



REPUBLIC OF KENYA



**Chesang v Kurui (Environment & Land Case 2 of 2022)
[2023] KEELC 17080 (KLR) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17080 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 2 OF 2022**

JM ONYANGO, J

MAY 3, 2023

BETWEEN

MAGDALINE JEBKOECH CHESANG APPLICANT

AND

JOHN KIPROP KURUI RESPONDENT

RULING

1. By a Notice of Motion dated 17th January, 2022 the Applicant filed an application seeking the following orders:
 - a. Spent
 - b. That pending the hearing and determination of this application an order of temporary injunction do issue against the Respondent by himself restraining him, his agents, servants and/or assigns from trespassing onto, selling, charging, developing, transferring, leasing, subdividing and/or in any manner dealing with all that parcel of land known as Koitoror/Tuiyoluk Block 1/Koitoror/297 also known as Soin Farm belonging to the Applicant.
 - c. That pending the hearing and determination of the main cause, the Land Registrar Uasin Gishu County be restrained from in any manner dealing with the register of all that parcel of land known as L.R No.Cherangang Kondabulet/55.
 - d. That in the alternative to prayer (b) and (c) above, there be an order of status quo both on the ground and register of all that parcel of land known as Koitoror/Tuiyoluk Block 1/ Koitoror/297 also known as Soin Farm belonging to the Applicant pending the hearing and determination of the Originating Summons filed herein.
 - e. That the costs of this application be in the cause.



2. The application is premised on the grounds set out in the Notice of Motion and the Applicant's Supporting Affidavit sworn on the 17th February, 2022.
3. The gist of the said affidavit is that the Applicant and Respondent are stepbrothers. The suit property initially belonged to their father one Kibor Kabarak (Deceased). Before his death, the deceased made a written will by which he divided his land among each of his children. The Applicant was bequeathed a portion of the suit land measuring 5 acres while the Respondent was bequeathed 2.5 acres. A copy of the said will is annexed to the Applicant's affidavit. However due to his poor health and old age, the deceased transferred the entire suit land to the Respondent's name to hold it in trust for his siblings including the Applicant. It is the Applicant's contention that she has been in occupation of the portion bequeathed to her even before their father died. The Respondent has now threatened to sell the entire parcel of land and the Applicant fears that if the suit land is sold, she will be deprived of her rightful share thus she will suffer substantial loss and damage. She is therefore of the view that it is in the best interest of justice if the status quo on the ground and in the register is maintained pending the hearing and determination of the main suit.
4. The Respondent filed a Replying Affidavit sworn on 10th June 2022 in opposition to the application. In the said affidavit he avers that the Applicant lacks the locus standi to institute this suit and the application as he has not obtained a grant of Letters of Administration in respect of the estate of the deceased. He denies that the suit property was ever registered in the name of the deceased and asserts that he is the registered proprietor of the suit land hence his rights to the said property are protected under Article 40 of *the Constitution*. He denies that the Applicant has been in occupation of the suit land as alleged and avers that the Applicant has not met the conditions for the grant of injunctive relief.
5. The Applicant filed a Further Affidavit emphasizing that she has been in occupation of the suit land for more than 20 years. She avers that since the suit land is registered in the Respondent's name, she was not required to take out a Grant of Letters of Administration. She further states that the question of whether or not the suit land belonged to their late father can only be determined at a full hearing.
6. The court directed that the application be disposed of by way of written submissions and both parties filed their submissions which I have considered.

Issues for Determination

7. Having considered the Notice of Motion and rival submissions, the singular issue for determination is whether the Applicant has met the conditions for the grant of a temporary injunction.
8. The principles that guide the court in considering whether or not to grant an application for injunction were set out in the case of *Giella v Cassman Brown & Company Ltd* 1973 EA 358 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.”



9. In the case of *Mrao v First American Bank of Kenya Limited* [2003] eKLR Bosire JA (as he then was) stated as follows:

“A prima facie case is one 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. The Applicant’s case is predicated on the fact that her late father bequeathed to her a portion of land measuring 5 acres out of land parcel no. Koitoror/Tuiyoluk Block 1/Koitoror/297 which she has been occupying for the last 20 years. It is her contention that the said parcel of land is registered in the name of the Respondent in trust for her and other beneficiaries. She has annexed a copy of her late father’s will and a letter from the chief to her affidavit in support of her claim. Although the Respondent denies that the suit land belonged their late father, this can only be established at a full hearing when both parties will be expected to present their evidence and call witnesses.

11. As was stated in the case of *Nguruman Ltd v Jane Bonde Nielsen & 2 Others* 2014 eKLR

The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.

12. On the material placed before the court, I am persuaded that the Applicant established a prima facie case with a probability of success.

13. I will now move on to consider if the Applicant is likely to suffer irreparable loss. In her Further Affidavit, the Applicant avers that she has utilized a portion of the suit land for a period of more than 20 years with the knowledge of the Respondent and other family members. Although the Respondent denies this allegation, the chief’s letter demonstrates the contrary. If the Applicant’s allegation that she has used the land for a period of 20 years is true, then she is likely to suffer irreparable loss if the Respondent effects his threat of selling it.

14. With regard to the balance of convenience, the court in the *case of Nawaz Manji & 4 Others v Vandeeep Sagoo & 8 Others* [2017]eKLR stated as follows:

“The court should issue an injunction where the balance of convenience is in favour of the plaintiff and not where the balance is in favour of the opposite party. The meaning of balance of convenience in favour of the plaintiff is that if an injunction is not granted anthe suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiffs would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that that that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting it”.

15. Whereas the applicant has indicated that she has been utilizing the land, there is no suggestion by the Respondent that he has ever utilized the 5 acres claimed by the Applicant and that may explain why he



wants to dispose of it. Although the Applicant would be inconvenienced if the suit land was sold, the Respondent would not in any way be inconvenienced as he would be paid the purchase price. It is also clear that if the injunction is not issued, the substratum of the suit would be destroyed. The interests of justice would therefore be served if the subject matter of the suit is preserved pending the hearing and determination of the main suit.

16. Consequently, I find merit in the application and I grant prayer 4 thereof and direct has follows:
17. That pending the hearing and determination of the Originating Summons herein, the status quo both on the ground and in the register of all that parcel of land known as L.R No. Koitoror/Tuiyoluk Block 1/Koitoror/297 also known as Soin Farm registered in the defendant's name be maintained.
18. The costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 3RD DAY OF MAY 2023.

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J.M ONYANGO

JUDGE

In the presence of;

- 1. Ms. Isiaho for the Plaintiff**
- 2. Mr. Tororei for the Defendant/Respondent**

Court Assistant: A. Oniala

