



**Kenya Institute of Business & Technology & 2 others v Kandie & 2 others (Environment & Land Case E026 of 2023) [2023] KEELC 20406 (KLR) (3 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20406 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE E026 OF 2023**

**JM ONYANGO, J**

**OCTOBER 3, 2023**

**BETWEEN**

**KENYA INSTITUTE OF BUSINESS & TECHNOLOGY ..... 1<sup>ST</sup> PLAINTIFF**

**CALVIN CHEPCHUMBA MASE ..... 2<sup>ND</sup> PLAINTIFF**

**PHILIP KIPKEMBOI RONO ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**LEAH KANDIE ..... 1<sup>ST</sup> DEFENDANT**

**DAVID KIPKEMBOI KANDIE ..... 2<sup>ND</sup> DEFENDANT**

**DAVID KIPSANG KIPYEGO ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The Plaintiffs/ Applicants herein filed a Notice of Motion dated 26<sup>th</sup> April, 2023 seeking an injunction to restrain the Defendants/Respondents either by themselves, their family members, agents and/or any other persons whosoever acting on their behalf from entering, trespassing, ploughing, cultivating, planting, erecting any structures or in any way interfering with the property rights of the Plaintiffs parcel of land known as L.R No. Cheptiret/Kapkoi Block 3 (mugondo)/49 measuring 4.730 Ha pending the hearing and determination of the main suit.
2. The applicants have listed ten grounds upon which the application is based but in brief the applicants allege that that the suit property is registered in the name of the 1<sup>st</sup> Applicant and they have annexed a copy of the title deed. They further allege that the Defendants were evicted from the suit property in 2009 pursuant to a court order in Eldoret CMCC No. 250 of 2006. After one Paul Tanui purchased the land at a public auction before he sold it to the plaintiffs. The Defendants have threatened to go back to the land with a view to cultivating and planting crops thereon.



3. It is the Applicants' deposition that if the Defendants carry out their threats, the Plaintiffs will suffer irreparable loss and the 1<sup>st</sup> plaintiff institution will suffer embarrassment and humiliation.
4. The application is resisted by the Defendants through the replying affidavit of Leah Kandie, the 1<sup>st</sup> defendant herein. She deposes that she is the widow of the late Julius Kandie Sakwa (Deceased) and one of the administrators of his estate.
5. She avers that she is in occupation of the suit property together with her family and that they have been ploughing and utilizing it since it was allocated to the deceased. She adds that the 1<sup>st</sup> plaintiff had instituted a similar case in the lower court being CMELC Case No. 65 of 2021 touching on the suit property which is still pending in court. She states that in the lower court an order of injunction was granted restraining the Plaintiffs from conducting further demolition on the Defendant/Respondent's properties. She therefore contends that the doctrine of sub-judice bars the Plaintiffs from instituting a similar suit over the same subject matter.
6. She points out that there is a pending appeal in the High Court in respect of the order of injunction issued by the lower court, being HC Civil Appeal No 29 of 2020. She denies that the plaintiffs have been in possession of the suit property. She is of the view that the application is an abuse of the court process and that the same should be dismissed.
7. The application was disposed of by way of written submissions.
8. In his submissions dated 17<sup>th</sup> July 2023 learned counsel for the applicants gave a background of the suit property stating that it initially belonged to the 1<sup>st</sup> plaintiff's late husband – Julius Kandie who had charged it to Industrial and Commercial Development Corporation (ICDC) as security for a loan. When he defaulted in payment of the loan, (ICDC) sold the suit property to one Paul Tanui Kosgei Sakwa after he obtained an eviction order against the late Julius Kandie before he sold it to the 1<sup>st</sup> Plaintiff
9. He contends that the Plaintiffs have met the conditions for injunction set out in the case of *Giella v Cassman Brown* as they have established a prima facie case with a probability of success and demonstrated that if the order of injunction is not granted they will suffer irreparable loss. He relied on the case of *Nguruman Limited v Jan Bonde Nielson & 2 Others* CA No. 77 of 2012 (2014) eKLR for the proposition that the 3 conditions laid down in the *Giella* case must be met. He also relied on *Kipchirchir Kogo v Frank Kimeli Tenai* ( 2018) where the court defined the meaning of balance of convenience.
10. Commenting on the other suits touching on the subject matter, he submitted that ELC Case No. 65 of 2021 had been withdrawn as per the Notice of Withdrawal of Suit annexed to the Replying Affidavit dated 30<sup>th</sup> January, 2023 and filed on 1<sup>st</sup> March, 2023. He further submitted that the appeal filed by the deceased had abated by operation of the law as the Appellant died in 2021.

### **Analysis and Determination**

11. After a careful consideration of the application, replying affidavit, further affidavit and the rival submissions, the following issues arise for determination.
  - i. Whether the 1<sup>st</sup> Plaintiff is the registered proprietor of land parcel number Cheptiret/Kapko Block 3 (Mugondo)/49.
  - ii. Whether the suit herein is sub-judice.
  - iii. Whether the suit is res judicata.



