



Silgut (Suing as the Legal Representative of the Estate of the Late Kibirgen Arap Kibiego alias Pikiken A. Pyeko) v Rotino & another (Environment and Land Case E038 of 2025) [2025] KEELC 6758 (KLR) (8 October 2025) (Ruling)

Neutral citation: [2025] KEELC 6758 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND CASE E038 OF 2025
CK NZILI, J
OCTOBER 8, 2025**

BETWEEN

JONATHAN KIMAIYO SILGUT (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE KIBIRGEN ARAP KIBIEGO ALIAS PIKIKEN A. PYEKO) PLAINTIFF

AND

**PETER APERIT ROTINO 1ST DEFENDANT
KENYA COMMERCIAL BANK 2ND DEFENDANT**

RULING

1. There are two applications before this court. The 1st one is dated 30/7/2025. It seeks temporary orders of injunction stopping the defendants from selling by way of public auction or private treaty, alienating or dealing with Land Title No. West Pokot/Siyoi "A"/205, pending hearing and determination of this suit. The grounds are set out on the face of the application and in two affidavits of Jonathan Kimaiyo Silgut, sworn on 30/7/2025 and 19/9/2025.
2. It is deposed that the late Kibirgen Arap Kibiego was the original registered owner of the suit land as per the limited grant, green card, area chief's letter, land committee letter, attached as annexure JKS-1, 2(a) and (b), and 3.
3. The applicant deposes that the initial owner passed on in 1993, leaving the suit land as part of his estate under the care of his wife, now the Cherono Matelong Kibiego, as per the burial permit and the certificate of death attached as annexure JKS-4(a) and (b).
4. The applicant deposes that the said wife had leased out part of the land to the 1st defendant upto 2015, but immediately she passed on in 2015, the land fraudulently and mysteriously changed status to the



- name of the 1st defendant who charged the same to the 2nd defendant as per the green card and search certificate marked as annexure JKS-5(a) and (b).
5. The applicant deposes that unless the orders sought are granted, the estate will suffer great loss and damage. The applicant deposes that though he is not the biological child of the deceased, he had been adopted from young alongside their two biological children, otherwise there were no letters of administration taken out after the wife passed on in 1993 and therefore, one Henry Baiyo Birgen lacked capacity to dispose of the land, making any sale agreements entered into between 2014 and 2015 nullities.
 6. The 1st application is opposed through a replying affidavit of Peter Aperit Rotino, sworn on 8/9/2025. It is deposed that the applicant is not the son of the deceased and is out to unjustly enrich himself.
 7. The 1st respondent deposes that the charge over the suit property was lawful, and after he fully repaid the loan, there was a discharge and the title was released to him as per annexure marked PAR-1(a) and (b).
 8. The 1st respondent deposes that he has been on the suit land for 29 years after the deceased and her family relocated to Jabali-Moi's Bridge; otherwise, there is no evidence of any lease agreement. The 1st respondent avers that the order to maintain the status quo is unjust, for the land is his primary source of income or livelihood, due to the extensive developments and sugarcane farming thereon, as per annexure marked PAR-2(a), (b), (c) and (d).
 9. The 1st respondent avers that the plaintiff had filed another suit, namely Kitale CMC ELC No. 131 of 2025, which he withdrew. The 1st respondent deposes that he bought the land in 1996 from Cherono Matelong Kipyegon, for Kshs. 700,000/= under the witness of the deceased's son, Henry Maiyo and a step-father, Kiprono Sungura Kiptalam, as per annexed agreement marked PAR-3(a) and (b).
 10. The 1st respondent deposes that Eunice Maiyo was also present and witnessed his last payment made to Richard K. Kabo, as per annexure PAR-4, and that later, the subsequent agreement in 2016 superseded the earlier one made between him and Henry Maiyo Birgen as per annexure marked PAR-5(a), (b), (c), (d) and (e).
 11. The 1st respondent deposes that the suit property is not under any threat or intention of disposal to third parties and that the applicant does not reside on the suit property; hence, the application lacks merit.
 12. The 2nd application is brought by the 2nd defendant. It is supported by an affidavit of Bonnie Okumu, sworn on 15/9/2025. It is deposed that while it is true that the sit property was charged to the bank to secure a loan facility, the loan was repaid in full and by a letter dated 18/11/2022, a discharge of charge prepared and the original title released to the 1st defendant as per the annexed letter, discharge document and a loan account statement marked BO-1, 2 and 3. The 2nd defendant deposes that in the light of the above, it has no legal or equitable interest in the suit land to be joined in this suit.
 13. The application is opposed through a replying affidavit of Jonathan Kimaiyo Siulgul, sworn on 19/9/2025. It is deposed that he joined the 2nd defendant as a party, going by the official search certificate and green card, copies dated 3/1/2025 and 20/5/2025, attached as JKS-1(a) and (b), showing that the suit land is still charged; otherwise, he could not have known that the said title was discharged when the copy of records demonstrates otherwise.
 14. The plaintiff deposes that there is no corresponding letter from the 2nd defendant confirming that the suit property was discharged; otherwise, the 2nd defendant did not plead in his statement of defence that the title was discharged.



