



**Mosoito (Suing as legal representatives of the Estate of Mosoito  
David Ole Koti (Deceased) v Mosoito & another (Land Case  
E001 of 2023) [2024] KEELC 259 (KLR) (23 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 259 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS  
LAND CASE E001 OF 2023  
EM WASHE, J  
JANUARY 23, 2024**

**BETWEEN**

**NABIKI MOSOITO (SUING AS LEGAL REPRESENTATIVES OF THE ESTATE  
OF MOSOITO DAVID OLE KOTI (DECEASED) ..... PLAINTIFF**

**AND**

**SALIALEL MOSOITO ..... 1<sup>ST</sup> DEFENDANT**

**KONCHELLA KOITO ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiff (hereinafter referred to as “the Applicant”) moved this Honourable Court through the Notice of Motion dated 11.07.2023 (hereinafter referred to as “the present application”) seeking for the following orders; -
  - a. The service of this application be dispensed with in the first instance and the same be certified urgent and heard ex-parte in the first instance due to the urgency of the relief sought herein.
  - b. That pending the hearing and determination of this application, this honourable Court be pleased to issue temporary orders restraining the 1<sup>st</sup> Defendant by himself, his agents, employees and/or any other person from interfering, trespassing, entering, intimidating, harassing and/or denying the Plaintiff’s quiet enjoyment of the suit property.
  - c. That pending the hearing and determination of the suit, this Honourable Court be pleased to issue permanent orders restraining the Defendant by himself, his agents, employees and/or any other person from interfering, trespassing, entering, intimidating and/or denying the Applicant’s quiet enjoyment of the suit property.



- d. That this Honourable Court be pleased to order the Respondent to initiate the process of succession proceedings immediately.
  - e. That this Honourable Court be pleased to order the Officer Commanding Station (OCS) Lolgorian Police Station to effect the orders herein.
  - f. That costs for this application be provided for.
2. The 1<sup>st</sup> Respondent has opposed the present Application by filing a Replying Affidavit dated 13.03.2023 on the following grounds; -
- a. The 2<sup>nd</sup> Respondent passed away and therefore can not be sued in his personal name save through a legal representative(s).
  - b. The 1<sup>st</sup> Respondent confirmed that the property known as L.R.No.transmara/kimintet “C”/11 (hereinafter referred to as “the suit property”) was registered in the names of the Applicant’s deceased husband together with the 1<sup>st</sup> and 2<sup>nd</sup> Respondents having been a inheritance from their father.
  - c. The 1<sup>st</sup> Respondent stated that the suit property was to be used jointly and equally by all the three registered owners and/or their families.
  - d. However, on or about 1<sup>st</sup> August 2020, the families of the three registered owners resolved to lease out the entire suit property for a period of Thirty (30) years so that the proceedings thereof would assist their families with finances.
  - e. The 1<sup>st</sup> Respondent insisted that the Applicant and her family consented to the said Lease of the suit property and have received their agreed portion of the rent premiums for their own benefit.
  - f. Consequently therefore, the 1<sup>st</sup> Respondent denied being in possession of the suit property as alleged and any orders of injunction issued against him would be in vain.
  - g. The 1<sup>st</sup> Respondent informed the Honourable Court that the reason the Applicant filed this proceeding is because of a disagreement on the amount of rent premium allocated to her and not any other issue.
  - h. The 1<sup>st</sup> Respondent further stated that all the three families have small portions of land which they graze their cattle including the Applicant.
  - i. The 1<sup>st</sup> Respondent reiterated that the suit property was in occupation of a third party who has invested heavily in cultivating the suit property and as such, any orders of injunction would result to an interference of the Lease Agreement thereby exposing the registered owners to damages.
3. In response to the Replying Affidavit sworn by the 1<sup>st</sup> Respondent, the Applicant reiterated the following facts in her Supplementary Affidavit dated 16.10.2023; -
- a. The suit property herein was to BE retained in the names of the three registered owners until their children attained the age of majority and the same passed to them.
  - b. The purported Lease Agreement dated 01.08.2020 was entered and/or executed without her knowledge and/or authority.



