



**Kiplagat (Suing through nephew and next friend John Kibor Biwot)
v Kogo & 2 others (Environmental and Land Originating Summons
E007 of 2024) [2025] KEELC 835 (KLR) (25 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 835 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E007 OF 2024
GMA ONGONDO, J
FEBRUARY 25, 2025**

BETWEEN

**JOSEPH KIPLAGAT (SUING THROUGH NEPHEW AND NEXT FRIEND
JOHN KIBOR BIWOT) PLAINTIFF**

AND

**RITA JEROP KOGO 1ST DEFENDANT
LAND REGISTRAR, NANDI COUNTY 2ND DEFENDANT
GEORGE KOECH 3RD DEFENDANT**

RULING

1. The instant ruling is in respect of an application by way of Notice of Motion dated 8th October 2024 and lodged herein on 9th October 2024 by the plaintiff/applicant through M/s Kiplagat J. Misoi & Company Advocates seeking the orders infra:
 - a. Spent
 - b. Spent
 - c. That a temporary order of injunction be and is hereby issued restraining the 1st and 3rd defendants by their agents, servants by themselves or others claiming interest from constructing, carrying out any development, fencing, transferring or in any other manner dealing with all that property known as Nandi/Baraton/2497 and Nandi/Baraton/2498 (the 1st and 2nd suit parcels of land respectively herein) pending the hearing of the main suit.
 - d. That the costs be provided for.
 - e. Any other relief that this court may deem fit to grant.



2. The application is based on four grounds, inter alia:
 - a. The 1st and 3rd respondents have commenced construction over the 1st and 2nd suit parcels of land, despite having been served with the pleadings herein.
 - b. The constructions and developments over the 1st and 2nd suit parcels of land shall automatically prejudice the interests and concerns raised by the plaintiff over the property.
 - c. It is in the best interest of justice that the prayers sought be granted in the interim pending the hearing of this application and subsequently the determination of the main cause.
 - d. The plaintiff/applicant has established a prima facie case with high chances of success against the respondents.
3. Further, the application is anchored on the applicant's supporting affidavit of eight paragraphs sworn on even date, alongside the annexed document marked as J.K.B.1 which is a copy of the official search certificates in respect to the suit parcels of land dated 27th August 2024.
4. Briefly, the applicant laments that upon service of the pleadings in respect to this suit on the parties herein, the 1st and 3rd respondents started constructing on the 1st and 2nd suit parcels of land. That he has placed a caution over the 1st and 2nd suit parcels of land and should construction and development thereon continue, his interest and that of his uncle over the same shall be prejudiced. That he has established a prima facie case with high chances of success. Thus, he urged the court to allow the application as prayed.
5. The 1st respondent through M/s Chebii Cherop and Company Advocates, opposed the application by way of a Replying Affidavit sworn on 30th October 2024. She deposed that this application has been filed by a stranger and ought to be dismissed or struck out for want of legal capacity. That she got registered as the proprietor of the suit parcels of land with the consent of the plaintiff and his family.
6. It was the 1st respondent's submissions that later, she transferred the said parcels to the 3rd respondent herein with the consent and authority of the entire family, including the plaintiff herein who is her brother in law. That the 3rd respondent took possession of the same and has been in occupation and use thereof for a period in excess of three years. That the instant application does not meet the threshold for grant of the orders sought.
7. The 3rd respondent through Kigen W. J. and Company Advocates lodged a Notice of Preliminary Objection dated 2nd October 2024 to the effect that the suit herein is fatally defective and bad in law as it contravenes the provisions of sections 26 and 27 of the [Mental Health Act](#) and Order 32 Rule 15 of the Civil Procedure Rules.
8. By a replying affidavit sworn on 11th November 2024, the 3rd respondent through his counsel, opposed the application. He indicated that he had filed a notice of Preliminary Objection as stated in paragraph 6 hereinabove challenging the applicant's capacity to institute the instant suit and application. That the Preliminary Objection ought to be determined on priority basis. That in any event, the instant application has not met the threshold for grant of an injunction order. That he has no legal and/or beneficial interest in the suit parcels of land and is not carrying out any construction thereon. That this application lacks merit, is frivolous, vexatious and has been made in bad faith hence, the same ought to be dismissed with costs.
9. In a supplementary affidavit sworn on 18th November 2024, the applicant averred that he has not lodged the instant application in bad faith. That he has valid grounds to challenge the transfer and



