



Sum (Suing as the administrator of the estate of Ernest Sum) v Samoei (Environment & Land Case E057 of 2022) [2023] KEELC 16107 (KLR) (10 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16107 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E057 OF 2022**

JM ONYANGO, J

MARCH 10, 2023

BETWEEN

VERONICA SUM PLAINTIFF

SUING AS THE ADMINISTRATOR OF THE ESTATE OF ERNEST SUM

AND

JOEL SAMOEI DEFENDANT

RULING

1. This ruling is in respect of the notice of motion dated November 28, 2022 and the notice of preliminary objection dated December 6, 2022. In the notice of motion, the plaintiffs seeks a permanent injunction to restrain the defendant, his servants and/or agents and/or employees or anybody acting under his authority or instructions from trespassing, encroaching and/or developing any structure on LR No 2226 (IR 603) measuring approximately 1,300 acres or any portion thereof or doing anything against the interest of the plaintiff and/or assignees, agents, servants or relatives occupying the suit land pending the hearing and final determination of the main suit.
2. She also seeks a mandatory injunction to compel the defendant to pull down the constructed fence and back fill the trenches dug on the suit land and an order that the officer commanding station –Moiben police station to ensure compliance with the said orders.
3. The application is premised on the grounds set out on the face of the notice of motion and the applicant’s supporting affidavit sworn on the November 28, 2022. In the said affidavit she deposes that she is the administrator of the estate of Ernest Kingetich Sum who was the registered proprietor of the suit property. It is her contention that the defendant has without any colour of right started constructing a permanent fence and other illegal structures in addition to digging a trench on the suit property. He has also been allowing illegal grazers, tree cutters and charcoal burners on the suit property without the plaintiff’s consent. The applicant avers that the defendant has been sending goons armed with pangas, machetes, bows and arrows to the suit property to harass her, her family members and



workers and they are now living in constant fear of being attacked. She refutes the defendant's claim that he purchased a portion of the suit property from her late husband and states that the defendant's actions amount to a violation of her constitutional right to own property.

4. In response to the application, the defendant filed a notice of preliminary objection and a replying affidavit sworn on December 6, 2022. He deponed that he is a manager of a parcel of land measuring 100 acres belonging to one Celine George Poland who has been in occupation of the said parcel since 1982. He annexed a copy of a sale agreement dated 13th 1982 between Ernest Kipngetich Sum and Celine George. He stated that the plaintiff had acknowledged the sale of the said parcel to Celine George through her letter to the district commissioner dated July 26, 1982.
5. He maintained that the activities that he was carrying out on the suit property were authorized by Celine George Poland who according to him owns the portion measuring 100 acres. He denied bringing goons to the suit property. He averred that the applicant's daughters Eileen Sum and Edel Sum were mere beneficiaries of their later father's estate and they had no right to interfere with the portion of land occupied by the defendant. He stated that there was a succession cause - ELD HC succession cause No 38 of 2001-In the matter of the estate of Christopher Chirchir Sum which was dealing with the distribution of the suit property and he was of the view that the instant suit was intended to delay the disposal of the succession case. He averred that he could not be restrained from using the land he had been using for the last 40 years.
6. In response to the replying affidavit the applicant filed a further affidavit sworn on the December 18, 2022 in which she deponed that the ownership of the alleged 100 acres was determined in Eldoret ELC case No 418 of 2012(Celine George v Jonah Chiroch and Veronica Sum(the administrator of the estate of the late Ernest Sum) whereby the suit filed by Celine George was dismissed and the defendant had therefore given an incorrect picture on the status of the suit property. She also denied that she had been coerced by her daughters Eileen Sum and Edel Sum to sign documents in relation to this case.
7. The preliminary objection raises the following grounds:
 - i. That the defendant is only an agent of Celine George Poland who bought 100 acres of land on March 13, 1982 from Ernest Kipngetich Sum (deceased), the registered proprietor of LR No 2226 Moiben, Uasin Gishu county and the plaintiff is the administrator of the estate of the deceased.
 - ii. That there is pending before the High Court succession cause No 38 of 2018-In the matter of the estate of Christopher Kipchirchir Sum in which an application dated May 12, 2021 is pending, which application seeks to bring on board the Catholic Diocese of Eldoret (purchased 100 acres), Celine George Poland(purchased 100 acres and for whom the defendant is an agent), Ambrose Kipkorir Bitok (son and beneficiary), Fiona Jerono Sum (grand daughter of the plaintiff and beneficiary), Kenneth Kiprop (grandson of the plaintiff-beneficiary and Petitioner in the cause), Vallerie Chelagat (purchaser) Priscillah Jepkemboi Sitienei (allottee) and Kibiwot Seroney (allottee by deceased) all of whom are supposed to be given their rightful shares upon distribution which the High Court is due to handle.
 - iii. That the plaintiff cannot purport to restrain the owner of 100 acres from doing developments on her parcel of land through her agent the defendant as this is private property.
 - iv. That the suit herein is filed by Eileen Chepchumba Sum and Edel Chepkorir Sum, daughters of the plaintiff ostensibly to interfere with the intended process of distribution being handled by the High Court by trying to obtain some orders restraining the defendants so that they can have a chance to lease out the land to strangers like they did in 2022 when they leased the land



to one Martin Korir who planted all the land (sic) thereby displacing all beneficiaries and the two women used police on the land by giving them misleading information over the land.