- c. The person who is purported to represent the registered owners of the suit property was not authorised to do so.
  - d. The Applicant denied receiving any proceeds from the purported Lease Agreement dated 01.08.2020 as alleged.
  - e. Further to that, the Applicant stated that the Lessee in the Lease Agreement dated 01.08.2020 had excavated and/or dug a water dam just next to her home and therefore has caused her losses by having to pay damages when her cattle damage the Lessee's crops.
  - f. In essence therefore, the Applicant sought this Honourable Court to grant the prayers sought in the present application.
4. The Honourable Court after receipt of the Further Affidavit directed parties to file their submissions wherein the Applicant filed her submissions on 16.01.2023 while the 1<sup>st</sup> Respondent filed his submissions on 14.11.2023.
  5. The Honourable Court has indeed perused the present Application, both the Replying Affidavit as well as the Further Affidavit together with the submissions and identify the issues for determination as follows; -
    - Issue no. 1- is the applicant entitled to a prayer of prohibitory injunction pending the hearing & determination of this suit?
    - Issue no.2- can the honourable court direct the 1<sup>st</sup> & 2<sup>nd</sup> defendant to initiate succession proceedings relating to the suit property?
    - Issue no.3 – is the applicant entitled to the orders sought in the present application?
    - Issue no.4- who bears the costs of the present application.
  6. The issues for determination having been duly identified hereinabove, the same will now be discussed hereinbelow.

**Issue No. 1- Is the Applicant Entitled to a Prayer of Prohibitory Injunction Pending the Hearing & Determination of this Suit?**

7. The first issue for determination in the present application is whether the Applicant is entitled to a temporary injunction prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from entering, interfering, trespassing, entering, intimidating, harassing and/or denying the Applicant's quiet enjoyment of the suit property.
8. The principles of granting temporary injunction were set out in the case of *Giella-versus-cassman Brown* (1973) EA 358 are as follows; -
  - a. Establishment of a prima facie case.
  - b. Damages are not an adequate remedy
  - c. When in doubt, the matter be decided on a balance of convenience.
9. In another case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR the Court of Appeal held that;

“in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable



injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.

10. Based on the above principles, this Honourable Court will now proceed to evaluate the same based on the facts of the present application.

#### **A. Establishment of a prima facie case.**

11. The first ingredient in considering an application for injunction is the establishment of a prima facie case.
12. In the case of Mrao Limited-versus- First American Bank Of Kenya Limited (2003) eKLR, the Court of Appeal gave a determination on a prima facie case as follows; -

“ ... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
13. Turning to the Plaintiff dated 11.07.2023, the Applicant is seeking a permanent injunction against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants restraining them from threatening, harassing and/or interfering with her quiet enjoyment of the suit property.
14. Further to that, the Applicant is seeking for a sub-division of the suit property and subsequently a transfer of a portion of the same to her name.
15. The 1<sup>st</sup> Respondent on the other hand states that the suit is incompetent against the 2<sup>nd</sup> Defendant who has since died.
16. Consequently therefore, this Honourable Court should not make any orders as relates to the 2<sup>nd</sup> Defendant unless and until a substitution is done and the legal representatives of the 2<sup>nd</sup> Defendant participate.
17. Further to that, the 1<sup>st</sup> Respondent stated that the suit property is registered in the names of the deceased Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents jointly.
18. Consequently therefore, the Applicant can not prohibit the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from the enjoyment of the suit property for whatsoever reasons.
19. Further to that, the 1<sup>st</sup> Respondent submitted that the suit property is correctly leased out to a third party who took possession and has occupied the same.
20. The 1<sup>st</sup> Respondent stated that the Lease of the suit property was with the consent of the Applicant who has enjoyed the proceeds thereof until recently when a dispute arose on the manner of sharing the same.
21. In essence therefore, the injunction orders sought can not be enforced against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as they have no occupation and/or possession capable of being granted to the Applicant.
22. Looking at the facts of the Plaintiff herein, the Applicant is alleging being harassed and/or being hindered in occupying a portion of the suit property which she is entitled from her late husband’s ownership.



