



Koech & another v Chepkwony & another (Environmental and Land Originating Summons E005 of 2023) [2024] KEELC 1526 (KLR) (21 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1526 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E005 OF 2023
MC OUNDO, J
MARCH 21, 2024**

BETWEEN

JANE CHEPTOO KOECH 1ST PLAINTIFF

FLORENCE CHEPKURUI KOECH 2ND PLAINTIFF

AND

JOSHUA KIPKEMOI CHEPKWONY 1ST DEFENDANT

ESTHER CHEPTANUI PIOMDO 2ND DEFENDANT

RULING

1. By a Notice of Motion dated 28th July, 2023 brought under the provisions of Order 40 Rule 1 of the *Civil Procedure Rules, 2010* and Section 3A of the *Civil Procedure Act*, Cap, 21 of the Laws of Kenya and all other enabling provisions of law, the Applicants herein sought for interim injunctive orders against the Respondents by themselves, their servants, agents, or any other person from evicting, demolishing, harassing, selling, offering for sale, advertising, alienating, transferring by public auction or private treaty, disposing off or otherwise completing by conveyance, transfer of any sale concluded by public auction or private treaty, taking possession, appointing receivers, leasing, letting, charging or otherwise interfering with all that parcels of land known as Land Reference Kericho/Kiptere/467 pending hearing and determination of the Originating Summons herein.
2. They also sought that the Land Registrar be directed to prohibit or restrict dealings to all that parcel of land known as Land Reference Number Kericho/Kiptere/467 pending the hearing and determination of the Originating Summons herein. That further, the costs of this Application be provided for.
3. The application was supported by the grounds therein as well as the supporting Affidavit of an even date, sworn by Jane Cheptoo Koech, the 1st Plaintiff/Applicant herein who deponed that together with her late husband one R.K Chebochok, they had acquired the parcel of land registered as Kericho/ Kiptere/467 (the suit land) in the year 1975 from the then registered owner the late Kipkosgei Arap



Mitei, however, the said land had never been registered in their names. That they had then proceeded to develop the suit land where they built their matrimonial home, farmed, kept livestock and lived continuously without any interruption for over 47 years even after the demise of her husband in the year 2013 wherein she had been joined by the 2nd Plaintiff/Applicant who was her step-daughter.

4. . The recently the Defendants/Respondents who had full knowledge of their occupation and possession of the suit land and who were unknown to them, sent them an eviction notice.
5. In response and in opposition to the application, the Respondents vide their undated Replying Affidavit filed on 21st August, 2023 sworn by Joshua Kipkemoi Chepkwony, the 1st Defendant/Respondent herein deponed that the instant Application was an abuse of the court process. That he was the son of the late Kipkoskei Arap Mitei who had died in the year 1990. That in the year 2016, his uncle, one Kipterer Mitei Akui had informed him that the suit land had belonged to his (1st Applicant) late father who had given the same to him to cultivate. That he had subsequently filed a Succession Cause which Gazette Notice had not been objected to by the Plaintiffs/Applicants.
6. That it was not true that the Applicants had been on the suit land since the year 1975 as they had claimed. That together with the 2nd Defendant/Applicant, they were now duly registered as the proprietors of the suit land having completed the Succession Cause.
7. That the suit land had never been sold to anyone including the Applicants who were neither beneficiaries of the estate of the late Kipkoske Arap Mitei nor beneficial owners of the suit land.
8. That the photograph of the alleged matrimonial home attached in the Applicant's Supporting Affidavit as JC-2b was situated on the suit land. That they had made several attempts to evict the Plaintiffs/Applicants until recently when the eviction notice had been served upon them which had prompted them to move the court through the instant suit. That the Plaintiffs/Applicants actions were unlawful as they were out to defraud/frustrate the Defendants/Respondents. That the instant Application was frivolous, scandalous hence it was in the interest of justice that the same be dismissed.
9. Directions were given that the application be canvassed by way of written submissions to which the parties complied and filed their submissions summarized as herein under.

