



**In re Estate of the Late Anna Chepchirchir (Succession Cause
317 of 2009) [2023] KEHC 832 (KLR) (10 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 832 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 317 OF 2009
RN NYAKUNDI, J
FEBRUARY 10, 2023
IN THE MATTER OF THE ESTATE OF THE LATE ANNA CHEPCHIRCHIR**

BETWEEN

**GRACE CHEPKOSGEI KIPROTICH 1ST OBJECTOR
BEN KIMUTAI ROTICH 2ND OBJECTOR
DAVID KIBET ROTICH 3RD OBJECTOR**

AND

**IGNATIUS KIPKEMEI ROTICH 1ST PETITIONER
LOUIS M KIPRUGUT ROTICH 2ND PETITIONER
MARK KIPLAGAT ROTICH 3RD PETITIONER**

RULING

1. The Petitioners filed an application dated January 3, 2023 seeking the following orders;
 - a) That service of this application be dispensed with in the first instance.
 - b) That pending the hearing 'and determination of this Suit, the Honourable Court be pleased to issue a mandatory injunction compelling any other party, their servants, employees, agents and/or any other persons claiming through the respondents to allow the Petitioners to occupy their parcel of land.
 - c) That an interlocutory injunction do issue against the Respondents, restraining them whether by themselves, their servants and or agents from evicting, denying access, trespassing or interfering with the use and occupation by the Applicants of land parcel known as Eldoret Municipality/block 14/73 pending the hearing and determination of this application in the first instance and there after pending the hearing and determination of the main suit.



- d) That upon grant of prayer b and c above, the court be pleased to order and/or direct the Officer in Charge of Police Division (OCPD), Officer Commanding Station at Langas Police Station or DCIO Eldoret South to ensure compliance of the order herein in prayer b and c above.
- e) Costs of the application be sourced by the respondents.

Application Dated January 3, 2023

Applicant's case

2. The applicants/petitioner's case is that they were issued with a certificate for confirmation of grant on February 14, 2011 and they have been in occupation of the subject land since before the confirmation. They contend that they have been kept out of the premises since the death of their parents. Further, that the respondents abandoned the property and left it in a deplorable state. However, on December 30, 2022 the 1st and 3rd respondents accompanied by goons attacked them and injured them, threatening to come and finish the job. They proceeded to file the present application to protect themselves.

Respondent's case

3. The respondent/objectors oppose the application and stated that it is intended to mislead the court. They contend that they are the ones who were attacked on December 30, 2022 with an OB No 19. Further, that there are orders that were issued by this court on March 17, 2014 that allowed them to occupy the premises and the same have not been set aside or varied.

Analysis & Determination

4. This application seeks an injunction against the objectors/respondents on the parcel of land known as parcel known as Eldoret Municipality/block 14/73.
5. The application is expressed to be brought under Order 40 Rule 1 of the [Civil Procedure Rules](#). Section 47 of the [Law of Succession Act](#) provides: -

"The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.

Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice."

6. On the other hand, Rule 73 of the [Probate and Administration Rules](#) provides that: -

"73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

7. This court therefore has jurisdiction to entertain the application. I note that the applicant required an order of the court to enter said premises to restore the graves of their deceased parents on July 18, 2021. From the facts on record it is clear that there is a dispute over the said property and it requires to be preserved. As to who is in occupation of the property the same was to be determined by a visit of the site by the deputy registrar courtesy of an order given by the court on January 16, 2023. The deputy registrar visited the premises and there is a report in P&A 193 of 2003 which reveals that the petitioners



therein were in occupation of the property. The petitioners being the petitioners/applicants in the present suit.

8. The law on granting of interlocutory injunctions is set out under order 40(1) (a) and (b) of the [Civil Procedure Rules 2010](#) which provides that:

“Where in any suit it is proved by affidavit or otherwise—

- (a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- (b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further.”

9. Order 40 is one of the provisions of the Civil Procedure Rules imported into the [Law of Succession Act](#) by dint of Rule 63 of the [Probate and Administration Rules](#). This being an application for interlocutory injunction, the law is settled that an applicant must demonstrate the following as laid down in *Giella v Cassman Brown* cited above:

- (i) that he has a prima facie case with probability of success;
- (ii) that he will suffer irreparable loss that cannot be adequately compensated by damages: or
- (iii) that the balance of convenience is in his favour.

10. I have considered the facts underlying the application and the report of the deputy registrar dated January 18, 2023 and it is my view that the applicants have a *prima facie* case. The land definitely constitutes the sub stratum of the succession and therefore the applicants will suffer irreparable damage if the orders sought are not issued. It is clear that the balance of convenience lies in allowing the application for an injunction.

