Aiyabei v Kiplagat & another (Environment & Land Case E012 of 2025) [2025] KEELC 3643 (KLR) (8 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3643 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND CASE E012 OF 2025

CK YANO, J

MAY 8, 2025

BETWEEN

PAULINE KIMOI AIYABEI ..... PLAINTIFF

AND

PATRICK AYABEI KIPLAGAT ..... 1ST DEFENDANT

SIMION KIPTOO ROTICH ..... 2ND DEFENDANT

RULING

1. Vide a Notice of Motion dated 20th February, 2025 and filed under certificate of urgency, the Plaintiff/ Applicant sought the following orders: -

    a. Spent.

    b. Spent.

    c. That this Honourable Court be pleased to grant interim order for injunction restraining the 2nd Defendant by himself, authorized agents, from cultivating, constructing, transferring, entering or trespassing into the plaintiff's matrimonial property known as Kiplombe/ Kuinet Block 3 (Lalaginy)/ 16 pending the hearing and determination of this suit.

    d. Costs of this Application be provided for.

2. The application is based on the 13 grounds on the face of the application and on the Applicant's Supporting Affidavit sworn on even date and a Supplementary Affidavit dated 18.3.2025 and sworn by one Esther Jepchumba Ayabei, a co-wife of the applicant.

3. The Applicant admitted that the suit land Kiplombe/ Kuinet Block 3 (Lalaginy) 16 is registered in the name of the 1st respondent, who is her husband having been married since the year 1971. It is therefore her claim that she is a beneficial owner of the said suit land by virtue of it being a matrimonial property

and is thus held by the 1st Respondent in trust for her. She further maintained that she uses and depends on the said matrimonial property for her survival through farming.

4. It is the applicant's contention that the 2nd Respondent unlawfully and illegally trespassed into a portion of the suit land measuring approximately 20 Acres, fenced it off and is ploughing the land without her consent and in total disregard of the law. That as a result of the actions by the 2nd Respondent, she is unable gain access and enter the suit land and is likely to cause breach of peace.

5. She avers that she later learnt that the defendants/respondents had entered into a lease agreement over a portion of the suit land measuring 20 Acres for 2-year period without involving her or obtaining her consent as a spouse as required in law. Further, that no consent of the Land Control Board has ever been obtained with regard to the suit land and that the purported lease by the defendants is therefore void and illegal for want of compliance.

6. It is further her claim that she stands to suffer irreparable damage and loss if the 2nd Defendant/ Respondent continues with his unlawful and wrongful acts of dealing with the suit parcel and maintained that the 2nd respondent will not be prejudiced in anyway if the orders sought are granted.

7. In the Supplementary Affidavit sworn by the Applicant's co-wife and wife of the 1st defendant/ Respondent, she alleged that the suit land is matrimonial property having been purchased in the year 1983 and that the plaintiff/applicant was settled on the said land by the 1st respondent in the year 1993.

8. She dismissed the allegations by the 1st Respondent that the plaintiff deserted the matrimonial home in the year 1982 and that she has never returned to her matrimonial home or that the 2nd respondent has been leasing the parcel of land since 2017.

9. It was her contention that the plaintiff/applicant lives on the suit land and has been using the entire parcel until the 2nd respondent invaded the land.

10. She added that she saw the plaintiff plough the land in readiness for planting before the 2nd respondent reploughed the same but the plaintiff has remained on the land. She thus urged the court to allow the application.

11. The application was opposed. Both the 1st Respondent and the 2nd Respondent filed their separate Replying Affidavits both sworn and dated 14th March, 2025.

12. The 1st Respondent in his Replying Affidavit stated that he lived with the plaintiff/applicant from 1970s up to the year 1982, when the applicant left his home in Chemalal Farm, went back to her home and has never gone back to date.

13. It was his claim that he acquired the suit land long after the applicant had left his home and added that the applicant does not live on the suit land.

14. He further deponed that the 2nd respondent has been leasing a portion of the suit land on an annual basis since the year 2017 without issues and has even paid him in full for the current lease and has already ploughed, harrowed and is in the course of planting this season's crops.

15. It was therefore his contention that since the 2nd respondent is already in possession, the applicant's prayer for interlocutory injunction will amount to eviction of the 2nd respondent.

16. It was further his claim that he risks being sued for breach of contract should the orders sought be granted and the 2nd respondent is restrained from using the suit land and that he cannot find an alternative means of refunding the amount paid for the lease by the 2nd Respondent.

17. He maintained that the applicant will not suffer prejudice that cannot be adequately compensated by damages if the orders sought are not granted.