Plaintiffs/Applicants Submissions

10. The Plaintiff/Applicants vide their written submission dated 13th November, 2023 framed one issue for determination to wit; whether they had met the threshold for granting an interlocutory injunction.
11. They placed reliance on the guiding principles in the celebrated case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 to submit that they had established a prima facie case with a probability of success, having lived openly, peacefully, uninterrupted and continuously in the suit land since the year 1975 which was a period well over 35 years. Reliance was also placed on a combination of decisions in the case of *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125 and *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR to submit that the court ought to preserve the suit property until the question of ownership had been heard and determined.
12. On the issue as to whether they would suffer irreparable injury, which would not be adequately compensated by an award of damages, should the orders sought not be granted, but the Applicants submitted that they stood to lose the suit property as they had been served with an eviction notice by the Respondents. They placed reliance on the provisions of Order 40 Rules 1 and 2 of the *Civil Procedure Rules, 2020* to submit that the court had powers to grant an order of temporary injunction



to restrain such acts and prevent the wasting, damaging, alienation, sale, removal or disposition of the suit land.

13. They relied on the definition of irreparable injury in *Halsbury's Laws of England*, 3rd Edition Volume 21, paragraph 739 page 352 and the decision in the case of *Joseph Siro Masioma v Housing Finance Company of Kenya Limited & 3 Others* [2008] eKLR to submit that they had nowhere else to go as they had no other home. Further, that they were depending on the suit land for subsistence hence if injunction were not to be granted, they would be evicted from their home and they would find themselves under the mercy of the vagaries of nature.
14. With regards to whether the balance of convenience tilted in their favour, the Applicants reiterated that they had been living on the suit land for over 35 years and had never heard of, nor seen the Respondents. They relied on the decided case of *Chebii Kipkoach v Barnabas Tuitoek Bargarioria & Another* [2019] eKLR to submit that they had nowhere to go. That the Respondents would not suffer any harm since they had only laid claim on the suit land in less than 6 months period of time while the Applicants had been living and utilizing the suit of land for over 35 years.
15. That subsequently, it was just and equitable for the court to grant the requested interlocutory injunction as the same would serve the overarching objective of maintaining fairness, equality and protection of rights in legal proceedings.

Respondents Submissions

16. The Respondents, in opposition to the instant Application and vide their submissions dated 1st November, 2023 also relied on the principles in the case of *Giella v Cassman Brown and Co. Ltd* (supra) to frame their issues for determination as follows:
 - i. Whether the Plaintiffs/Applicants had established a prima facie case.
 - ii. Whether there is irreparable loss
 - iii. Where does the balance of convenience lie?
17. On the first issue for determination as to whether the Applicants had established a prima facie case, the Respondents placed reliance in the *Mrao Ltd case* (supra) to submit in the negative. That there had been no evidence to show that the Applicants had been in occupation of the suit land for a period of more than 12 years. That whereas the Applicants had alleged that they had acquired the suit land in the year 1975 from the then registered owner, one Kipkosgei Arap Mitei (deceased), they had not attached any document to confirm the same. That the pictures and growers did not prove the year of the alleged occupation of the suit land.
18. That from the Respondents' annexures 5, 6 and 8, it had been evident that they had been keen in taking possession of the suit land, them being the legal and rightful owners. That the claim of adverse possession by the Applicant could not stand as they (Applicants) had not been in exclusive and uninterrupted possession and/or occupation of the suit land.
19. That the Applicants had only been occupying another parcel of land bordering the suit land and the photographs of the alleged matrimonial home in the suit land annexed as JC-2B had clearly been on a different parcel of land. While relying on the *Mrao Ltd case* (supra), the Respondents submission was that no prima facie case had been established.
20. On the issue as to whether there was irreparable loss, the Respondents submission was to the effect that the Applicants had failed to demonstrate how they would suffer irreparable loss. That their allegation that the Respondents intended to sell the suit land had was non-founded. That notwithstanding, the



- Respondents had legal right to sell what legally belonged to them as the suit land was registered in their names and the Applicants were neither staying thereon nor had they been in occupation of the same.
21. Regarding where the balance of probabilities lay, the Respondents submitted that the same tilted in their favour because they had demonstrated that the Applicants were not in occupation of the suit land neither had they been in continuous occupation uninterruptedly as required by law. That the Applicants had not come to court with clean hands.
 22. In conclusion, the Respondents submitted that the Applicants had not satisfied any of the conditions set for the grant of interlocutory injunction. That Applicants Application was frivolous, and undermined the doctrine of equity hence the court ought to disallow the same and grant such other reliefs as may be appropriate in the circumstances especially as to costs of the cause.

