



REPUBLIC OF KENYA



**Busieni & 2 others v Kilel & 4 others (Environment & Land Case  
E007 of 2023) [2023] KEELC 21402 (KLR) (9 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21402 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE E007 OF 2023  
MC OUNDO, J  
NOVEMBER 9, 2023**

**BETWEEN**

**MARGARET JESANG BUSIENI ..... 1<sup>ST</sup> PLAINTIFF  
SAMUEL KIPLAGAT RUTTO ..... 2<sup>ND</sup> PLAINTIFF  
ANNE CHEMUTAI ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**JOSEPH MARITIM KILEL ..... 1<sup>ST</sup> DEFENDANT  
ROBERT HAMISI NGENO ..... 2<sup>ND</sup> DEFENDANT  
DIRECTOR LAND ADJUDICATION AND SETTLEMENT SCHEME .... 3<sup>RD</sup>  
DEFENDANT  
COUNTY LAND REGISTRAR, KERICHO ..... 4<sup>TH</sup> DEFENDANT  
ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. Vide a Notice of Motion brought under the provisions of Order 40 rule 1 and 2, Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 3A and 63 (e) of the *Civil Procedure Act* the Plaintiffs/Applicants have sought for the following orders;
  - i. Spent.
  - ii. Spent
  - iii. That an interim order of injunction issue restraining the Defendants/Respondents either by themselves, their servants and or agents or anyone whomsoever claiming title, deriving authority, or acting on their behalf from entering, constructing, building, erecting, remaining



in, occupying/continuing to occupy or trespassing onto the Land Parcel Number Kericho/Kunyak/Settlement Scheme/289 pending the hearing and determination of this suit.

- iv. That the costs of this Application be provided for.
2. The said Application is based on the grounds therein and a supporting affidavit of Margaret Jesang Busienei, the 1<sup>st</sup> Plaintiff/Applicant sworn on the 8<sup>th</sup> March, 2023 to the effect that she was one of the Administrators of the estate of James Kipkemoi Tesot, her deceased father who was the absolute proprietor of Land Parcel Number Kericho/Kunyak/Settlement Scheme/289 (suit land) where their mother Pauline Chemaiyo Tesot was buried.
3. That the County Land Registrar Kericho had began the process of preparing a title in their names after they lodged with them the Certificate of Confirmation but the said County Land Registrar Kericho could not proceed because the Director of Land and settlement had not discharged the Charge over the said parcel despite the fact that their deceased father had already cleared the settlement Fund Trustee requirement and had been issued with the certificate of outright purchase.
4. She further deponed that they submitted documents to the 3<sup>rd</sup> Defendant officers in Nairobi for signing of the discharge of charge forms, the officers manning the respective department colluded with the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants/Applicants and refused to discharge the charge even after their officers visited the parcel of Land and presented the ground report that the parcel was clean and should be registered in the name of the Plaintiffs.
5. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents had thereafter with impunity trespassed onto the Plaintiffs/Applicants land and had planted sugar cane, Napier grass and even erected temporary structures without the Plaintiffs/Applicants consent and despite them being served with a letter of warning against trespassing, the said Defendants/Respondents jointly and severally had continued with their flagrant impunity in breach of the Plaintiffs' fundamental rights and the sacrosanct, absolute and inviolable right to the sanctity of their title, right and lien over.
6. The Application was opposed by the 2<sup>nd</sup> Respondent's Replying Affidavit dated the 17<sup>th</sup> April, 2023 to the effect that the Application was incompetent and an abuse of the court process having intentionally failed to make full disclosure of the material facts to wit that he had bought the suit land from the original Allottee one James Kipkemoi Tesot wherein he had taken possession and occupation of the suit land to date. That the other part of the suit land was in the possession and occupation by the 1<sup>st</sup> Defendant/Respondent.
7. That the said deceased James Kipkemoi Tesot had migrated from his ancestral land at Kimendet, Kapkesaos Village in Chepalungu Sub-County of Bomet County and settled in Kunyak Settlement Scheme wherein in the 11<sup>th</sup> January 1989 he had been allocated the suit land measuring 7.5 acres. That he had then been issued with a Certificate of outright purchase having paid the full purchase price. That at the time of allotment the purported wife of James Kipkemoi Tesot had already died in 1977 at unknown place. That the said James lived alone and had no wife nor children.
8. He deponed that when James Kipkemoi fell sick, he requested that he be taken to Tenwek Mission Hospital for treatment and upon the 2<sup>nd</sup> Defendant informing James' brothers namely Chepkwony Arap Tesot and Kipkorir Arap Tesot, they together took him to Tenwek Mission Hospital but unfortunately the said James passed on after undergoing treatment for one year.
9. That on 13<sup>th</sup> December 2005, the Land Adjudication and Settlement Officer informed the Resident Magistrate Kericho that the owner of the suit land had passed on and had left two brothers surviving him. The Resident Magistrate was also informed that before the said James passed on, he had