18. As a result, thereof, he urged the court to find that an order for maintenance of status quo would be appropriate.

19. The 2nd Respondent in his Replying Affidavit confirmed having leased a portion of the suit land comprising 20 Acres for a term of 2 years and that prior to the said lease he had been leasing portions of the suit parcel on annual basis since the year 2017 and that the applicant has never raised any objection.

20. It was his contention that upon inquiry, the 1st respondent confirmed to him that the suit land was not a matrimonial property. He maintained that he has a running lease which was signed last year and that he has already ploughed, harrowed and is in the process of planting on the 20 acres portion. He thus argued that the restraining orders will amount to an indirect eviction at an interlocutory stage since he has already taken possession and is in the process of planting this season's crops.

21. In conclusion, he urged the court to find that the best option would be to maintain the status quo pending the hearing and determination of the suit on merit.

22. The Application was disposed off by way of written submissions, however, from a perusal of the court record and the CTS e-filing platform, I do note that only the respondents have jointly filed their submissions dated 24th March, 2025 together with authorities, which I have read, considered and summarized as hereunder.

Respondents' Submissions;

23. The Respondents mainly submitted on the threshold for the grant of an interlocutory injunction and whether the applicant had met the said standard.

24. On whether the applicant had established a prima facie case, counsel submitted that the suit land is registered in the 1st Respondent's name and that the applicant is neither in possession of the land nor has she adduced any lawful evidence to sustain the argument that she is a spouse.

25. Counsel thus dismissed the claim by the applicant that her consent as the spouse was necessary before the 1st respondent could lawfully deal in the suit land as not having any basis. He thus maintained that the applicant has failed to demonstrate that she has a prima facie case with a probability of succeeding.

26. On Irreparable Loss, counsel submitted that the applicant admitted that the 2nd respondent is already in possession and further that the averment by the 2nd Respondent that he has been in the land since the year 2017 has not been controverted.

27. He further stated that the 2nd respondent has a lease of only 2 years and upon lapse of the lease period the land will revert to the 1st respondent.

28. It was also his submission that since the applicant neither resides nor has she been utilizing the suit land, the applicant has lost nothing as a result of the lease and therefore no irreparable loss has been demonstrated to warrant the grant of the orders sought.

29. On the final element of balance of convenience, they submitted that the 1st Respondent is the registered owner of the suit land and further that the 2nd Respondent is in possession and use of a portion measuring 20 Acres, having leased the same for a period of 2 years. They thus maintained that the balance of convenience tilts in favor of allowing the 2nd Respondent to continue utilizing the suit land for the remainder of the lease period pending the determination of the matter.

30. It was further their contention that allowing the application would amount to constructive eviction at an interlocutory stage. They thus urged the court to dismiss the application with costs.

Analysis and Determination:

31. Looking at the application, the supporting and supplementary affidavits together with the annexures thereto, the replying affidavits and respondents' submissions in totality, it is my considered view that the main issue arising for determination is whether the Applicant has met the requirements for the grant of a temporary order of injunction as sought.

32. The law governing injunctions is found under Order 40 (1) (2) of the Civil Procedure Rules which provides as follows: -

    1. "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;

    b. .....,

    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 orders."

33. Section 13 (7) (a) of the *Environment and Land Court Act*, 2015 also empowers this court to grant interim preservation orders, including an interim order of injunction in the nature sought herein.

34. The principles governing the grant of injunctions are well settled and have been established by a long line of authorities. An applicant seeking orders of injunction is under a duty to satisfy the 3- hurdle test set out in Giella vs Cassman Brown and Co. Ltd [1973] EA. 358 at 360 where the court held as follows: -

    a. where he is required to demonstrate that he has a prima facie case with serious triable and arguable issues with a probability of success against the respondent. The test on prima facie case does not mean establishing a case beyond reasonable doubt;

    b. He will suffer irreparable harm/injury which cannot be adequately compensated by damages;

    c. Balance of convenience: In granting an injunction under this condition the court must be satisfied that the hardship or inconvenience which is likely to be caused to the applicant by declining the injunction will be greater than that which is likely to be caused to the respondent.

35. The 3 elements/principles outlined above are to be applied as separate, distinct and logical hurdles which an applicant is expected to surmount sequentially. The existence of one element alone does not automatically entitle an applicant to an order of injunction without considering the other elements. See Kenya Commercial Finance Co. Ltd -Vs- Afraha Education Society [2001] Vol. 1 EA 86.

36. The first element to be demonstrated is whether the Applicant has established a Prima Facie case which raises arguable and triable issues with a probability of success. The Court of Appeal in Mrao Ltd vs.

First American Bank of Kenya and 2 Others (2003) KLR 125 explained what amounts to a prima facie case and stated 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."