15. The plaintiff deposes that if indeed the alleged discharge of title was done, the defendants are to blame for not taking the appropriate steps to rectify the land records to reflect the correct status of the title.
16. The plaintiff deposes that he should not be condemned to pay any costs for the joint mistake of the defendants in failing to rectify the title register; otherwise, he reasonably believed the 2nd defendant had an interest in the subject land.
17. The 1st respondent relies on written submissions dated 12/9/2025, stating that the applicant has not met the conditions to grant temporary orders set out in Order 40 Rule 1(a) and (b) of the Civil Procedure Rules. Reliance is placed in *Giella -vs- Cassman Brown* [1973] EA 358, *Nguruman Limited -vs- Jan Bonde Nielsen & Others* [2014] eKLR, *Mrao Ltd -vs- First American bank of(K) Ltd & Others* [2003] eKLR, *Kenleb Cons Ltd -vs- New Gatitu Service Station Ltd & Another* [1990] KLR 557, *Wairimu Mureithi -vs- City Council of Nairobi*, Civil Appeal No. 5 of 1981 KLR 322, *Chelogoi -vs- Shah & Others* [2024] eKLR and *Paul Gitonga Wanjau -vs- Gathuthi Tea Factory Co. Ltd & Others* [2016] eKLR.
18. The 2nd defendant relies on written submissions dated 20/9/2025. It is submitted that under Order 2 Rule 15 of the Civil Procedure Rules, a court may strike out a suit inter alia where no reasonable cause of action is disclosed. In this suit, the 2nd defendant submits that no cause of action is disclosed or can attach to give the plaintiff a remedy against it, since after the discharge of the charge upon repayment of the loan, the bank is released from original title and discharge of the charge; it no longer has any proprietary or financial interest in the 1st defendant's land. Therefore, the 2nd defendant terms the suit as suffering from misjoinder and an abuse of the court process.
19. Reliance is placed on *Tahir Sheikh Said vs Prof. Abdalla Said Bujra* [2008] eKLR, *D.T. Dobie & Co. (K) Ltd -vs- Muchina* [1983] KLR 1, *Safaricom PLC -vs- Kinuthia & Others & Others* [2021] eKLR, *Waweru -vs- Kibathi & Another* [2023] eKLR, and *Muchanga Investments Ltd -vs- Safari Unlimited Africa Ltd & Others* [2009] eKLR.
20. The 2nd defendant submits that in the absence of a subsisting charge or financial interest, the plaintiff cannot sustain a claim against it, making the proceedings serves no useful purpose, it only burden the bank with unnecessary litigation, or clog court's time, it is not in the interest of justice to continue with it, there are not particulars of fraud or negligence pleaded against it and that the only live dispute is between the plaintiff and the 1st defendant, otherwise the suit against it was hopeless from the outset.
21. A cause of action refers to an act on the part of the defendant that gives the plaintiff his cause of complaint. A court determines a cause of action by examining the underlying facts and the relevant law. In *D.T. Dobie & Co. Ltd -vs- Joseph Mbaria Muchina & Another* [1980] KECA 3 [KLR], the court held that it has to act cautiously, carefully and consider all facts of the case before dismissing a case for not disclosing a reasonable cause of action or a suit being otherwise, an abuse of the court process. The court said that no suit should be dismissed summarily unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, or is so weak as to be beyond redemption or is not incurable by way of an amendment.
22. Order 1 Rule 9 of the Civil Procedure Rules provides that no suit shall be dismissed by reason of the misjoinder or non-joinder of parties and that the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.
23. The 2nd defendant has urged this court to find it is improperly joined in this suit, for it no longer has a financial interest or otherwise, over the title to the 1st defendant's land, following discharge of the charge and the release of the original title deed after the loan facility was fully repaid.