11. As the distribution of the estate is still yet to be concluded, I decline to grant the mandatory injunction sought. There are issues that need to be ironed out and granting a mandatory injunction in the circumstances would render the same nugatory.

12. In the premises, the application dated January 3, 2023 succeeds to the extent of prayers c and d. There shall be no orders as to costs.

Application Dated February 10, 2023

13. The objectors filed an application dated January 10, 2023 seeking the following orders;

- a) That this Application be certified urgent and heard ex-parte at the first instance.
- b) That this application be placed before the vacation Duty Judge forthwith.
- c) That pending the hearing and determination of this Application, the Honourable Court be pleased to issue orders that the Petitioners and the 4th Respondent, their agents, workers, employees, assignees and/or anybody else acting on their behalf, employment or directions



to forthwith vacate/leave the residential premises erected on LR No Eldoret Municipality Block 14/73 which they unlawfully, illegally, forcefully and violently entered from which they violently evicted the Applicants on December 30, 2022.

14. As per the deputy registrar's report dated January 18, 2023 that was filed pursuant to a site visit ordered on January 16, 2023, it is evident that the petitioners are in occupation of the land known as LR No Eldoret Municipality Block 14/73. The applicants/objectors refer to a judgment dated March 17, 2014 as having allowed them to occupy the premises and that the same has never been varied or set aside. I have perused the said orders and they specifically refer to Kakamega/Sergoit/148. They also direct that the parties remain in the land they occupy but there is no indication of which parcels are occupied by which parties.
15. Having considered the report of the deputy registrar it is clear that the petitioners are in occupation of the property known as LR No Eldoret Municipality Block 14/73 as this was the subject of the disputes that led to the order for the site visit. In the premises, the application dated January 10, 2023 is unmerited and is dismissed. Nevertheless this is a just and convenient case for the court to grant an injunction restraining either of the intermeddles by themselves or through their agents and or servants from entering, altering or otherwise interfering with the property. There is indeed a serious issue to be tried with a high prospect of success on survivorship and inheritance of the deceased intestate estate. The court in *National Commercial Bank Jamaica Ltd vs Olint Corp Ltd* (2009) UKPC this is what the court had to say that what:

“ what is true is that the features which ordinarily justify describing an injunction as mandatory are often more likely to cause irremediable prejudice than in case in which a defendant is merely prevented from taking or continuing with some course of action: See *Films Rover International Ltd vs Cannon Film Sales Ltd*, (1987) 1 WLR 670, 680. But this is no more than a generalisation. What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is like to be. If it appears that the injunction is liked to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low, that is to say that the court will feel as megarry J said in *Stepherd Homes Ltd b sandham* (1971) Ch 340, 351, “a high degree of assurance that at the trial it will appear that at the trial (sic) the injunction was rightly granted.

For these reasons, arguments over whether the injunction should be classified as prohibitive or mandatory are barren: se the *Film Rover* case, *ibid.* what matters is what the practical consequences of the actual injunction are like to be”.

16. Similarly the set of principles applicable for both probatory and mandatory injunctions is outlined in the persuasive case of *Minister of Fisheries, Aquaculture and Environment* (2006), 271, DLR where the court stressed as follows:-

“I would adopt the view that, while there must be a serious issued to be tried, to begin with all that is required is a finding that the issue is neither frivoulous not (sic) vexatious. Once that is determined the court must consider the issue of irreparable harm and balance of convenience. Those latter two issues may be weak for the applicant. In which case it may be necessary to take another look at the seriousness of the issue to be tried. Where the case for the applicant appears almost certain to be found in favour, then the other issues may not need to have a particularly strong weight in their favour. They could even be neutral, however even where a judge is doubtful about the success of a case. But cannot find the issue to be frivolous, then irreparable harm to the applicant and/or overwhelming inconvenience



to the applicant as opposed to every little inconvenience to the respondent, can decide the issue in the applicant's favour".

17. In the case at bar the applicant has discharged the burden of proof of demonstrating a *prima facie* case based on the material presented before court to warrant a remedy for injunctive relief.
18. I therefore find that the application dated January 3, 2023 is merited in terms of prayer c and d and direct as follows;
 1. That an interlocutory injunction do issue against the Respondents, restraining them whether by themselves, their servants and or agents from evicting, denying access, trespassing or interfering with the use and occupation by the Applicants of land parcel known as Eldoret Municipality/block 14/73 pending the hearing and determination of this application in the first instance and there after pending the hearing and determination of the main suit.
 2. That I hereby direct the Officer in Charge of Police Division (OCPD), Officer Commanding Station at Langas Police Station or DCIO Eldoret South to ensure compliance of the order herein in prayer c above.

It is so ordered.

DATED DELIVERED AND SIGNED AT ELDORET ON THIS 10TH DAY OF FEBRUARY 2023

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R. NYAKUNDI

JUDGE

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