37. The basis of the applicant's claim is that the subject land is a matrimonial property and duly registered in her husband's name, the 1st respondent. She contends that a portion of the suit land was leased out to the 2nd respondent without her knowledge or consent or obtaining the requisite consent to lease as statutorily required. That as a result of the said lease, the 2nd respondent unlawfully invaded and trespassed into her land parcel.

38. The respondents on the other hand, maintained that the suit land is not a matrimonial property and therefore the applicant's consent was not necessary at the time of signing the lease as alleged. Further, the 1st respondent stated that the applicant was not his wife, was neither a beneficial owner nor was she in possession and use of the suit land.

39. I have critically considered the rival positions by all parties. It is not in dispute that the suit parcel is registered in the name of the 1st respondent and that there is a running lease between the 1st and the 2nd respondent over a portion of the suit land measuring 20 acres. It is also not in contest that as a result of the said lease, the 2nd respondent is currently using the suit land. This fact was confirmed by the applicant in her supporting affidavit, the supplementary affidavit and by the respondents in their replying affidavits.

40. It is interesting to note that while the applicant claims to be the spouse of the 1st respondent, the 1st respondent has maintained that there is no valid marriage between them and has even annexed a copy of a judgment from the magistrate's court, wherein he was seeking divorce.

41. Conscience of the limits of the jurisdiction of this court, I must state that what is before this court is not a determination of whether or not the applicant and the 1st respondent are legally married or whether the suit parcel constitutes a matrimonial property but a determination of the rights of the parties in respect to the suit land.

42. In addition, the averments made in the supplementary affidavit that the applicant has been in possession and use of the entire suit land throughout have not been substantiated by any proof.

43. Based on the material presented before this court by the applicant, it is my considered opinion that she has failed to demonstrate to the required standard that she has a prima facie case.

44. The second element is that an applicant must demonstrate the irreparable loss and injury that he is likely to suffer that cannot be adequately compensated by an award of damages unless an order of injunction is granted. An applicant is bound to demonstrate the nature and extent of the irreparable loss and harm she is likely to suffer.

45. An injury is irreparable where there is no standard by which an amount can be measured with reasonable precision and accuracy or is in such a nature that monetary compensation, of whatever amount, will never be an adequate remedy. It has been held that speculative injury or unfounded fear does not amount to an irreparable injury.

46. The Court of Appeal in the case of Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR; while defining what amounts to an irreparable injury held as follows;

> "On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

47. Other than stating that she is the beneficial owner of the suit parcel and that the 2nd Respondent invaded and trespassed into a portion of the said land measuring 20 acres, the applicant did not demonstrate with a degree of precision any irreparable loss that she is likely to suffer, that cannot be compensated by an award of damages, as a result of the respondents' actions.

48. The pictures of the tilled/ploughed land is not a clear demonstration of the loss and harm likely to be suffered by the applicant, especially having admitted that the 2nd respondent has fenced off and is tilling the land.

49. Consequently, it is the finding of this court that the Applicant has failed to demonstrate the irreparable loss that she is likely to suffer that cannot be compensated by an award of damages to the set standard.

50. The final element that must be established is on the balance of convenience. The court needs to be satisfied that the inconvenience likely to be caused to the Applicant by declining the injunction is greater than that which is likely to be caused to the Respondents. The court is called upon to balance the inconveniences of both parties and possible injuries to them and their properties. (See Charter House Investment Limited vs Simon K. Sang and 3 Others [2010] eKLR.

51. In this case, it is admitted that the 2nd Respondent is already in possession, occupation and use of a portion of the suit land, albeit pursuant to a contested lease. In my view, the balance of convenience tilts in favour of the 2nd Respondent. Granting the orders sought herein would certainly be tantamount to an eviction at an interlocutory stage.

52. In the totality of the foregoing, it is my finding that the balance of convenience does not lie in favor of the applicant or in granting the orders of temporary injunction as sought.

Costs:

53. The general rule is that costs follow the event.

54. Having held that the Applicant has failed to prove her application to the required standard, I find that the respondents are entitled to the costs of the application.

Conclusion:

55. In view of the foregoing, I find that the Notice of Motion Application dated 20th February, 2025 is not merited and is hereby dismissed with costs to the Respondents.

56. It is so ordered.

DATED, SIGNED AND DELIVERED IN ELDORET THIS 8TH DAY OF MAY, 2025.

HON. C. K. YANO

JUDGE, ELC

Ruling delivered virtually in the presence of: -

Mr. Wainaina for Plaintiff/Applicant.

Mr. Kipnyekwei for Defendants/Respondents.

Court Assistant – Laban