



**Ekaterra Tea Kenya PLC v Chepkwony & 2 others (Environment & Land Case E021 of 2022) [2024] KEELC 6215 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6215 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE E021 OF 2022  
MC OUNDO, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**EKATERRA TEA KENYA PLC ..... APPLICANT**

**AND**

**SAMUEL KIMUTAI CHEPKWONY ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Vide a Notice of Motion Application dated 5<sup>th</sup> December, 2022 brought under the provisions of Section 1A, 1B and 3A of the *Civil Procedure Act*, Section 13 of the *Environment and Land Court Act*, Order 40 Rule 1 and 2 of the Civil Procedure Rules, 2010, the Plaintiff/Applicant sought for an interim order of injunction restraining the 1<sup>st</sup> Defendant either by themselves, servants and/or employees, relatives, their agents and/or representatives from entering, remaining upon and/or trespassing into, disposing, alienating, encumbering, charging, interfering, transferring or in any other way howsoever dealing with all that property known as LR 4098/2 (IR 3939) and LR 4433/5 pending the hearing and determination of the suit.
2. The Applicant further sought that the court be pleased to direct the Rift Valley Police Regional Commander/Co-ordinate to supervise the enforcement of the order sought, and for costs of the Application.
3. The said application was supported by the grounds therein as well as the supporting Affidavit of an even date, sworn by Tumaini Kimone, the Plaintiff/Applicant’s Legal Counsel who deponed that the Applicant was the registered and lawful proprietor of all that property known as L.R No. 4098/2 (IR 3939) and LR No. 4431 measuring approximately 1552 and 1541 acres respectively situate in Kericho within Kericho County (the “suit properties”) by virtue of a Grant over the property known as LR



No. 4098/2 (IR 3939) that had been issued to the Applicant by the Government of Kenya following a transfer dated 7<sup>th</sup> October 1929 registered at the Registry of Titles at Nairobi as I.R No. 153/5. That a title over the property known as LR No. 4431 had also been issued to the Applicant for a term of 999 years with effect from 1<sup>st</sup> June, 1920 for which the Applicant had been paying both land rent and rates and had complied with all other conditions set out in the titles of the suit properties and had therefore acquired an indefeasible title over the suit properties wherein it was entitled to quiet enjoyment and use of suit Properties.

4. That the titles to the suit properties had first been issued in the name of Kenya Tea Company Limited which name changed to Brooke Bond Liebig Kenya Limited, Brooke Bond Kenya Limited, Unilever Tea Kenya Limited, and subsequently to the Applicant's current name. That the Applicant had been in lawful possession and occupation of the suit properties with effect from 12<sup>th</sup> December, 1929 for property LR No. 4098/2 (IR 3939) and from 19<sup>th</sup> December 1969 for property LR No. 4431 wherein it had been utilizing the suit properties for various agricultural activities including planting trees for sale and/or for use in its tea plantation estates.
5. That on or about 1<sup>st</sup> November, 2022, he had become aware that the 1<sup>st</sup> Respondent held a Certificate of title to LR No. 4433/5 and had been alleging ownership to the piece of land which was an outspan within the Applicant's suit properties and which comprised of approximately 20 acres across the River Jamji, land which had been set aside for travelers to encamp with their servants, animals, wagons for rest and water for a period of not more than 48 hours. That the said title was unlawful, invalid and a nullity ab initio because the land had not been available for allocation since part of it comprised of riparian land and the Applicant had neither been notified nor involved.
6. That the Applicant was therefore apprehensive that the 1<sup>st</sup> Respondent by itself and/or its servants, agents and/or representatives would descend on the suit properties and interfere with its activities thereon thus interrupting and disrupting its quiet possession and enjoyment of the suit properties and violating Applicant's right to the protection of its property as enshrined under Article 40 of *the Constitution* for which there was therefore the need to issue injunctive orders against the 1<sup>st</sup> Respondent who was likely to alter the nature and use of the suit properties thereby completely destroying the suit properties and permanently dispossessing the Applicant of the same thereby exposing it to irreparable injury besides rendering the suit nugatory.
7. The Applicant deponed that it had made out a prima facie case with high chances of success and should be allowed to ventilate the same. That unless the orders sought were granted, the 1<sup>st</sup> Respondent would trespass into the suit properties and/or destroy the Applicant's property to its detriment. That the Applicant clearly stood to suffer irreparable loss and injury which could not be adequately compensated by an award of damages if the orders sought were not granted. That the balance of convenience tilted in favour of granting the orders sought and that the wider interest of justice would be best served if the orders sought were granted.
8. In response and in opposition to the Applicant's application, through his Replying Affidavits dated 4<sup>th</sup> December, 2023 sworn by Simon Kimutai Chepkwony, the 1<sup>st</sup> Defendant herein deponed that he was the duly registered proprietor of the Property known as L.R No. 4433/5 which property he had been allotted on or about the year 1999. That he was aware that the Plaintiff/Applicant was the owner of properties known as L.R Nos. 4098/2 and 4431.
9. That he stood to suffer prejudice and loss should the orders sought in the instant application be granted as he would be deprived of his lawfully owned property in light of the interim orders of injunction sought against him restraining him from dealing in any way with the property known as L.R 4098/2