- v. That any orders to be issued herein will conflict with the orders made in the High Court since this is the only main asset of the estate of Ernest Kipngetich Sum (deceased) which the plaintiff has failed to fully distribute.
 - vi. That the certificate of confirmation of grant dated April 18, 1988 annexed herein as “VCS 1” is expected to be consolidated with the two other causes of the same estate HC P & A No 268 of 2000 and HC P& A No 38 of 2018 before distribution is done
 - vii. That it is only fair that this suit is stayed pending determination of the succession cause before the High Court which will solve all the issues and this court will not have any case to handle.
8. The court directed that the preliminary objection and application be heard concurrently and that the same be canvassed by way of written submissions. The plaintiff filed her submissions on December 16, 2022 while the defendant filed his submissions on January 1, 2023.

Plaintiff’s Submissions.

9. With regard to the preliminary objection, learned counsel for the plaintiff submitted that the same did not meet the characteristics of a preliminary objection as set out in the case of *Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited* (1969) EA 969.
10. It was his contention that the preliminary objection filed by the defendant solely concerned itself with factual issues rather than points of law. For example, he alleged that he was an agent of Celine George Poland who allegedly bought land from Ernest Kipngetich Sum (deceased), the registered proprietor of the suit property. He also alleged that there was pending in the High Court a succession cause No 38 of 2018 where an application had been made to bring on board various parties including Celine George Poland who bought land from the deceased. The defendant has also made allegations that the instant suit is intended to interfere with the process of distribution of the estate. He submitted that these are contested issues which the court will canvass at the hearing.
11. Counsel further submitted that in Eldoret ELC case No 418 of 2012 Celine George Poland v Jonah Chiroch & Veronica Chepsat Sum, the court dismissed Celine’s claim to 100 acres from the suit property on the grounds that at the time she allegedly purchased the same the property was still charged to Agricultural Finance Corporation and there was no discharge of charge. Since the said Celine George did not appeal against the judgement of the court, the defendant’s allegations that Celine George owns 100 acres out of the suit property have no legal basis.
12. Counsel also took issue with the defendant’s contention that he was an agent of Celine George Poland as the defendant had not provided any proof of the agency relationship. He therefore submitted that for these reasons and more particularly because the preliminary objection was not based on points of law, the same should fail. He relied on the case of *Oraro v Mbaja* (2005) KLR 141 and *Margaret Wachu Karuri* (2021) eKLR for the proposition that a preliminary objection must not be blurred with factual details liable to be contested and proved through the process of evidence.
13. Turning to the application for injunction he submitted that the plaintiff had met the requirements for injunction laid down in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* (2014) eKLR. In the said case the court held as follows:

“...in an interlocutory injunction application the applicant has to satisfy the triple requirements to a) establish his case at a prima facie level, b) demonstrate irreparable injury



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

14. He submitted that the applicant had established a prima facie case by demonstrating that she was the administrator of the estate of Ernest K Sum (deceased) who was the registered proprietor of the suit property. She had also demonstrated that if the defendant who is a trespasser is allowed to continue encroaching on her land and carrying on further developments, she would suffer irreparable injury. He relied on the case of *Kipchirchir v Frank Kimeli Tenai* (2018) eKLR where the court explained that irreparable injury was injury that cannot be adequately compensated for in damages.
15. Counsel further submitted that the balance of convenience tilted in favour of the applicant as the inconvenience caused to the applicant would be greater if the injunction was not granted would be greater than that cause to the respondent since the respondents acts were likely to permanently waste or destroy the suit property. He therefore prayed that the application be granted.

