to interfere with the suit land and threatened him. To my mind even if the Defendants had a right over the suit land as claimed, I opine that they should not interfere with it. Further, they have a recourse to lodge a complaint against the Administrator, within the succession cause. In the case of *Nguruman Ltd. Vs. Jan Bonde Nielsen* CA No. 77 of 2012, the Court of Appeal was emphatic that for irreparable harm to qualify, it should not be speculative. It held that there must be some unfounded fear or apprehension and that injunctive will issue solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable which



cannot be adequately compensated by damages. In relying on the decision cited above and based on the circumstances at hand, I find that the Plaintiff's alleged injuries are not speculative as he has demonstrated the harm he will suffer together with other beneficiaries mentioned in the Certificate of Title, if the injunctive orders are denied.

12. On the question of balance of convenience, from the evidence presented by the parties, I find that the balance tilts in favour of the Plaintiff whose rights have been infringed upon by the Defendants.
13. It is against the foregoing that I find the plaintiff's notice of motion dated the May 31, 2022 merited and will proceed to make the following final orders:
  - a. That pending the hearing and determination of the main suit herein, the Defendants either by themselves, agents, servants and/or assignees are hereby restrained from in any way trespassing, interfering and/or damaging any property on land parcel No. Donyo Sabuk/Komarock Block 1/96849.
  - b. Costs of the Application will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 14<sup>TH</sup> DAY OF MARCH, 2023**

**CHRISTINE OCHIENG**

**JUDGE**