- developments on the suit parcels of land since the same was done without the consent of his uncle, who is of unsound mind.
10. Both the application and the Notice of Preliminary Objection were heard by way of written submissions pursuant to this court's directions of 12th November 2024. Further, the court directed that the Preliminary Objection be treated as a response to the application.
 11. Accordingly, Learned Counsel for the applicant filed submissions dated 11th December 2024 and submitted that the applicant's uncle, Joseph Kiplagat, on whose behalf the applicant has initiated the instant suit and who is mentally impaired, has been rendered homeless by the 1st and 3rd respondents' actions. That the applicant has established a prima facie case as held in *Giella-vs-Cassman Brown & Company Ltd (1973) EA 358*. That the applicant has established that there exists a relationship between himself and the said Joseph. Thus, he urged the court to allow the application as prayed. Counsel relied on the case of *Mrao Limited-vs-First American Bank of Kenya Limited & 2 others (2003) eKLR*, to reinforce the submissions.
 12. By the submissions dated 20th January 2025, the 1st respondent's counsel submitted that the Preliminary Objection is grounded on the provisions of Section 26 and 27 of the *Mental Health Act* and Order 32 Rule 15 of the Civil Procedure Rules 2010. That Order 32 Rule 15 (supra) mandates that suits on behalf of persons of unsound mind be instituted through a next friend or guardian with the express leave of the court or a medical certificate certifying the plaintiff's mental incapacity. That the plaintiff/applicant has failed to comply with the provisions of the law hereinabove mention, hence the present suit is incompetent. That such non-compliance renders any action taken on behalf of a person of unsound mind void. That therefore, the applicant herein lacks the locus standi to institute and prosecute the suit on behalf of his purported uncle, Joseph Kiplagat. That besides, the applicant has not satisfied the principles for grant of injunction orders. That the appropriate order that can issue in the circumstances is status quo. Thus, counsel urged the court to dismiss the application with costs. To fortify the submissions, reliance was placed on various authoritative pronouncements including *Mumo Matemo -vs- Trusted Society of Human Rights Alliance & 5 others (2013) eKLR* and *Giella vs Cassman Brown (supra)*, among others.
 13. The 3rd respondent's counsel filed submissions dated 10th January 2025 and stated that the Preliminary Objection lodged is merited since the plaintiff/applicant failed to comply with Section 26 and 27 of the *Mental Health Act* and Order 32 Rule 15 of the Civil Procedure Rules 2010, when instituting the present suit. That the applicant has not established prima facie as against the 3rd respondent herein. That the applicant has not demonstrated any irreparable harm that he stands to suffer. That therefore, the balance of convenience cannot tilt in his favour. That the instant application lacks merit and ought to be dismissed with cost. To buttress the submissions, counsel relied on the case of *Nguruman Ltd-vs-Jan Bonde Nielsen (2014) eKLR*, *Mrao (supra)*, among others.
 14. Notably, the 2nd respondent did not oppose the application or file any submissions herein.
 15. It is important to note that by Originating Summons dated 12th September 2024 and filed herein on 16th September 2024, the plaintiff/applicant, through M/s Kiplagat J. Misoi and Company Advocates, sought the orders infra;
 - a. That Declaratory Order do issue declaring the registration of 1st and 2nd suit parcels of land in the names of 1st Defendant by the 2nd Defendant is unlawful illegal null and void.
 - b. That an Order do issue directing the 2nd Defendant to rectify the Land Registrar by removing and /or deleting the 1st Defendant's name and replacing the same with those of JOSEPH KIPLAGAT in both parcels of land.