- (IR 3939) and L.R No. 4431 wherein the outspan created within the said properties, or into L.R No. 4433/5 was his property.
10. That it was evident from the face of the titles that whereas all the properties were found in the same general area within Kericho, they were distinct parcels of land. He thus prayed that the instant Application should be dismissed with costs for lack of merit.
  11. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not participate in the instant application.
  12. The application was disposed of by way of written submissions to which the Applicant summarized the factual background of the matter before placing its reliance in the decided cases of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358, *Suleiman v Amboseli Resort Limited* [2004] KLR 589 and *Muhia Daniel Kimeu & Another v Equity Bank Kenya Limited & Another* [2017] eKLR on the principles applicable in an application for injunction, to frame its issues for determination as follows:
    - i. Whether the Applicant has established a prima facie case with probability of success;
    - ii. Whether the Applicant will suffer irreparable injury which cannot be adequately compensated should an injunction not issue at this stage; and
    - iii. Whether the balance of convenience lies in favour of granting the interim injunction.
  13. On the first issue for determination, the Applicant placed reliance in a combination of decisions in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR and *David Ndi & others v Attorney General & others* [2021] eKLR to submit that it had established the proprietorship of the suit properties through the Grant that had been issued in the year 1920 and 1929 hence pursuant to the provisions of Section 26 of the *Land Registration Act*, it had acquired an indefeasible title over them thereby becoming the absolute owner thereof and was still enjoying the unexpired term of 896 and 897 years respectively.
  14. That further, it was uncontroverted that the Applicant was the registered owner of the suit properties wherein it had been in occupation and had been paying Land Rent and had complied with all conditions set out in the titles therein. That further, the Applicant had been using the outspan area for tree conservation and the rest of the land for tea planting and processing.
  15. Reliance was placed on the provisions of Sections 15 and 16 of the *Land Act*, 2012 to submit that the outspan had been created on a temporary basis within the suit properties as an implied term of the Applicant's leasehold title. Further reliance was placed on the provisions of Section 162 of the *Land Act* to submit that in the absence of any law in the *Land Act*, specifically providing anything to the contrary regarding outspans, the said outspan continued to be governed by the repealed laws. (ie is Section 14 and 29 of the Crown Land Ordinance which had been replaced by Section 85 of the Government *Land Act*)
  16. That the Certificate of Title L.R No. 4433/5 which had been issued on 13<sup>th</sup> May, 2019 to the 1<sup>st</sup> Respondent and which related to the outspan within the suit properties was unlawful, invalid and null ab initio as the same could not validly be issued nor the land be allocated since it had not been available for allocation. That pursuant to the provisions of Section 85 (1) of the Government *Land Act* (repealed), the said land could not have been allocated to the 1<sup>st</sup> Respondent unless it was closed and/or altered by a competent authority. It contended that the said outspan had never been closed or altered by any competent authority nor had the 1<sup>st</sup> Respondent tendered any evidence to demonstrate the closure or alteration of the same. That further, such closure or alteration could not have been undertaken without notice to the Applicant within whose property the outspan had been created. That the 1<sup>st</sup> Respondent had also not demonstrated the procedure that he had used to obtain his title.



