



REPUBLIC OF KENYA



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Kimari v Kairu (The Legal Administratrix of the Estate of the Late Rebo Kairu) (Environment & Land Case E037 of 2023) [2025] KEELC 855 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEELC 855 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E037 OF 2023
AE DENA, J
FEBRUARY 27, 2025

BETWEEN

THUO MUCHIGI KIMARI PLAINTIFF

AND

TERESIA WAIRIMU REBO KAIRU DEFENDANT

THE LEGAL ADMINISTRATRIX OF THE ESTATE OF THE LATE REBO KAIRU

RULING

Background

1. The proceedings herein are two pronged. Thuo Muchigi Kimari commenced proceedings against TERESIA WAIRIMU REBO KAIRU (The Legal Administratrix of the estate of the Late Rebo Kairu) vide a plaint dated 26th May 2023 (Herein Main suit). The main suit was filed by the firm of Mungai Kamau & Company Advocates. In response to the pleadings the Defendant in the main suit filed a statement of Defence and Counterclaim dated 7/07/23 (counterclaim) through the firm of A.N. Siminyu. The Counterclaim names Thuo Muchigi Kimari together with one Jane Wanjiru Mbatia, the Land Registrar Kwale and the Attorney General as Defendants.
2. On 5/07/24 the 2nd Defendant in the Counterclaim, Jane Wanjiru Mbatia filed a Notice of Preliminary Objection dated 5/07/2024 on the grounds that the Plaintiff in the counterclaim lacked capacity to commence the proceedings thereof and that the counterclaim arising from an agreement for sale dated 8/3/2014 was time barred.
3. On 24/07/24 Mr. Mungai sought to withdraw the main suit with no orders as to costs on the basis that upon service of the Defendants response and Counterclaim they noted there was a confirmed grant issued by the court in Limuru in favor of his client the Plaintiff in the main suit. This application was vehemently opposed by Ms. Siminyu Counsel for the Defendant in the main suit and Plaintiff in the counterclaim. Her position was that the Plaintiff was all along aware of the grant. Ms. Siminyu



further objected to the withdrawal of the main suit and insisted should the withdrawal be sanctioned by the court, then the Defendant in the main suit should be awarded costs. Mr. Mungai was of the view that the defendant failed to disclose the grant and had not approached the court with clean hands to warrant costs.

Directions

4. Noting that the issue of costs on withdrawal of the main suit was highly contested, I directed that since the Plaintiff is the one who had approached the court the court found no justification to stop them from withdrawing the said suit. I therefore proceeded to mark the main suit as withdrawn. I invited parties to file written submissions on whether costs are payable. I also directed that the preliminary objection be heard concurrently in the same manner. I fixed the matter for hearing on 23/10/24.
5. On 23/10/24 Ms. Siminyu informed the court that following withdrawal of the main suit, she had instructions to withdraw part of her clients claim. Consequently, the Plaintiff in the counterclaim filed a Notice of Part withdrawal of Suit dated 22/10/2024 against the Defendants in the counterclaim to the extent of the claim based on contract for the balance of purchase price, penalties and Land Parcel Number Kwale/Galu Kinondo/2053. The notice states the suit would proceed based on fraud against the Defendants in respect of Kwale/Galu Kinondo/2054. The court directed that the same is served for the benefit of the other parties.
6. Upon service Ms. Mukabane holding the brief of Mr. Mungai submitted that in view of the fact that both parties had withdrawn the claim in respect of Kwale/Galu Kinondo/2053 then parties should bear their own costs. On the other hand Ms Siminyu was of the view that the issue of costs be put in abeyance to await the outcome of the preliminary objection or the entire suit.

Ruling on costs

7. The court rendered a short ruling essentially directing that each party should bear their own costs since both parties were not pursuing parcel Kwale/Galu Kinondo/2053. I directed that focus should be on the counterclaim. I further noted that ground 1 of the preliminary objection was spent in view of the disclosure that there was a grant. Ms. Mukabane abandoned the ground. The preliminary objection was to be argued on the issue of time bar.
8. The Plaintiff in the counterclaim had also filed an application dated 28/5/24 seeking orders of injunction which I noted would only be in relation to Kwale/Galu Kinondo/2053 (sic should be 2054). I invited the parties to consider maintaining the status quo. Ms Mukabane maintained the position that such orders would not issue because the plaintiff had not presented a grant in court to demonstrate they can deal with the deceased property.

