



**Kibet (Suing as the legal representative of the Estate of the Late Christopher Kibet Kiptum) v Koech (Environment & Land Case 22 of 2023) [2024] KEELC 4046 (KLR) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 4046 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 22 OF 2023  
JM ONYANGO, J  
APRIL 30, 2024**

**BETWEEN**

**ROSBELLA JEPKASI KIBET (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE CHRISTOPHER KIBET KIPTUM) ..... PLAINTIFF**

**AND**

**TIMOTHY KIPKORIR KOECH ..... DEFENDANT**

**RULING**

1. What is before me for determination is a Notice of Motion dated 8<sup>th</sup> November 2023 seeking the following orders;
  1. Spent.
  2. THAT a Temporary Orders of Injunction do issue restraining the Defendant, his agents, servants, assigns, or anyone claiming through him from taking over, leasing out, trespassing, encroaching, cultivating or dealing with the Plaintiff's parcel of land No. Kuinet/4-57R (forming part of L/R 8405/) pending the hearing and determination of this application.
  3. THAT a Temporary Orders of Injunction do issue restraining the Defendant, his agents, servants, assigns, or anyone claiming through him from taking over, leasing out, trespassing, encroaching, cultivating or in any way dealing with the Plaintiff's parcel of land No. Kuinet/4-57R (forming part of L/R 8405/) pending hearing and determination of the main suit.
  4. The costs of the application.”



2. The application is brought under “Article 40, 46, 47, 48, 50 (1), 159 of *the Constitution* of Kenya 2010, Section 1A, 1B, 3A, 63(E) of the *Civil Procedure Act* CAP 21, Order 40(Rule 1 and Rule 4) and Order 50 Rule 1 of the Civil Procedure Rules 2010.
3. The application is predicated on the grounds on the face of it and supported by the affidavit of Rosbella Jepkasi Kibet sworn on 8<sup>th</sup> November 2023. In brief, the applicant deponed that some of the beneficiaries to the estate of Christopher Kibet Kiptum entered into a lease agreement for two years with the defendant without her consent being the legal representative of the estate and wife to the deceased and other beneficiaries. The beneficiaries who entered into the lease agreement realised the mistake and were willing to refund the rent paid for 2024 since the defendant had already tilled the land for 2023. The defendant, however, declined to take the refund and is adamant that he will continue to be in possession unless a court order is issued against him. The intervention by the estate has proved futile despite the lease being void. The beneficiaries are yet to obtain the full grant.
4. The application is opposed via a Replying Affidavit sworn on 13<sup>th</sup> December 2023 by Timothy Kipkorir Koech. In brief, he deponed that he entered into a lease agreement for 50 acres of land out of the suit property Kuinet/4-57R for two years with Alex Kibet Kipro and Cynthia Kiptum, who indicated to him that they were beneficial owners of the land. He stated that he paid Kshs 1,200,000/- for the two years and immediately took possession of the suit property. It is his contention that the land is already ploughed in preparation for the 2024 season, and the plaintiff has over 200 acres for use with other beneficiaries. He further avers that the plaintiff has not demonstrated the loss she stands to suffer and has not shown that she had the blessings of the other beneficiaries. He maintains that he is not a trespasser as he has only leased land but has not purchased the 50 acres and is thus not an intermeddler.
5. The application was disposed of by way of written submissions. The Applicant filed their submissions on 18<sup>th</sup> January 2024. The Respondent filed their submissions on 26 January, 2024.

### **Applicant’s Submissions**

6. The Applicant submitted that she had met the requirements for granting an interlocutory injunction as provided under the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* (2014) eKLR. The Applicant also relied on the cases of *Eso Kenya Limited v Mark Makwata Okiya Civil Appeal No.69 of 1991* and *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR to buttress her point that she has met all the conditions for an injunctive order. She is of the view that the balance of convenience tilts in her favour as she has the right to be in the estate property which right includes distributing the same to the beneficiaries.
7. Additionally, the Defendant/Applicant submitted that the Respondent shall not suffer prejudice but the Applicant and the other beneficiaries will suffer prejudice as they are entitled to enjoy the estate once distributed. The Applicant submits that the Defendant could not have acquired any valid interest in the land as it is leased from a person who does not have title to it. The transaction is thus unlawful. On whether the defendant can acquire a leasehold interest in a deceased estate before confirmation of the grant of letters of administration, the Applicant submitted that the agreement was not made in the deceased’s lifetime and that any dealings with the deceased’s estate amounts to intermeddling contrary to the provisions of Section 45 of the *Law of Succession Act*. It was her further contention that a grant of letters of administration does not relate to the date of death to authenticate any acts of Administrators done between the date of death and date of appointment. It is her further contention that the beneficiaries are in agreement and ready to refund the Defendant. The Applicant submits that they have established a prima facie case based on the material presented. On this basis she submits that the injunction should be granted pending the determination of the suit.



