



**Kibet v Boinett & 5 others (Environment & Land Case 203 of 2014)
[2023] KEELC 22632 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 22632 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 203 OF 2014
JM ONYANGO, J
OCTOBER 12, 2023**

BETWEEN

ANTONY DANIEL KIBET PLAINTIFF

AND

HILLARY KIPKOSGEI BOINETT DEFENDANT

AND

**ESTATE OF JIM KIPTUM CHOGE (THROUGH THE
ADMINISTRATORS)BYRON KIPNGETICH GAWON CHOGE 1ST
PROPOSED DEFENDANT**

NOREEN ALI SHARIFF 2ND PROPOSED DEFENDANT

OFFICIAL RECEIVER 3RD PROPOSED DEFENDANT

UASIN GISHU COUNTY 4TH PROPOSED DEFENDANT

THE HON ATTORNEY GENERAL 5TH PROPOSED DEFENDANT

RULING

1. By a Notice of Motion dated 13th October, 2022 the proposed 2nd and 3rd Defendants/Applicants filed an application seeking to be joined in this suit alongside the proposed 4th, 5th and 6th defendants. They also seek an order of temporary injunction restraining the Defendant/Respondent by himself, his agents, servants employees and/or otherwise whosoever from transferring, auctioning, charging, dealing, advertising for sale, disposing of or in any other way interfering with the suit property herein being the parcel of land known as Eldoret Municipality/Block 9/1753 measuring approximately 0.996 Ha or thereabouts equivalent to 2.46 acres or thereabouts pending the hearing and determination of the suit herein. They further seek an order that the Uasin Gishu Land Registrar, the Proposed 5th Defendant be ordered to provide certified Transfer documents, application for consent, consent and



- payment of stamp duty receipt to prove payment of registration fee in respect of the suit property herein of the land parcel known as Eldoret Municipality/Block 9/1753.
2. The 31 grounds on which the application is based are enumerated on the face of the Notice of Motion and replicated in the Supporting affidavit of Byron Kipngetch Gawon Choge sworn on the 13th day of October, 2022. The long and short of it is that the suit property was registered in the name of Jim Kiptum Choge (now deceased) on 1st November, 1991. Sometime in 2000, bankruptcy proceedings were filed against the deceased vide Nairobi Commercial Division Milimani Bankruptcy Cause No. 6 of 2000 and the suit property is one of the deceased's properties whose title was handed over to the Official Receiver.
 3. That while the said title was in custody of the Official Receiver, it was mysteriously transferred to the Defendant on 18.11.2010 after the deceased had died.
 4. It is the applicant's deposition that despite the fact that the Land Registrar, Uasin Gishu, the Proposed 5th Defendant, published Notices in the Kenya Gazette No. 13867 and 1405 Corrigenda in 2011 for cancellation of the suit property after expiration of 30 days, so that the title could revert to the name of the deceased, the same had not been done to date. He therefore believes that the suit property which rightfully belongs to him and his co-administrator was fraudulently transferred to the Defendant.
 5. The application is resisted by the Proposed 4th Defendant through the Replying affidavit of Beatrice Osicho sworn on 23rd January 2023. The main ground raised in her affidavit is that the receiving order in respect of the deceased was rescinded by the Court on 15th October 2002 which was published in Gazette Notice No. 7131 of 1st November, 2002. It is thus the Proposed 4th Defendant's contention that they were released as Receiver of the deceased's estate and discharged from all their obligations in respect thereto.
 6. In response to the 4th Respondent's Replying Affidavit, Byron Kipngetch Gawon Choge filed a Further Affidavit sworn on 14th April 2023. In the said affidavit he maintains that contrary to the averment by Beatrice Osicho that the 4th Defendant was discharged from its obligations with respect to the property of the late Jim Kiptum Choge pursuant to the discharge order dated 15th October 2002, they wrote letters dated 11th October, 2011 and 15th April, 2012 conceding that there had been interference with the said deceased's titles by unauthorized persons and requested the Land Registrar to issue fresh documents of title in the name of the deceased. He is therefore of the view that the Official Receiver should be joined in the suit in order to explain how the title to the suit property was transferred to the Defendant while it was in their custody.