Submissions

9. Against the foregoing background I directed the respondents to respond to the application appropriately. The application dated 28/5/24 and the preliminary objection were to be heard concurrently by way of written submissions. Parties complied and exchanged submissions with Mr. Penda relying on the submissions filed by Mr. Mungai. The court has considered the submissions in rendering this ruling. This ruling therefore is the subject of the Preliminary objection dated 5/07/2024 and the application dated 28/5/24.



The Preliminary Objection

10. Black's law Dictionary 11th Edition defines a preliminary objection as

‘..as an objection that, if upheld would render further proceedings before the tribunal impossible or unnecessary.
11. The court will address itself on the merits of the preliminary objection first, since if it is sustained, the entire suit will collapse.
12. I will proceed on the premise that all orders touching on parcel Kwale/Galu Kinondo/2053 are spent. The court notes that Mr Mungai submitted on all the grounds in the PO including the issue of costs on withdrawal of the main suit. This is understandable since the said submissions were filed before the proceedings of 23/10/24. To clear this confusion I see no prejudice proceeding on grounds 1 and 3 since both parties have addressed the court on the same.
13. On whether the Plaintiff has locus standi to file the counterclaim it is submitted by the 2nd Defendant that the suit is incompetent since it was filed before the Plaintiff was issued with a grant of Letters of administration in respect of the estate of the deceased. That as such the counterclaim ought to be struck out since the Plaintiff lacks capacity and or locus standi to bring the present claim on behalf of the deceased. It is urged that the plaintiff did not possess a grant of letters of administration for parcel Kwale/Galu Kinondo/2054 when she filed the counterclaim. That she has not demonstrated what interest, capacity or nexus between herself and the said property which she is claiming and suing on behalf of the estate of the deceased since the property has never been part of the deceased estate as it is evidently clear from the Rectified Certificate of Confirmation of grant dated 16/02/2022. That a grant acquired post filing of the suit cannot apply retrospectively.
14. But what did the Plaintiff in the counterclaim have to say about the above contention. It is submitted on behalf of the counterclaimant that there is a contradiction as the Defendants main ground is that the Plaintiff is not the administratrix of parcel Kwale/Galu Kinondo/2054 yet at the same time admit that the said Plaintiff counterclaimant is the administratrix of the estate of the late John Rembo Kairo alias Rebo Ngure Kairu . Citing the provisions of section 82(a) of the Law of Succession Act it is submitted that the late John Rembo Kairo alias Rebo Ngure Kairu claim on parcel Kwale/Galu Kinondo/2054 survived him. That all the averments in the counterclaim on this parcel were offences and or illegalities against the estate of the deceased in which the Plaintiff is an administratrix. The Plaintiff urges that the grant presented in evidence is not a limited grant but a general one for administration of the entire estate of the deceased and it cannot be limited by the respondent.
15. Having considered the above arguments on the part of both counsels, I wondered whether the preliminary objection has been properly raised with regard to the Plaintiffs standing. I say so because the nature of a preliminary objection is now well established. In the case of Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributors [1969] E.A. 696 where Law JA at page 700 stated;

“ ... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”



16. Justice Newbold in the said suit argues that;-

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion” Emphasis is mine

17. Based on the arguments raised above by both parties the issue of whether the Plaintiff is an administratrix cannot be ascertained from the pleadings. The issue has been highly contested as to its truth. From the submissions it is clear the court is being invited to scrutinize documents filed by the parties and interrogate facts to enable it render a determination. Immediately the court moves into this arena the preliminary objection ceases to be on a pure point of law. I respectfully agree with the Plaintiff's submission that the preliminary objection cannot in itself be determined without considering documents attached in evidence and that it does not limit itself on matters of law but spills over into matters of evidence.

18. It is therefore this court's finding that on the issue of locus the preliminary objection has not been properly raised and should fail.

19. Ground No. 2 of the Notice of preliminary objection is as follows; -

That the claim by the Plaintiff is a claim arising out of an agreement dated 8/3/2014 and the claim is time barred therefore the suit is time barred as per the provisions of section 4(1) (a) of the Limitations of Actions Act Cap 22 of the Laws of Kenya.