17. It was the Applicant's submission that the 1<sup>st</sup> Respondent's contention that his title was different from the Applicant's was an attempt at simplifying the issue to veil the dubious origin of his title as it was clear from the map that had been annexed as TK-1b that the alleged 1<sup>st</sup> Respondent's title fell within the Applicant's suit properties. That further, a perusal of the Deed Plan annexed as TK-3 contained in the 1<sup>st</sup> Respondent's alleged title and the map showed that the road reserve and the river passing inside the suit properties was one and the same as the one contained in the said 1<sup>st</sup> Respondent's alleged title thus an irrefutable proof that the 1<sup>st</sup> Respondent's alleged title fell within the Applicant's properties.
18. That whereas the 1<sup>st</sup> Respondent had in his Replying Affidavit alleged that he had been allotted the title to parcel of land L.R No. 4433/5 upon his application for allotment to the Land Registrar in Nairobi, he had not adduced any evidence whatsoever to support the said allegation as to the acquisition as he did not annex any Letter of Allotment and receipts. That further, an application for allotment could not be made to the Land Registrar as it was previously made to the Commissioner of Lands under the old regime but was currently made to the National Land Commission under Section 12 of the [Land Act, 2012](#) thus the 1<sup>st</sup> Respondent's allegation that he had made an application to the Land Registrar in Nairobi had flaws.
19. That from the foregoing, the Applicant had presented a prima facie and believable case hence it should be given a reasonable opportunity to ventilate the same while protecting its rights and interests.
20. On the second issue for determination as to whether the Applicant would suffer irreparable injury, the Applicant submitted in the affirmative to the effect that it had been in lawful possession and occupation of the Suit properties from 12<sup>th</sup> December 1929 for property LR. No. 4098/2 (IR 3939) and from 19<sup>th</sup> December 1969 for property LR. No. 4431 and was enjoying the unexpired term of 896 and 897 years respectively. That it had invested heavily on the suit properties for various agricultural activities including planting trees and tea for sale and use in its tea plantation estates hence were the 1<sup>st</sup> Respondent to descend on the suit Properties, he would alter its use leading to unquantifiable loss upon the Applicant. That further, for trees to mature to a state where they could be used as timber, it usually required a number of years, time and expertise for which the Applicant would not regain. That any change of use of the suit properties would inevitably affect the current agricultural activities conducted by the Applicant thus irreversibly and indiscriminately affecting the remaining portions of land owned by the Applicant. That unless the court issues an interim injunction stopping the Respondents, the nature, use and character of the suit properties would change from a tree and tea plantation to anything else. That other than an interim injunction, there was no other available and adequate remedy open to the Applicant by which it would protect itself and the suit properties from the consequences of the illegal and unconscionable acquisition of the Applicant's title.
21. That further, the Respondents had not presented any evidence that should the Applicant succeed in the instance case, then they would be ready, willing and able to compensate the Applicant for the colossal losses which it could potentially incur as a result of his illegal title in the event that an interim injunction did not issue. That conversely, the Applicant was a huge Corporation which had employed thousands of people in Kericho County and was helping in the development of Kericho economy hence if after the hearing and determination of the instant suit the Applicant was found to be at fault, it would be able to compensate the Respondents by way of damages for any infringement.
22. The Applicant thus submitted that it had proved that it would suffer grave inconvenience were the interim injunctive orders not issued as sought. It urged that the court to find so.
23. On the third issue for determination, the Applicant submitted that the balance of convenience tilted towards granting the orders sought because after delivery of the Ruling, the matter would proceed



for hearing allowing the Chief Land Registrar, the 2<sup>nd</sup> Defendant herein and the National Land Commission, the 3<sup>rd</sup> Defendant to testify as to the validity and authenticity of the 1<sup>st</sup> Respondent's title. That the 1<sup>st</sup> Respondent had neither contested nor demonstrated that he would suffer irreparable injury or be prejudiced should an interim injunction be issued since he had also not been in possession of the contested parcel of land or attached any evidence as regards any economic or social activity he was conducting on his alleged title. That in the alternative, the inconvenience that would be occasioned to it would be greater as compared to that which would be caused to the 1<sup>st</sup> Respondent were the Orders sought not granted.

24. The 1<sup>st</sup> Respondent in his submissions framed one issue for determination as follows;
  - i. Whether the Plaintiff has established a reasonable cause of action against the 1<sup>st</sup> Defendant sufficient to maintain him as a party to the suit.
25. In so framing his issue for determination the 1<sup>st</sup> Defendant submitted that under the provisions of Article 40(1) of *the Constitution*, everyone had a right to own property which property ought to be protected by the state provided that it was the lawfully acquired. That Section 7 of the *Land Act* provided methods of acquisition of title to land.
26. That whereas the Applicants had maintained their proprietorship to land parcels known as LR. No. 4098/2 and LR. No. 4431, the 1<sup>st</sup> Respondent was the proprietor of LR. No. 4433/5 which were distinct parcels of land though found within the same general area within Kericho. That the 1<sup>st</sup> Respondent had thus exercised his constitutional right to apply for and had been lawfully allocated LR. No. 4433/5 on or about the year 1999 wherein he complied with the terms of the Letter of Allotment dated 27<sup>th</sup> April 1999 and was issued with a good title.
27. That where there are two competing titles, a party could not simply seek the sanctity of the said title without proving its root, as was held in the case of *Munyu Maina vs Hiram Gathiha Maina Civil Appeal No. 23 of 2009*. That the 1<sup>st</sup> Respondent's proof of the root to his title was the Letter of Allotment dated 27<sup>th</sup> April 1999, the receipts evidencing the performance of the conditions therein leading to the acquisition of a good title.