23. This fact of the Applicant being harassed, threatened and dislodged of her portion of land on the suit property is one that needs to be rebutted by the 1<sup>st</sup> Respondent and/or the estate of the 2<sup>nd</sup> Defendant.
24. As to the success of this Plaint, this Honourable Court can not delve into the merits and demerits of the same at this stage.
25. Consequently, this Honourable Court is of the view that indeed the Applicant has a prima facie case for determination as envisaged in this principle.

**b) Damages are not adequate**

26. The second ingredient for consideration is whether if the alleged damages can be compensated by way of damages or not.
27. In the case of Pius Kipchirchir Kago-versus- Frank Kimeli Tenai (2018) eKLR, the Court described irreparable injury as follows; -

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.
28. In the present application, the Applicant has not stated what injury the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have occasioned to her that can not be compensated by way of damages.
29. As stated earlier, the Applicant seems to admit in the Further Affidavit that a third party is actually in occupation of the suit property although she challenges her consent to the Lease Agreement.
30. The Applicant has not denied receiving a portion of the rent premium paid by the third party in the Further Affidavit and even confesses that she agreed to pay a sum of KShs 50,000/- to the third party when her cattle trespassed onto the leased property.
31. Such an admission creates the impression that the Applicant is receiving a portion of rent premium from the third party as it would be impossible for an owner of a property to compensate a third party for trespass if one has not consented to such an arrangement.
32. The fact that the Applicant is receiving a rent premium from a third party for the occupation and/or use of the suit property, then any interference of the Applicant’s occupation can be compensated by way of damages which can be assessed by the Court if the same is awarded.
33. To this end, the Applicant’s grounds do not establish an injury that can not be remedied by way of damages.

**c. When in doubt of b, the matter be decided on a balance of convenience.**

34. The last ingredient is where the Court is in doubt of ingredient b, then the application should be decided on a balance of convenience.
35. This Honourable Court has made its mind of the second principle and is not in doubt that the Applicant can be compensated by way of damages.
36. To that effect, the balance of convenience tilts in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent.



37. In conclusion therefore, the Applicant has not satisfied the three ingredients for granting a temporary injunction and the same is declined.

**Issue No.2- Can the Honourable Court Direct the 1<sup>st</sup> & 2<sup>nd</sup> Defendant to Initiate Succession Proceedings Relating to the Suit Property?**

38. The second issue for determination in the present application is whether or not this Honourable Court can direct the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to initiate succession proceedings.

39. The Honourable Court is not clear as to whom such orders should be addressed to and how the same can be supervised.

40. Succession proceedings are usually instituted through the Law of Succession, which is rather explicit.

41. Where a party feels that an asset of a deceased person should be subjected to administration under the Law of Succession, then such a party can commence proceedings through a citation of an administrator and thereafter proceed with the succession.

42. This Honourable Court has not business in forcing members of the public to undertake succession where no such interest has been expressed for their own reasons.

43. To that end, the Applicant's prayer no. 4 is declined.

**Issue No.3 – Is the Applicant Entitled to the Orders Sought in the Present Application?**

44. The third issue for determination is whether the Applicant is entitled to the orders sought in the present application.

45. The prayers sought in the present application have been discussed as issues no.1 and 2 hereinabove.

46. Unfortunately, the issues No.1 and 2 discussed hereinabove were not determined in favour of the Applicant.

47. Consequently, the prayers sought in the present Applicant are not merited and cannot be granted.

**Issue No.4- Who Bears the Costs of the Present Application.**

48. The last issue is who should bear the costs of the present application.

49. It is a settled rule that costs follow the outcome of the proceedings.

50. In the present application, the Applicant has not been successful in the prayers sought and therefore should meet the costs of the same.

**Conclusion.**

51. In conclusion therefore, this Honourable Court hereby makes the following orders in determination of the Notice of Motion dated 11.07.2023; -

a. The notice of motion application dated 11.07.2023 is hereby dismissed forthwith.

b. The applicant will bear the costs of the said application.

**DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 23<sup>RD</sup> OF JANUARY 2024.**

**EMMANUEL.M.WASHE**



**JUDGE**

**IN THE PRESENCE OF:**

Court Assistant: Mr. Leken

Advocates for the Applicant: Mr. Kiprotich

Advocates for the 1<sup>st</sup> Respondent: Mr. Mugambi (N/A)