20. Section 4(1)(a) of the Limitations of Actions Act stipulates that;-

Actions of contract and tort and certain other actions

(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

- (a) actions founded on contract;
- (b) actions to enforce a recognizance;
- (c) actions to enforce an award;
- (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
- (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

21. It was submitted that the contract for the purchase of the Kwale/Galu Kinondo/2054 between the Plaintiff in the main suit and the deceased was entered into on 8/3/2014. That the Counterclaim herein was filed on 25/08/23 thus 9 years and five months far beyond the 6 years provided in the above provision.

22. I have already noted this ground was spent. However, to put the matter to rest and having perused the Counterclaim and the Notice of withdrawal of part of the claim, the Counterclaim pleads fraud on the part of the 1st and 3rd Defendants part (see paragraph 34). It is now established that for purposes



of limitation time starts running from the date of discovery of the fraud see the persuasive decision of S. Okongo J in Justus Tureti Obara Vs. Koipeitai (2014) eKLR. This is an issue that will require the court to probe the facts and evidence. This can only be done at full hearing of the parties. On the same breath the preliminary objection cannot be sustained on this limb.

23. Having made the above findings on the preliminary objection I will now embark on the application.

Application Dated 28th May 2024

24. This ruling is also the subject of the application dated 28th May 2024 filed on behalf of the Plaintiff in the counterclaim seeking the following verbatim orders; -

- a. Spent
- b. A temporary order of injunction be issued against the defendants/respondents restraining them either by themselves or through their agents, relatives, employees and or servants or any other persons claiming under or through them from alienating, laying claim to, trespassing onto, utilizing, developing, carrying out any works on, constructing on or any other manner dealing or interfering with the suit portion of land parcel Nos KWALE/GALU KINONDO/2053 and KWALE/GALU KINONDO/2054 pending hearing and determination of this application.
- c. A temporary order of injunction be issued against the defendants/respondents restraining them either by themselves or through their agents, relatives, employees and or servants or any other persons claiming under or through them from alienating, laying claim to, trespassing onto, utilizing, developing, carrying out any works on, constructing on or any other manner dealing or interfering with the suit portion of land parcel Nos KWALE/GALU KINONDO/2053 and KWALE/GALU KINONDO/2054 pending hearing and determination of this application.
- d. This Honorable court be pleased to issue prohibitory orders prohibiting and or inhibiting any dealings on title KWALE/GALU KINONDO/2054 and or status quo be maintained pending hearing and determination of this matter.
- e. This Honorable court be pleased to do a site visit on the suit properties to confirm the current ground position and or status quo be maintained.
- f. This Honorable court be pleased to issue an order compelling Co-operative Bank of Kenya Ltd to supply the applicant with certified copies of the deceased JOHN REMBO KAIRU alias REBO NGURE KAIRU's Bank account statements for his account number 01109307996300 for the period running from March 2014 to 24th May 2024
- g. Cost of this application

25. The application is supported by the affidavit of Tersia Wairimu Kairu sworn on even date and the grounds set on the face of the Motion. It is deponed that during the pendency of the suit on 25th May 2024 the 2nd respondent and her agents started clearing and fencing off parcel KWALE/GALU KINONDO/2054 and were working thereon. The deponent is apprehensive the 1st and 2nd defendants will continue with construction changing the character of the property. That to render the suit nugatory they could transfer the property to third parties.

26. The deponent further avers that she has tried to obtain the deceased bank account statements from the Cooperative Bank Kenya Limited to help in the just determination of this dispute without success.



27. The 2nd Respondent did not respond to the application dated 28th May 2025 despite the directions on 23/10/23 that they do so within 7 days.
28. Mr. Penda state Counsel for the 3rd and 4th Defendants opposed the application vide grounds of opposition dated 23/10/24. It stated that the applicant has no legal authority to represent the estate of the deceased. The court has already dealt with this point elsewhere in this ruling. It is contended that by dint of the Notice of withdrawal dated 28/10/24 prayer b) and c) of the application are overtaken by events in so far as they concern KWALE/GALU KINONDO/2053. This is not in contest both parties having dropped claims touching on this parcel.
29. Counsel for the applicant submitted that the property has not been used by any of the parties and has been fallow and therefore the orders sought cannot prejudice the Respondents. That clearance is an indication of the respondents intention to put the property to use either by farming or construction including alienation of the same. The balance of convenience tilts in favor of maintaining the character of the land. The court is also invited to visit the suit property to know the current status of the property.