Defendant's Submissions

16. On his part, learned counsel for the respondent submitted that the defendant is the manager and agent of Celine George Poland who is a purchaser of a parcel of land measuring 100 acres from the late Ernest Kipngetch Sum and the defendant is therefore not a trespasser on LR No 2226. He submitted that the defendant had been in possession of the suit property since 1982 and that the applicant was aware that her late husband had sold the land to Celine George. He referred to ELC case No 418 of 2012 Celine George Poland v Jonah Chiroch and Veronica Sum where the court found that the Celine George and the Ernest Kipngetch Sum had entered into a sale agreement for the sale of 100 acres on July 2, 1984. He argued that the purchaser of the 100 acres cannot be restrained from utilizing her parcel of land. He was of the view that the balance of convenience tilted in favour of the defendant and urged the court to dismiss the application.
17. With the regard to the preliminary objection counsel submitted on each of the grounds. On the first ground he reiterated the fact that the defendant was the agent of Celine George Poland who purchased 100 acres from Ernest Kipngetch Sum (deceased) and this fact was known to the plaintiff. He argued that the defendant who was the agent of Celine could not be restrained form utilizing the land.
18. With regard to the second ground in the PO it was his submission that there was pending in the High Court succession cause No 38 of 2018- In the matter of the estate of Christopher Kipchirchir Sum (deceased) in which there was an application seeking to enjoin all the beneficiaries of the estate of Ernest Kipngetch Sum and the said application was fixed for hearing on April 17, 2023. He contended that the instant suit had been instigated by the daughters of the late Ernest Kipngetch Sum to delay and frustrate the efforts of the beneficiaries to have the land distributed as they intend to lease the suit property to third parties.
19. On grounds 3 and 4 of the PO counsel contended that the plaintiff could not purport to restrain the owner of 100 acres form carrying developments on her land. He maintained that the filing of this case was intended to derail the distribution of the distribution of the estate of the late Ernest Sum to his beneficiaries, including Celine George Poland for whom the defendant is an agent.
20. With regard to grounds 5 and 6 and 7 of the PO counsel contended that any orders issued in this suit were likely to conflict with the orders that will made in the High Court as the only asset in the succession cause is the land registered in the name of Ernest Kipngetch Sum and the pending succession cause was intended to resolve all the issues touching on the estate of Ernest Kipngetch Sum (deceased).



Issues for Determination

21. The main issues for determination are;
 - i. Whether the preliminary objection should be sustained.
 - ii. Whether the plaintiff is entitled to an order of injunction

Analysis and Determination.

22. In order to determine whether the preliminary objection ought to be sustained it is important to define what a preliminary point of law is.
23. In the case of *Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd* [1969] EA 696 the court held as follows:

“A preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings and which if argued as preliminary point may dispose of the suit.

24. Justice Newbold in the said suit argues that

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion”

As was stated in the case of *Oraro v Mbaja* (supra)

“A preliminary objection correctly understood , is now well defined as and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection and yet bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.”

25. The preliminary objection raised by the defendants is mainly based on factual details touching on the background of the case and contested facts regarding the status of defendant as an agent of Celine George Poland and how the said Celine purchased 100 acres of land from the plaintiff's late husband Ernest Kipngetich Sum (deceased). These are facts which can only be ascertained by way of evidence.
26. Having analyzed the defendant's preliminary objection in line with the above authorities, it is my finding that the said preliminary objection does not qualify as a true preliminary objection as it is marred with contested facts.
27. I will now consider whether the plaintiff has met the conditions for the grant of a temporary injunction.
28. In order to qualify for an order of injunction an applicant must meet the conditions set out in the case of *Giella v Cassman Brown & Company Limited* 1973 EA358 which are as follows:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by



damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”

29. With regard to the first condition, the plaintiff has demonstrated that she is the administrator of the estate of Ernest Kipngetich Sum (deceased) who is the registered proprietor of LR No 2226. She has annexed a copy of the title and certificate of confirmation of grant. She has alleged that the defendant is illegally occupying a portion of the said parcel of land measuring 100 acres and is in the process of erecting a permanent fence without the plaintiff’s consent. The defendant does not deny that he is in occupation of the suit property although he claims to be there as an agent of an alleged purchaser one Celine George Poland. The plaintiff has annexed a copy of the judgment in ELC case No 418 of 2012 delivered on November 20, 2017 which shows that Celine’s claim to the suit property was dismissed by the court. I am therefore satisfied that the applicant has demonstrated that she has *prima facie* case with a probability of success.
30. On the issue of irreparable loss, the applicant has stated that if an injunction is not granted the respondent will continue trespassing upon and making further developments on the suit property which will cause further wastage and destruction to the property and he may proceed to dispose of the land. The applicant has annexed photographs to her supporting affidavit showing that the defendant has dug trenches and he is in the process of constructing a fence on the suit property. These are activities which will alter the structure of the land and result in irreparable loss to the applicant which cannot be adequately compensated by damages.
31. With regard to the balance of convenience, it is clear from the above analysis that the balance of convenience tilts in favour of the applicant who has been denied the use of her land by a person who has no valid claim to it.
32. Having carefully considered the preliminary objection, application and rival submissions, I am of the view that the preliminary objection is not sustainable and I dismiss it. On the other hand, the application for injunction has merit and I grant it and make the following orders:
 - a. A temporary injunction is hereby issued restraining the defendant, his servants and/or agents and/or employees or anybody acting under his authority or instructions from trespassing, encroaching and/or developing any structure on LR No 2226 (IR 603) measuring approximately 1,300 acres or any portion thereof or doing anything against the interest of the plaintiff and/or assignees, agents or servants or relatives occupying the suit land pending the hearing and final determination of the main suit.
 - b. The costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 10TH DAY OF MARCH 2023.

J.M ONYANGO

JUDGE.

In the presence of;

Mr. Gichana for the Plaintiff/Applicant

Mr. Miyianda for the defendant/Respondent

Court Assistant: Mr. Oniala