## Determination

28. I have considered the Applicants' application, its opposition, the submissions by parties, the law as well as the authorities therein cited. Via their application dated 5<sup>th</sup> December, 2022, the Applicants herein sought for injunctive orders against the 1<sup>st</sup> Respondent restraining him from interfering with their quiet possession of all those parcels of land known as LR 4098/2 (IR 3939) and LR 4433/5, pending the hearing and determination of the suit and for the Rift Valley Police Regional Commander/Coordinate to supervise the enforcement of the order sought.
29. The reason given by the Applicant in seeking these orders was that they were proprietors of the said parcels of land measuring approximately 1552 and 1541 acres respectively, which land was situate within Kericho, by virtue of a Grant over the property known as LR No. 4098/2 (IR 3939) following a transfer dated 7<sup>th</sup> October 1929 which had been registered at the Registry of Titles at Nairobi as I.R No. 153/5, and a title over the property known as LR No. 4431 issued to the Applicant for a term of 999 years with effect from 1<sup>st</sup> June, 1920. Subsequently, the Applicant had fulfilled all the prerequisite conditions and had been making payments thereto.
30. That in the midst of the said parcels of land was an outspan which comprised of approximately 20 acres across River Jamji, land which had been set aside for travelers to encamp with their servants, animals,



wagons for rest and water for a period of not more than 48 hours and for which the 1<sup>st</sup> Respondent lay claim to having unlawfully acquired a Certificate of title LR No. 4433/5 on or about 1<sup>st</sup> November, 2022.

31. The 1<sup>st</sup> Respondent on the other hand deponed that LR No. 4433/5 had been lawfully allocated to him vide an allotment letter dated 27<sup>th</sup> April 1999 wherein he had subsequently been registered as its legitimate proprietor. That it was evident from the face of the titles that whereas all the properties were found in the same general area within Kericho, they were distinct parcels of land. He thus prayed that the instant Application be dismissed with costs for lack of merit.
32. 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").
33. The Court has been moved under a Certificate of Urgency, by the Applicant, to issue temporary injunctive orders against the 1<sup>st</sup> Respondent. 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 have demonstrated that they have a genuine and arguable case or not.
34. The issue that arises for determination herein is whether an interim order of injunction should issue.
35. On the first limb as to whether the Applicant in this matter have 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.”
36. I have taken into consideration these arguments and also considered the parties ownership title documents herein annexed to the respective suit lands herein.
37. Section 26 (1) of the Act provides as follows:-

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that subject to challenge, except

  - a. on the ground of fraud or misrepresentation to which the person is proved to be a party, or
  - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.



38. Ostensibly, it is not possible to make a final determination at this interlocutory stage on the validity of the titles held, however keeping in mind that both parties hold titles to the respective parcels of land in contention. I have however noted that the Applicant has been in occupation of the suit property properties from 12<sup>th</sup> December 1929 for property LR. No. 4098/2 (IR 3939) and from 19<sup>th</sup> December 1969 for property LR. No. 4431 wherein as submitted, it had invested heavily therein on various agricultural activities including planting trees and tea for sale and use in its tea plantation estates which position has not been contested by the 1<sup>st</sup> Respondent.
39. Keeping in mind therefore that the validity of the parties titles shall be determined at a full hearing, and further that the order of Injunction being an equitable remedy, the court is enjoined to look at the conduct of the Applicant for the injunctive orders, the surrounding circumstances whether the order sought is likely to affect the interests of the 1<sup>st</sup> Respondent and to ensure equality of arms, the principle of proportionality and the need to treat all the parties coming to court on equal footing. I thus 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, there having been no evidence that the 1<sup>st</sup> Respondent will suffer any prejudice were the interim orders not issued for he had neither contested nor demonstrated that he would suffer irreparable injury or be prejudiced. Secondly, no evidence had been alluded to his possession and/or occupation of the contested parcel of land or any activity being carried therein.
40. The Court of Appeal in the case of *Mugah –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.
41. 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 Plaintiff/Applicant is still in occupation of land in parcel LR 4098/2 (IR 3939) and LR 4433/5, as at the time of filing suit.
  - ii. There shall not be any interfering with parcel registration LR 4098/2 (IR 3939) and LR 4433/5.
  - 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 5<sup>th</sup> December, 2022 shall be in the cause.

**DATED AND DELIVERED VIA TEAMS MICROSOFT AT NAIVASHA THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