Determination.

23. The celebrated case of *Giella vs Cassman Brown* (1973) EA 358 sets out conditions for the grant of an interlocutory injunction as follows:-
 - i. Is there a serious issue to be tried(prima facie case)
 - ii. Will the Applicant suffer irreparable harm if the injunction is not granted;
 - iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (Often called "balance of convenience").
24. On the first issue as to whether the Plaintiff/Applicant in this matter has made out a prima facie case with a probability of success, I am guided by the case of *Mrao vs First American Bank of Kenya Limited & 2 Others* (2003) KLR 125, where a prima facie case was described 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.”
25. The Court has been moved under a Certificate of Urgency, by the Applicant, to issue temporary injunctive orders against the Respondents. At this stage, the Court is only required to determine whether the Applicant is deserving of the orders sought. The Court is not required to determine the merit of whether the Applicants herein has demonstrated that they have a genuine and arguable case or not.
26. The issues that arises for determination herein is whether an interim order of injunction should issue.
27. In this matter, the Plaintiffs/Applicants herein have alleged that pursuant to a sale agreement between the 1st Applicant, her late husband one R.K Chebochok, they had purchased the suit parcel of land registered as Kericho/Kiptere/467 in the year 1975 from the then registered owner the late Kipkosgei Arap Mitei wherein they had proceeded to develop it and had lived there continuously without any interruption for over 47 years before they were served with an eviction notice by the Respondent.
28. The Respondents argument on the other hand was that the suit land belonged to the 1st Respondent’s father the late Kipkoskei Arap Mitei who died in the year 1990. That pursuant to a successful succession cause, the land was registered to them through transmission. That the Applicants had never been in occupation of the said land, were not beneficiaries of the estate of the late Kipkoske Arap Mitei nor beneficial owners of the suit land.



29. At paragraph 22 of their Replying Affidavit, the Respondents acknowledged that presence of the Applicants on the suit land when they deponed that they had made several attempts to evict them in vain. This also buttressed by the fact that they had served the Applicants with an eviction notice annexed as "JC5" in the Applicant's affidavit in support. There is therefore no argument that the Applicants are in occupation of the suit land.
30. I have considered that the title deed of parcel of land No Kericho/Kiptere/467 herein annexed as "JKC 09a" was registered to both the Respondents on the 12th September 2019. The fact that the Applicants are in occupation of the suit land and now seek to be registered as proprietors of the same as adverse possessors is a matter which will be determined at a full hearing however since it is not disputed that the Applicants are in occupation of the same, and all that they seek is an injunction against the Respondents from disposing off the land in the ways herein above enumerated, or taking possession of the same, so as to preserve the suit land pending the determination of the case, I see no harm in ordering that the parties do maintain the status quo pertaining which order will assist in case management until determination of the case.
31. The Court of Appeal in the case of *Mugab-v-Kunga* [1988] KLR 748, held that in land matters status quo orders should always be issued for purposes of preserving the subject matter. The court's practice directions vide Gazette Notice No. 5178/2014 Practice direction No. 28(k) gives the court the leeway and discretion to make an order for status quo to be maintained until determination of the case.
32. With this in mind, and whilst cautioning myself on the preservation of the status quo so as to ensure that no party is prejudiced, I would therefore interfere in a limited manner by clearly defining the status quo herein to the effect that:
- i. An order of status quo is herein issued to be maintained by all the parties in that it must be understood that the Plaintiffs/Applicants are still in occupation of land in parcel LR No. Kericho/Kiptere/467, as at the time of filing the Originating Summons.
 - ii. There shall not be any or interfering with parcel registration LR No. Kericho/Kiptere/467.
 - iii. Such status quo is to be maintained by all parties until the matter is finally heard and determined.
 - iv. The cost of the application dated the 28th July, 2023 shall be in the cause.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT NAIVASHA THIS 21ST DAY OF MARCH 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