24. The plaintiff, on the other hand, says that he reasonably sued the two defendants, since the official search certificate and a copy of the record to date indicate that the suit property is still charged by the 2nd defendant.
25. Order 2 Rule 2(1) of the Civil Procedure Rules provides that, save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant or the same defendants jointly, in which they are jointly interested against the same defendant, or the same defendants jointly may unite in the same suit.
26. The plaintiff takes the view that he had no other way of knowing that the loan had been repaid. A discharge of charge has to be registered for it to become effective. The 1st defendant herein has not tendered any evidence that the discharge of the charge was lodged with the land registry. The right to discharge a charge is prescribed under Section 85 of the *Land Act*. It is a right to be exercised by the chargor upon the payment of all the monies secured by a charge. Once the discharge of charge is executed and sealed, it has to be lodged alongside the original title, copies of the borrower's identification card, personal identification number and payment of registration fees.
27. The Land Registrar then verifies the documents for compliance, discharges the charge and removes the encumbrance from the land records. An updated title, upon successful registration, will then be issued confirming the property is free from any encumbrances. It is only after all the above processes are fulfilled that the property is restored to full property ownership rights in favour of the owner.
28. Whereas the 2nd defendant has admitted that it issued a discharge of charge and released the original title deed to the 1st defendant after the loan advanced by it was cleared, it is not clear why the 2nd defendant did not follow up to ensure that the title records were updated. The 2nd defendant has admitted that it is no longer indebted over the loan by the 1st defendant. The 1st defendant, on the other hand, has not denied that there is a discharge of charge which he has not registered, though the original title documents have been returned to him.
29. In Consolidated Bank of (K) Ltd -vs- Ndung'u & Others ELC Appeal E053 of 2022 [2024] KEELC 4456 [KLR] (26th May 2024) (Judgment), the court said that in the absence of repayment of a debt, the statutory and or contractual remedies to the creditor remain valid and the right to recover the advanced loan remains, otherwise a lifespan of a cause of action arising from a contractual relationship in 6 years. See Yusuf Abdallah Gitau -vs- The Building Centre (K) Ltd [2007] eKLR.
30. The encumbrance registered in favour of the 2nd defendant is still subsisting against the title held by the 1st defendant. The law is that a banker has a lien right to retain the subject matter of the lien until the indebtedness of the customer is cleared or discharged. See Halsbury's Law of England 4th Edition para 78. In the circumstances obtaining, I find the plaintiff was entitled to lodge the suit against the two defendants.
31. The upshot is that I find the suit is neither an abuse of the court process nor lacking a cause of action against the 2nd defendant, who remains with an encumbrance on the title to the suit land. The plaintiff is at liberty to file a notice to discontinue the suit against the bank; otherwise, the statement of defence dated 21/8/2025 does not explicitly plead when and or whether the title to the suit land was ever discharged.
32. As to a temporary injunction, a party seeking such orders must establish a prima facie case, demonstrate irreparable damage and lastly, show that the balance of convenience tilts in favour of granting the orders sought. A prima facie case is established where, looking at the material presented, a right belonging to the applicant has been infringed, to call for a rebuttal from the opposite side.



33. In establishing whether or not a prima facie case is established, a court does not conduct a mini-trial or go to the merits of the case. The court looks at the face of the application to determine whether an applicant has a right which has been or is threatened with violation.
34. An applicant need not establish title. In *Mrao Ltd -vs- First American Bank of (K)* [2014] eKLR, the court said that showing a fair and bona fide question as to the existence of the right is enough. In *Nguruman Ltd -vs- Jan Bonde Nielsen* (supra), the court held that a party must show the injury they will suffer is irreparable by way of damages or the same cannot be adequately compensated by way of damages.
35. Balance of convenience refers to which party will be harmed more in the absence of an injunction. The doctrine ensures that neither party will suffer undue damage that cannot be compensated for. It involves striking a balance between the conflicting interests of the parties. To assess the balance of convenience, a court looks into the irreparable harm, hardship to both parties, preservation of the rights, and public interest, out of which it will determine whether the hardships borne by the plaintiff are greater than those of the defendant. See *Paul Gitonga Wanjau -vs- Gathuthi Tea Factory Co. Ltd & Others* (supra).
36. In this suit, there is no dispute that the title held by the 1st defendant arose out of the estate of the late Kibirgen Arap Kibiego, and later on Cheron Matelong Kibiego, as per the copy of the search, green card, and copy of the death certificates relied upon.
37. The title in favour of the 1st defendant was issued on 4/8/2015. The sale agreement dated 8/3/1996 was signed after the passing of the owner in 1993. From the copy of the records, there is no evidence that the seller had the capacity to deal with the estate of her deceased husband. The 1st defendant has not produced any evidence that whoever dwelt with him had the capacity to transact with the deceased's estate, under Sections 45 and 82 of the *Law of Succession Act*.
38. I think the plaintiff has established a right or interest in the suit land which has been infringed or violated by the 1st defendant. The estate of the deceased, which the plaintiff represents, is likely to suffer irreparable damage if the suit property dissipates or is disposed of to third parties. The plaintiff risks suffering more harm or hardship if the suit property is not preserved until the hearing.
39. The upshot is that I allow the application. The temporary injunction shall lapse after one (1) year.
40. Orders accordingly.

RULING DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 8TH DAY OF OCTOBER 2025.

HON. C.K. NZILI

JUDGE, ELC KITALE.

In the presence of:

Court Assistant – Dennis

Gemenet for the plaintiff present

Chebii for the 1st defendant present

Nabwile for the 2nd defendant present