Parties' Submissions

7. The application was canvassed by way of written submissions. In her submissions dated 18th April, 2023 learned counsel for the proposed 2nd and 3rd Defendants submitted that their inclusion and the proposed 4th and 5th defendants is necessary for various reasons.
8. First she contends that the inclusion of the 2nd and 3rd Respondents is necessary as they have the first preemptive right to land parcel No. Eldoret Municipality/Block 9/1753 which belongs to the estate of Jim Kiptum Choge Deceased. It is not in dispute that the Official Receiver (Proposed 4th Defendant) was given the title to the suit property pursuant to the receiving order made in Nairobi Commercial Division Milimani Bankruptcy Cause No. 6 of 2000 in respect of the late Jim Kiptum Choge. After the receiving order was rescinded by the court on 15th October, 2002 the title was supposed to be returned to the administrators of the estate of the deceased.



9. However, by their letters dated 11th October, 2021 and 15th April, 2012, the Official Receiver wrote to the Land Registrar Uasin Gishu (Proposed 5th Defendant stating that it had come to their attention that there had been undue interference with the said parcel of land by unauthorized persons. The official Receiver then instructed the Land Registrar to issue fresh documents of title to the suit property free from any encumbrances to Jim Choge (deceased) to the Official Receiver to enable them finalize the matter.
10. Secondly, the Proposed 2nd and 3rd defendants contend that they need to be joined in the suit to enable them protect their right to the suit property which is currently registered in the name of the defendant and to which the plaintiff is also laying a claim.
11. Thirdly, with regard to the inclusion of the 4th Defendant, counsel contends that the Official receiver ought to be joined to the suit to explain how the suit property was unprocedurally transferred to the defendant while the original title was in their custody.
12. Fourthly, is counsel's contention that the inclusion of the 4th, 5th and indeed all the proposed defendants is necessary in order for the court to determine the real issues in controversy.
13. With regard to the prayer for injunction counsel submitted that the 2nd and 3rd proposed defendants had met the conditions for the grant of a temporary injunction set out in the case of *Giella v Cassman Brown & Company Limited* (1973) E.A 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.”
14. With regard to the first limb counsel submitted that the Proposed 2nd and 3rd defendants had demonstrated that they have a prima facie case with a probability of success. She relied on the case of *Nguruman Ltd v Jan Bonde Nielsen & Others* C.A Civil Appeal No 77 of 2012 where the Court of Appeal held that :

“...in Considering whether or not a prima facie case has been established, the court does not hold a mini-trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation”
15. She submitted that it had not been denied that the suit land belongs to the estate of Jim Kiptum Choge as evidenced by the correspondence of the proposed 4th Defendant to the Land Registrar, Uasin Gishu (Proposed 5th Defendant). Additionally the Land Registrar issued Gazette Notices No. 13867 and 14705 Corrigenda respectively cancelling the certificates of title of land parcel No. Eldoret Municipality/Block 9/1753 measuring approximately 0.996 Ha or thereabouts after the expiration of 30 days and for the title to revert back to the name of the registered owner Jim Kiptum Choge, which has not been effected to date. She submitted that since the said Gazette Notices have not been revoked by the court, it is clear that the 2nd and 3rd proposed defendants are the bona fide, absolute and indefeasible owners of the suit land to which both the plaintiff and defendant are laying a claim. In the circumstances it is her submission that the said rights ought to be protected.
16. On the second limb, she submitted that the Proposed 2nd and 3rd Defendants stand to suffer irreparable loss that cannot be compensated by damages as they would be deprived of the full use of the suit



property should the defendant charge, sell, dispose of or in any other way interfere with the said parcel of land without their knowledge. She relied on the case of *Jaj Super Power Cash and Carry Limited v Nairobi Coty Council & 2 Others* C.A No. 111 of 2002 cited in the case of *Sharrif Adi Hassan v Nadhif Jama Adan* (2006) eKLR where the Court of Appeal held that;

“This Court has held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrongdoer cannot keep what he has taken because he can pay for it”

17. Thirdly, she submitted that the balance of convenience tilts in favour of the Proposed 2nd and 3rd Defendants. She relied on the case of *Ougo & Another v Otieno* (1987) KLR 364 where the Court held that;

“The general principle is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided at the trial”

18. On the other hand, learned counsel for the Proposed 4th Defendant submitted that the procedure for insolvency matters is that when the administration of a company. Partnership or bankruptcy estate is complete, the Official Receiver may apply to the High Court for his/her release as liquidator or trustee. The release takes effect from the date it is granted. It was his contention that in the case of the Bankruptcy proceedings against Jim Kiptum Choge, the Court rescinded the Receiving Order on 15th October, 2002 thus releasing the Official Receiver from his obligations as a liquidator with effect from that date. He relied on the case of *Stephen Kimotho 7 others v Attorney General & others* (2009) eKLR for the proposition that under section 247 (of the repealed *Companies Act*) an order releasing the liquidator shall discharge administration of the affairs of the company. He can only be held liable if the said order is revoked upon proof that he acted fraudulently or suppressed or concealed material facts.