- sold a portion of the suit land measuring 5.50 acres to Robert Hamisi Ngeno, the 2<sup>nd</sup> Defendant/Respondent herein. That the said deceased's brothers commenced the succession proceedings upon being issued with a letter from the Chief Kunyak Location whereby they were issued with the Letters of Administration Intestate of the estate of James Kipkemoi Tesot.
10. That a consent dated 26<sup>th</sup> November, 2018 was recorded as to the mode of distribution of the said estate and the 2<sup>nd</sup> Defendant/Respondent was listed as liability. That the Plaintiffs herein were not among the survivors listed in the Affidavit of Confirmation of Grant. That the Plaintiffs herein laid claim against the deceased's brothers from nowhere since the Chief Simat Location confirmed that their mother the late Pauline Jemaiyo Busienei was married to one Kipruto Busienei and not the deceased herein and that the said mother passed on in the year 1977.
  11. He further deponed that he had since moved the High Court Kericho to have the Grant that was fraudulently acquired revoked whereby the stay orders against the execution of the same was issued hence in the circumstances the Plaintiff/Applicants are not entitled to the suit land which is the estate of the late James Kipkemoi Tesot.
  12. That the Plaintiffs/Applicants would not suffer damages that could not be compensated in damages and that it would be appropriate that the status quo be maintained. That the 2<sup>nd</sup> Defendant/Applicant had been in possession of the suit land since the year 1996 without any interference or interruption from anybody. That there was a concluded contract of sale between himself and the deceased allottee herein. That having paid the entire purchase price timeously, he was entitled to the suit land.
  13. He further deponed that his continuous possession and occupation of the suit land and any subsequent dealings with the suit land including the Succession Proceedings were subject to his overriding interest as provided under the Registered Land Act (sic). That he had acquired the suit land by adverse possession since the year 2003 and none of the Plaintiffs herein had ever occupied or possessed the suit land neither were they the registered proprietors of the suit land for the law to vest interest of ownership upon them.
  14. That a grant was not a proof of ownership of land under the Land Registration Act. That at the time of filing the instant suit, the Plaintiff's father was still alive and his property was not available for subdivision and distribution hence the said Plaintiffs/Applicants had no cause of action with regard to deceased's property herein as no court of law had ever declared them as the deceased's children.
  15. That the Plaintiffs/Applicants had not availed documentary evidence to support their claim, neither do they have proprietary rights to the suit property hence the instant Application should be dismissed with costs to the Defendant/Respondent.
  16. In a rejoinder, the Plaintiffs/Applicants vide their Further Affidavits dated 26<sup>th</sup> April 2023 and 6<sup>th</sup> June, 2023 sworn by Margaret Jesang Busienei deponed that the issues raised by the 2<sup>nd</sup> Defendant/Applicant herein were raised by one Joseph Martin Kilel and the same was dismissed by the High Court. She reiterated that their mother Pauline Chemaiyo Tesot was buried on the suit land in the year 1977 and that as early as 2<sup>nd</sup> May 1989, as the children of the deceased James Kipkemoi Tesot, they had written a letter to the District Settlement Officer to refrain from interfering with the suit land because they had no other property.
  17. That the 2<sup>nd</sup> Defendant/Respondent had always tried to use fraudulent means including using their uncles to obtain letters of administration while stating that the deceased had no children. That they had applied for revocation of Grant issued to their said uncles and even had a meeting with the larger family whereby it was resolved that their uncles should hand over the administration of the deceased estate to them.



18. That in a bid to lay claim over the suit land, the 2<sup>nd</sup> Defendant/Respondent fraudulently took their sick father to Bomet in their grandfather's land to be buried there denying him a chance to be laid next to his wife Pauline in the suit land. She reiterated that the deceased James Tesot was their father and that he even left them settlement confirmation cards.
19. She deponed that they were not Kipruto Businei's children and therefore had no land in that family. That the said Businei was only their guardian when they were young and it was not uncommon for children to have their national identity in the names of the guardians.
20. That the 2<sup>nd</sup> Defendant/Respondent could not complain of being disinherited since he was not a member of their family. She further deponed that what triggered the instant application was that after they had obtained the confirmation of grant, they had filed a suit to have the 2<sup>nd</sup> Defendant/Respondent evicted from the suit land whereby upon being served with summons to enter appearance, the 2<sup>nd</sup> Defendant/Respondent fenced the suit land to show that he had been in possession.
21. There was no response from the 1<sup>st</sup> Defendant/Respondent.
22. On 27<sup>th</sup> April, 2023, directions were taken for the Application to be disposed of by way of written submissions to which only the Applicants complied.