- iv. Whether the Respondents are in actual and lawful possession of the suit property.
  - v. Whether the applicants are entitled to an order of temporary injunction.
12. It is not in dispute that the 1<sup>st</sup> plaintiff is the registered proprietor of the suit property. It has exhibited a copy of the title deed issued on 22<sup>nd</sup> November, 2016. The said title has not been challenged by the defendants and it remains valid.
  13. On the question as to whether this suit is sub-judice, what can be discerned from the affidavits filed by both parties is that the Plaintiffs had instituted a suit against the Defendants in the Chief Magistrates Court vide CMELC Case No. 65 of 2021 in which the court had issued an order dated 24.2022 stopping the plaintiffs from further demolishing the Defendants' structures or cutting down trees. However, the Plaintiffs have exhibited a Notice of Withdrawal of the said suit dated 30<sup>th</sup> January, 2023 and filed on 1<sup>st</sup> March, 2023. This means that the said suit is no longer in existence and therefore this matter is not sub-judice.
  14. The next issue for determination is whether this matter is res judicata. In his supporting affidavit the 3<sup>rd</sup> plaintiff stated that the suit property had been the subject of a legal ownership dispute culminating in an eviction order against Julius Kandie Sakwa (Deceased) who is the husband of the 1<sup>st</sup> defendant and the father of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. He annexed a copy of the eviction order. It is clear from the said eviction order that the suit was between one Paul Kosgey Tanui and Julius Kandie Sakwa.
  15. The doctrine of res judicata is set out in the *Civil Procedure Act* at Section 7 as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
  16. The Court of Appeal in the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR set out the elements that that court needs to consider when determining the issue of re judicata. The court stated that;

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

    - (a) The subject matter or issue was directly and substantially in issue in the former suit.
    - (b) That former suit was between the same parties or parties under whom they or any of them claim.
    - (c) Those parties were litigating under the same title.
    - (d) The issue was heard and finally determined in the former suit.
    - (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
  17. In order to determine whether the present suit is res judicata it is important to examine if it contains the elements mentioned in the above-cited case.



18. First the subject matter in the CMCC No. 250 of 2006 and the present suit are the same. Secondly, the former suit was not between the same parties as the ones in the current suit, nor were the parties litigating under the same title. Consequently the appeal filed by the firm of Ledisha Kittony & Co Advocates on behalf of the deceased would not have been a bar to this suit. In any case the appeal has abated by operation of the law as the deceased died in 2021 and no substitution has been done.
19. Thirdly, the suit was heard and determined by a court of competent jurisdiction. From the foregoing analysis, it is evident that the suit is not res judicata.
20. The next question is whether the defendants are in actual and lawful possession and occupation of the suit property. From the eviction order annexed to the 3<sup>rd</sup> plaintiff's affidavit, it is clear that the late Julius Kandie Sakwa who was the husband and the defendants were evicted from the suit property pursuant to the eviction order dated 27.9,2006.
21. The said eviction order addressed to the O.C.S Eldoret police Station states in part as follows:  
...” Now You Are Hereby Directed To Remove The Said Julius Kandie Sakwa together with his servants, agents and/or family members and together with their belongings as well as any other person bound by the said decree who may refuse to vacate the aid premises from the said parcel of land known as Cheptiret/Kapkoii Block 3 (Mugondoii)/49 for so doing this shall be efficient warrant and authority”
22. The above order leaves no doubt that the defendants who are the family members of Julius Kandie Sakwa are bound by the said eviction order. Indeed, the Plaintiffs have annexed copies depicting the defendants' demolished houses and stated they are currently staying at a nearby Trading centre. The plaintiffs have explained that the defendants have been making attempts to return to the suit property after they were evicted and especially after the death of Julius Kandie Sakwa.
23. In the circumstances I am satisfied that the defendants are not in actual or lawful possession or occupation of the suit property.
24. I will now proceed to determine if the Plaintiffs have met the conditions for injunction 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.”
25. 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”
26. The 1<sup>st</sup> plaintiff is the registered proprietor of the suit property and he has demonstrated the defendants are intent on trespassing thereon thus threatening the plaintiffs' proprietary rights thereto. The plaintiffs have therefore established a prima facie case with a probability of success.
27. As regards, irreparable loss, the plaintiffs have stated that the defendant's illegal activities on the suit property will expose them to embarrassment, shame and inconvenience and the they will suffer



irreparable loss as they will not be able to make use of the suit property. I am satisfied that the plaintiffs have demonstrated that they will suffer irreparable loss.

28. With regard to the balance of convenience, I have noted earlier, in this ruling that the defendants are not in occupation of the suit property as their houses were demolished pursuant to an eviction order. The balance of convenience therefore tilts in favour of the Plaintiffs.
29. From the foregoing, I am satisfied that the Plaintiffs/Applicants have satisfied the conditions for the grant of a temporary injunction. I therefore grant the application and make the following orders:
  - a. An injunction is hereby issued restraining the Defendants/Respondents either by themselves, their family members, agents and/or any other persons whosoever acting on their behalf from entering, trespassing, ploughing, cultivating, planting, erecting any structures or in any way interfering with the property rights of the Plaintiffs parcel of land known as L.R No. Cheptiret/Kapkoi Block 3 (Mugondoi)/49 measuring 4.730 Ha pending the hearing and determination of the main suit
  - b. The OCS Cheptiret Police Station is directed to ensure compliance with this order and provide the necessary security during its enforcement.
  - c. The costs of this application shall be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 3<sup>RD</sup> DAY OF OCTOBER, 2023**

.....

**J.M ONYANGO**

**JUDGE**

In the presence of;

Miss Kosgey for the Plaintiff/Applicants

Mr. Kibet for the Defendants/Respondents

Court Assistant: A. Oniala