## Respondent's Submissions

8. On his part, the Respondent submitted that the Plaintiff's application should be dismissed as he did not intermeddle with the estate and that the Applicant has not satisfied the grounds for grant of the injunctive orders sought. The Respondent relied on the cases of *Kibuturi v Kenya Shell*, Civil Case No. 3398 of 1980, *Giella v Cassman Brown* (1973) EA 358, and *Nguruman Limited v Bonde Nielsen & 2 others* (2014) eKLR to buttress his point that in his defence he only leased the land but did not purchase it. He added that he took possession with the full knowledge of the Applicant and other beneficiaries. He asserts that he is farming the land and that action is a means of preserving the land. He claims he is also not inflicting any harm upon the Applicant as he is the one who stands to suffer losses as he has already tilled the land in readiness for the 2024 planting season and the offer by the Applicant to refund Kshs.600,000/- cannot satisfy the financial expenses incurred. He contends that he holds a legitimate expectation that the lease will continue. It is his submission that the balance of convenience tilts in his favour considering that the lease period is short and that the land will not suffer any harm as the lease ends by the next harvest season. He relied on the case of *Paul Gitonga Wanjau v Gathuth is Tea Factory Company Limited & 2 others* (2016) eKLR to illustrate that the Respondent will suffer more if the injunction is granted as prayed. On the issue of intermeddling, the Respondent submits that he acknowledges the severity of the offence and relies on the case of *Veronica Njoki Wakagoto* (deceased) 2013 eKLR to elaborate his understanding but contends that he has not intermeddled with the deceased's estate. It is his contention that the Applicant could have sued the lessors. It is his submission that it would be proper for the lease premium to revert to the deceased's estate and for the Respondent to complete the lease period. The Respondent urges the court to exercise its discretion on costs in his favour and is guided by the case of *Republic v Rosemary Wairimu Munene ex-parte Applicant v Ihuru Dairy Farmers Co-operative Society Ltd*. It is his prayer that the application be dismissed with costs.

## Analysis And Determination

9. I have considered the issues raised in the application and the rival submissions. Before I delve into the issues for determination, I note that the issue of intermeddling has featured prominently throughout the application, response and rival submissions. The court will limit herself to the prayers sought as the application is based on the [Civil Procedure Act](#) and [the Constitution](#). The main issue for determination is:

### **i) Whether the Applicant ought to be granted the orders sought.**

10. The law on temporary injunctions is provided under Order 40(1) (a) and (b) of the Civil Procedure Rules 2010 as follows:

“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; or
- (b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit;

The court may grant a temporary injunction to restrain such act or make such other order to stay and prevent 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."

11. The conditions for consideration in an application for injunctions were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* (1973) E A 358, where the Court expressed itself in the following terms:

"Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

12. The first requirement is whether the Applicant has established a prima facie case with a probability of success. In the case of *Mrao Limited –versus- First American Bank of Kenya Limited And two others* (2003) eKLR, the court, in determining what amounts to a prima facie case, stated as follows;

"So what is a prima facie case? I would say that in civil cases this is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation on rebuttal from the latter."

13. The court makes the following observations on the issue of the prima facie case. From the application it is not clear who the other beneficiaries are as they were not stated. What is clear from the court record is that a Limited Grant of Letters of Administration was issued to the Applicant herein for the estate on the 30<sup>th</sup> of October, 2023. The court notes that the Respondent entered into a lease agreement with two lessors, Cynthia Kiptum and Alex Kibet Kiprop. The Applicant argues that the beneficiaries could not enter into such an agreement without the consent of the other beneficiaries and the legal representatives. What is the implication of such actions on the deceased's estate? Is the lease agreement legal? These questions must be answered to establish whether a prima facie case has been established.

14. In *Re Estate of M'Ngarithi M'Miriti* (2017) eKLR the term "intermeddling" was elucidated to mean the following:

"Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession (emphasis own), or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out (emphasis own), interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the *Law of Succession Act* I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under Section 45 of the *Law of Succession Act*. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person."



15. In view of the aforementioned definition, this court finds that the Respondent intermeddled with the estate of the deceased. The lease agreement is thus void as it facilitates the offensive actions against the deceased's estate, which the Applicant seeks to preserve and protect through the interlocutory injunction. The court therefore, finds that the Applicant has established a prima facie case with a probability of success.
16. On the second limb, the Applicant must demonstrate that there is irreparable harm which cannot be compensated by way of damages. The Respondent argues that he only leased the property and he has not purchased it, suggesting that leasing did not cause irreparable harm as the lease period is short. This court finds that this act of leasing the suit property puts the deceased's estate at risk as the grant is yet to be confirmed and the estate distributed among the beneficiaries. The applicant is keen to preserve the estate and is ready to refund the lease premium paid for the year 2024. It is the court's finding that allowing the Respondent to continue leasing the suit property will cause the Applicant to suffer irreparable harm which cannot be compensated by damages.
17. The third limb is the balance of convenience. Having considered the prevailing circumstances, it is my finding that the balance of convenience tilts in favour of the Applicant as mischief is likely to arise if the injunction is not granted, as the distribution of the estate will not proceed smoothly.
18. Lastly, on the legality of the agreement. This court is guided by the case of *Felistas Njeri Mukoma v Catherine Wanjiru Mwaura & 3 others* [2018] eKLR, which was faced with similar circumstances the court held:

“To enter into a lease agreement and receive rent thereto without legal representation of the owner of the estate amounts to intermeddling of the estate contrary to section 45 of the *Law of Succession Act*. It is trite law that any transaction undertaken in respect to an estate of a deceased person amounts to intermeddling of the estate and is null and void. Having found the lease agreement entered into being null and void it then follows that the monies paid in respect to rent pursuant to a void and null agreement is refundable to the Plaintiff.”

19. Having come to the conclusion that the application is merited, I make the following orders:
  - a. The application dated 8<sup>th</sup> November 2023 is hereby allowed with costs to the Applicant.
  - b. Parties are directed to comply with pre-trials in order to expedite the hearing of the main suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH<sup>TH</sup> DAY OF APRIL 2024.**

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**J.M ONYANGO**

**JUDGE**

In the presence of;

Miss Wambani for the Defendant/Respondent

No appearance for the Plaintiff/Applicant

Court Assistant: Mr. Brian K.