### **Applicants' submissions.**

23. In support of the Application, the Applicants framed one issue for determination to wit;
  - i. Whether the court should issue an order of temporary injunction compelling the Defendants/Respondents by themselves, their servants and or agents or anyone whomsoever claiming title, deriving authority, or acting on their behalf from entering, remaining in, occupying/continuing to occupy, cultivating constructing on, alienating, selling or doing any act on onto the Land Parcel Known as Kericho/Kunyak/Settlement Scheme/289.
24. The Applicants submitted that granting of interlocutory injunctions was governed by the provisions of Order 40 Rule 1 (a) and (b) of the *Civil Procedure Rules*. Reliance was also placed on the decision in the cases of *Giella vs. Cassman Brown and Co Ltd* [1973] EA 358 as was reiterated in the case of *Nguruman Limited vs. Jan Bonde Nielsen & 2 others* [2014] eKLR and *American Synamid Co. vs. Ethicom Limited* (1975) AER 504 where the court had laid down three principles that needed to be satisfied for the grant of interlocutory injunction.
25. On the first principle on the establishment of a *Prima facie* case, the Applicants relied on the decision in *Ruthi Kinyua vs. Patrick Thuita Gacheru & another* [2015] eKLR and *Vivo Energy Kenya Limited vs. Maloba Petrol Station Limited & 3 others* [2015] eKLR to submit that they had established a legal right to the property as children of the deceased proprietor having obtained a confirmed Grant *vide* an Order dated 30<sup>th</sup> May 2023 in Misc Succession Application No 2 of 2023. (sic)
26. That should the orders of injunction not be issued by the court pending the hearing and determination of the main suit, there was likelihood that the suit land would be wasted, damaged or alienated by the Defendants/Respondents who were trespassers. That this in turn would lead to an injustice being occasioned as that was the only land they owned and it was equally their late father's land.
27. On the second principle as to whether they would suffer irreparable harm, the Plaintiffs/Applicants relied on the decision in *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR to submit in the affirmative. That the Defendants/Respondents had already entered upon the suit land and had even attempted to plough it thus causing the Plaintiffs/Applicants a lot of distress and denying them their



right to peaceful enjoyment and occupation of their land. That the suit land was the only property that the Plaintiffs/Applicants owned and, in the event, that the orders of injunction were not issued, it would amount to them being disinherited thus they would suffer irreparable harm which could not be compensated by damages.

28. On the last principle as to where the balance of convenience lay, reliance was placed on the decided cases of *Pius Kipchirchir Kogo's (supra)* and *Robert Mugo Wa Karanja vs. Ecobank (Kenya) Limited & another* [2019] eKLR to submit that the inconvenience that the Plaintiff/Applicant was suffering was greater compared to that of the Defendant/Respondents. That the Plaintiffs/Applicants who are the children of the deceased proprietor of the suit land would suffer if injunctions were not granted as they had built homesteads in the suit land and they were also tilling and ploughing the said land. That the Defendants/Respondents had no beneficial interest in the suit land as the same did not belong to any member of their family. That they were trespassers to the suit land hence they would suffer no harm if the injunction was issued against them.
29. There were no written submissions filed by any of the Defendants herein.

### **Determination**

30. The celebrated case of *Giella vs. Cassman Brown* (1973) EA 358 sets out conditions for the grant of an interlocutory injunction as follows:-
- i. Is there a serious issue to be tried( prima facie case)
  - ii. Will the Applicant(s) suffer irreparable harm if the injunction is not granted;
  - iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (Often called "balance of convenience").
31. On the first issue as to whether the Plaintiffs/Applicants in this matter have made out a prima facie case with a probability of success, I am guided by the case of *Mrao vs First American Bank of Kenya Limited & 2 Others* (2003) KLR 125, where a *prima facie* case was described as follows:
- “a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It 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.”
32. The Court has been moved under a Certificate of Urgency, by the Applicants, to issue temporary injunction against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. At this stage, the Court is only required to determine whether the Applicants are deserving of the Orders sought. The Court is not required to determine the merit of whether the Applicants herein have demonstrated that they have a genuine and arguable case or not.
33. In this matter, the Plaintiffs/Applicants in their Complaint dated the 8<sup>th</sup> March 2023 are seeking from the 3<sup>rd</sup> Defendant, a discharge of the charge on the suit parcel of land and the return of the original certificate of confirmation of Grant. They also seek that they be declared as the absolute proprietors to the suit parcel of land and that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by themselves, their servants, their representatives and agents be enjoined from interfering, trespassing, selling or in any way dealing with their Parcel of Land No. Kericho/Kunyak/Settlement Scheme/289. That further they be ordered to vacate from the suit premises. They also sought for damages for trespass as well as for costs of the suit and interest.