Analysis And Determination On The Application Dated 28th May 2024

30. While the application may not have been opposed by the 2nd Respondent it is necessary that the court subjects it to a merit review. The main issue therefore that arises for determination is whether the application is merited.
31. I have seen the photos annexed as TWK 1a,1b & 1c to the supporting affidavit herein. I must state that there is nothing that has been placed before court to link the activities seen in the photo to the parcel KWALE/GALU KINONDO/2054. Moreover, no certificate is attached as required under section 106B of the *Evidence Act*. Infact the applicant at paragraph 5 wants the court to visit the site to confirm the averments. I think the applicant must put her best effort to bring evidence to the court as to the status of the parcel. I think some of the fears as to change of character of the suit property are prematurely raised before this court.
32. I have noted the fears as to disposal of the suit. I note that the application has also been brought pursuant to the provisions of order 40 Rule 1. Counsel for the applicant did not address this court on the principles of granting orders of temporary injunctions. But how best should the court deal with the suit premises noting the invitation to preserve the status quo. Justice Hoffman in the English case of Films Rover International cited in Jan Bolden Nielsen vs. Herman Phillipus Steyn alias Hermannus Phillipus Steyn & 2 Others (2012) eKLR made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781:- “ A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong””
33. The Black’s Law Dictionary, Butter Worth’s 9th Edition, defines status quo as a Latin word which means ‘the situation as it exists’.
34. The purpose of an order of status quo has been articulated in many court case as highlighted here below;-
35. In the case of Kenya Airline Pilots Association (KALPA) v Co-operative Bank of Kenya Limited & another [2020] eKLR, the court stated:

“ ... By maintaining the status quo, the court strives to safeguard the situation so that the substratum of the subject matter of the dispute before it is not so eroded or radically changed



or that one of the parties before it is not so negatively prejudiced that the status quo ante cannot be restored thereby rendering nugatory its proposed decision.”

36. In the case of *Fatuma Abdi Jillo v Kuro Lengesen & another* [2021] eKLR. In *Republic Vs National Environment Tribunal, Ex-parte Palm Homes Limited & Another* [2013] eKLR, Odunga J [as he then was] quotes various decisions in a bid to distinguish status quo from injunctive orders, stated;

“When a court of law orders or a statute ordains that the status quo be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining status quo is meant to preserve existing state of affairs...Status quo must therefore be interpreted with respect to existing factual scenario...” In *TSS Spinning & Weaving Company Ltd Vs Nic Bank Limited & another* [2020] eKLR, the unpacked the purpose of a status quo order as follows: “In essence therefore, a status quo order is meant to preserve the subject matter as it is/existed, as at the day of making the order. Status quo is about a court of law maintaining the situation or the subject matter of the dispute or the state of affairs as they existed before the mischief crept in, pending the determination of the issue in contention.In *Murithi Jin Boabab Beach Resort* as quoted by F. Tuiyot Saifudeen Abdullahi & 4 Others in *Mombasa High Court Misc. Civil Cause No. 11 of 2012*, described the nature of a status quo order as follows: “In my view, an order to Status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is a substantive equitable remedy granted upon establishment of a right, or at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof. It does not depend on proof of right or prima facie case. In its effect, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or the eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint.” (Emphasis is mine).

37. Guided by the above and as case management intervention this court is inclined to issue orders of status quo to preserve both the suit property on the ground as well as the parcel register. I see no prejudice to be occasioned to either of the parties herein in issuing these orders.

Disposition

38. The upshot of the foregoing is that; -
1. The preliminary objection dated 5/07/2024 is hereby dismissed.
 2. That the Application dated 28th May 2024 is disposed in the following terms; -
 - a. THAT Pending the hearing and determination of this suit the Status quo shall be maintained on the parcel KWALE/GALU KINONDO/2054. For the avoidance of doubt there shall be no activities to be undertaken by both the Plaintiff and the 1st and 2nd defendant in terms of clearing, fencing and construction on the said parcel.
 - b. THAT Pending the hearing and determination of this suit an order of inhibition is hereby issued restricting the registration of any disposition in the register of land parcel KWALE/GALU KINONDO/2054.
 - c. Costs shall abide the outcome of the main suit.



d. The case to be mentioned on 11th March 2025.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY VIA CTS THIS 27TH DAY OF
FEBRUARY 2025.**

.....

HON. A.E DENA

JUDGE

27/2/2025