Analysis And Determination

19. The main issues for determination are;
- a. Whether the proposed Defendants should be joined as parties to the suit.
 - b. Whether an order of injunction should be granted against the Defendant.
20. In the instant case, it is common ground that the receiving order was issued by the court on 15th October, 2002. The said order was published in Gazette Notice No. 7131 of 1st November, 2002. Under Section 247 of the repealed *Companies Act*, which applied to the said proceedings, the effect of the said order was to discharge the Official Receiver of all his/her obligations under the Bankruptcy order relating to Jim Kiptum Choge. There is therefore no legal basis for joining the official Receiver in this suit.
21. Even though I agree with counsel for the Proposed 2nd and 3rd Defendants that there is need for the Official Receiver to explain why they wrote the letters dated 11th October, 2021 and 15th April, 2012 relating to the suspicious transfer of the suit property, that can be done if the Official Receiver is summoned as a witness rather than being joined as a Defendant.
22. I say so because, for one to be joined in a suit as a defendant it must be demonstrated that you are a necessary party. The definition of a necessary party is illustrated by Havelock J in *Elisbeba Muthoni Mbae V Nicholas Karani Gichoe and 2 Others* (2014) eKLR where the learned judge cited the case of



Werrot & Co Ltd & Others V Andrew Douglas Gregory and Others Nairobi HCCC No. 2363 of 1998 (unreported) where justice Ringera observed as follows:

“The guiding principle in deciding whether to add a party is whether the presence of that party is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit.

23. As stated in Sarkar’s Law of Civil Procedure, Vol 1 at p. 531-532 there are two tests in the application of this principle:
 1. There must be a right to some relief against the party sought to be added in the matter involved in the proceedings in question
 2. It should not be possible to pass an effective decree in the absence of such a party
24. In the case of Laisa Mpyoe & 2 Others V Kajiado Central Milk Project “The Board” and 5 Others (2012) eKLR Justice Odunga restated what Nambuye J (as she then was) held in Kingori V Chege & 2 Others [2002] 2 KLR 243 as the principles for determining whether or not to join a party to a suit:
 - i. He must be a necessary party
 - ii. He must be a proper party
 - iii. In the case of a defendant there must be a relief flowing from that defendant to the plaintiff
 - iv. The ultimate order or decree cannot be enforced without his presence in the matter
 - v. His presence is necessary to enable the court effectively and completely adjudicate upon and settle the questions involved in the suit
25. In the instant suit, the 2nd and 3rd Proposed Defendants/ Applicants have not demonstrated that they intend to claim any relief against the Official Receiver or that if they get an order in their favour, the same cannot be enforced without the presence of the Official Receiver. In the circumstances, I am of the view that it is not necessary for the Official Receiver to be joined as a party to the suit.
26. However, the 2nd, 3rd, 5th and 6th Proposed defendants are necessary parties as the 2nd and 3rd Proposed Defendants have a stake in the suit property and they intend to file a counterclaim against the plaintiff and 1st defendant. On the other hand, the presence of the proposed 5th and 6th defendants is necessary to enable the court adjudicate and settle all the issues in controversy.
27. With regard to the prayer for injunction, I am of the view that the proposed 2nd and 3rd Defendants have met the 3 conditions in the Giella case and the interests of justice would be served if the status quo with regard to the suit property is preserved.
28. In the final analysis the application succeeds in part and I make the following orders:
 - a. The estate of Jim Kiptum Choge (through the administrators Byron Kipngetchi Gawon Choge and Noreen ali Sharrif), the Land Registrar Uasin Gishu County, and the Attorney General be joined in the suit herein as Defendants.
 - b. The additional defendants be served with the pleadings within 21 days to enable them file their Defences and Counterclaim as well as their Witness Statements, Lists and Bundles of Documents.



- c. In the meantime, the status quo obtaining as at the date of this order with respect to land parcel number eldoret municipality/block 9/1753 be maintained pending hearing and determination of the suit herein.
- d. The costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF OCTOBER 2023

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J.M ONYANGO

JUDGE

In the presence of;

1. Mrs. Khayo for the Applicants
2. Mr. Lisiji for the Plaintiff/Respondent
3. No appearance for the Defendant

Court Assistant: A. Oniala