34. The Plaintiffs' Application was premised on the basis that they were entitled, by virtue of the certificate of Confirmation of Grant to their late father's estate, the deceased, James Kipkemoi Tesot having been the registered owner of the suit land and as a necessary incident of that ownership, to have full and exclusive possession of the suit land against the Respondents.
35. This application has been opposed by the 2<sup>nd</sup> Defendant's response in his Replying Affidavit dated the 17<sup>th</sup> April, 2023 to the effect that he bought the suit land from the original Allottee one James Kipkemoi Tesot wherein he had paid the entire purchase price timeously. That in the year 1996 he had taken possession and occupation of the suit land to date without any interference or interruption from anybody and was thus was entitled to the suit land. That the other part of the suit land was in the possession and occupation by the 1<sup>st</sup> Defendant/Respondent. That none of the Plaintiffs herein had ever occupied or possessed the suit land, neither were they the registered proprietors of the suit land for the law to vest interest of ownership upon them.
36. I have anxiously considered the Applicants' Application herein and further considered the fact that by their own admission and the Respondent's response, there is no dispute that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are in occupation of the suit land herein. I thus find that issuing the orders so sought to wit: ".....restraining the Defendants/Respondents from entering, remaining in, occupying/ continuing to occupy", would amount to an eviction which is premature at this stage.
37. Any eviction order has far reaching implications as it entails the forceful removal of a party from land that he/she or in this case they, has/have been in occupation/possession of for some time. Before such an order is given, the court must be satisfied on its merits which means any person who stands to be affected by any order the court may make, is entitled to be heard. The Plaintiffs/Applicants have in this matter alleged ownership of the suit land, but the 2<sup>nd</sup> Respondent has argued that he purchased the land from the original allottee. I thus find that there would be great prejudice occasioned to the 2<sup>nd</sup> Respondent if the orders sought were granted without giving him an opportunity to be heard.
38. Indeed it is trite law more so considering the provisions of Article 50(1) of the *Constitution*, that stipulates that every person has the right to have any dispute that can be resolved by the Application of law, decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body and more so where adverse orders such as eviction orders are sought.
39. Secondly, I have also noted that the Plaintiff/Applicants have neither annexed an allotment letter, title deed nor any registerable documents within the law, to their application as prima facie evidence that they had proprietary ownership and /or interest of the suit land herein.
40. I find that since at this stage the court is not required to make final findings of contested facts but to weigh the relative strength of the parties cases as observed by Lord Diplock in *American Cyanamid Co. vs. Ethicon Limited* (1975) 1 ALL ER 504; (1975) A.C. 396 HL at 510 where he stated as follows:
- "It is no part of the Court's function at this stage of the litigation to try and resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.',"
41. After carefully considering the application herein, I find that no prima facie case has been established to warrant issuance of interlocutory orders.



42. The Court of Appeal in the case of *Kenya Commercial Finance Co. Ltd –vs- Afraba Education Society* (2001) IEA 86 cited by Gitumbi, J with approval in the case of *Joseph Wambua Mulusya –vs- David Kitu & Another* (2014) eKLR observed as follows:-

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.

43. That having been said, I need not consider the other two conditions for the grant of temporary injunction as established in the *Giella case (supra)* as the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a prima facie case had been established.

44. I therefor find that the balance of convenience does not tilt in favour of granting the injunctive orders sought and therefore the order that best commends itself in the circumstances of this case is an order of *status quo*, to this effect;

- i. Parties shall maintain the status quo prevailing pending the hearing and determination of the suit.
- ii. Parties shall set down this matter for hearing expeditiously by complying with the provisions of Order 11 of the [Civil Procedure Rules](#) within the next 21 days upon delivery of this ruling
- iii. Costs to be in cause.

**DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 9<sup>TH</sup> DAY OF NOVEMBER 2023.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