- c. That a Declaration Order do issue declaring the sale of the 1st and 2nd suit parcels of land by the 1st Defendant to the 3rd Defendant illegal, null and void and that the sale be revoked and/or annulled.
 - d. That a permanent injunction be and is hereby issued prohibiting the 3rd Defendant by himself by his agents or servants by themselves or others from carrying out any construction, developing or in any other manner dealing with 1st and 2nd suit parcels of land.
 - e. That an Order directing the 2nd Defendant to enter a prohibiting order in the encumbrance section of the Land Register in respect of the suit properties herein.
 - f. That the 1st and 3rd Defendants be condemned to meet the costs of this Originating Summons.
16. I have considered the instant application, the responses thereto including the Notice of Preliminary objection dated 2nd October 2024 and the parties’ rival submissions and the originating summons dated 12th September 2024. The Preliminary Objection is on a pure point of law namely locus standi hence, the same takes priority over all other matters herein and calls for prompt pronouncement; see *Kakuta Maimai Hamisi –vs- Peris Pesi Tobiko & 2 others* (2013) eKLR. Therefore, the issues that arise for determination are:
- a. Whether the Preliminary Objection is merited?
 - b. Depending on the outcome of (a) above, has the applicant established his claim to warrant the grant of the orders sought in the application?
 - c. What just orders can issue herein?
17. It must be noted that a Preliminary Objection ought to be on a point of law; see *Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors* (1969) EA 696 where the Court of Appeal pronounced itself on what constitutes a preliminary objection as follows:
- “...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 a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration...” (Emphasis added).
18. In the case of *Alfred Njau –Vs- City Council of Nairobi* [1983] KLR 625, the Court of Appeal held in part:
- “...Locus standi” literally means a place of standing and refers to the right to appear or be heard in Court or other proceedings and to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding.”
19. Section 2 of the *Mental Health Act*, Chapter 248 of the Laws of Kenya defines a “person with mental illness” thus:
- “...a person diagnosed by a qualified mental health practitioner to be suffering from mental illness, and includes—(a) a person diagnosed with alcohol or substance use disorder; and (b) a person with suicidal ideation or behavior...”



20. Order 32 Rule 15 of the Civil Procedure Rules, 2010 stipulates that the provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind, and to persons who though not so adjudged are found by the court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.
21. To that end, I associate myself with the findings of Mativo J. (currently JA) in *MMM v AMK* [2016] KEHC 4741 (KLR) that for the court to find that JOSEPH KIPLAGAT is incapable of protecting his interests, the court is required to hold an enquiry as provided under Order 32 Rule 15 (supra). Since no inquiry has been conducted, the instant suit cannot stand.
22. Sections 26 and 27 of the *Mental Health Act*, Chapter 248 of the Laws of Kenya set out the procedure for administration of property of persons with mental illness. See also, Order 32 Rule 15 (supra).
23. Clearly, the plaintiff/applicant herein has failed to comply with the mandatory provisions of the law since the mental status of JOSEPH KIPLAGAT had not been determined as required, prior to institution of the suit. The plaintiff has not petitioned the court under Section 26 and 27 (supra) to be appointed to be the administrator of the estate of such a person of unsound mind as alleged in this suit. From the entire record herein, JOSEPH KIPLAGAT has not been adjudged to be of unsound mind under the *Mental Health Act*.
24. In the circumstances, the plaintiff lacked capacity to institute this suit on behalf of JOSEPH KIPLAGAT. Therefore, it is my considered view that the suit together with the instant application are incompetent and fatally defective.
25. In view of the foregoing, this court being guided by Giella, Mrao, Nguruman cases (supra) on the conditions for injunctive orders, cannot make a finding on the merits or otherwise of the instant application.
26. Wherefore, the Notice of Preliminary Objection is merited. Therefore, the instant application originated by way of a notice of motion dated October 8, 2024 together with the Originating Summons dated September 12, 2024 and lodged herein by the plaintiff are hereby struck out.
27. Costs to be borne by the plaintiff/applicant.
28. Orders accordingly.

DELIVERED, DATED AND SIGNED AT FEBRUARY THIS 25TH DAY OF FEBRUARY 2025.

G. M. A ONGONDO

JUDGE

Present

Mr Kiplagat J Misoi learned counsel for the plaintiff/applicant

Ms Chebii learned counsel for the 1st defendant/respondent

Ms Odeyo learned counsel for the 2nd defendant/respondent

Mr Osewe Atieno learned counsel for the 3rd defendant

Walter, court assistant

