



**Cherunya (Suing as the Legal Representative of the Estate of
Kiptalam arap Cherunya) v Cherunya (Environment & Land Case
15 of 2023) [2024] KEELC 13554 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13554 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 15 OF 2023
FO NYAGAKA, J
NOVEMBER 21, 2024**

BETWEEN

**SAMMY KIPKORIR CHERUNYA (SUING AS THE LEGAL REPRESENTATIVE
OF THE ESTATE OF KIPTALAM ARAP CHERUNYA) PLAINTIFF**

AND

MICHAEL KIPSANG CHERUNYA DEFENDANT

RULING

On striking out a Suit

1. The Defendant herein filed a Notice of Motion dated 16/04/2024. He brought it under Order 2 Rule 15, Order 51 Rule 1 of the Civil Procedure Rules 2010, Sections 1A, 3, 3A and 65(e) of the *Civil Procedure Act* and all enabling provisions of the law. He sought the following Order:-
 - (i) That the plaintiff's suit dated 15/11/2023 be struck out.
2. He brought the application on six (6) grounds. The first one was that the Plaintiff was scandalous, frivolous, vexatious and did not disclose a reasonable cause of action against the defendant. Further, the Plaintiff lacked locus standi to complain on behalf of John Kithinji and bring the suit on his behalf or his representatives. The plaintiff was an abuse of the process of the court, a nullity and fatally defective. The plaintiff was evasive, inconsistent and did not raise any reasonable bona fide triable issues, for want of compliance with the law.
3. The application was supported by the affidavit of Michael Kipsang Cherunya sworn on 16/04/2024. After repeating the contents of the grounds above but in deposition form, he deposed that the Plaintiff, at paragraph 4, alleged that Kiptalam Arap Cherunya bought land for value from John Kithinji, now deceased, when the alleged vendor had no capacity to sell, contrary to the principles of "Nemo dat quod non habet." He annexed as MKC 1 a copy of the agreement and attached to the Plaintiff's List of



Documents. The agreement appeared to be dated 12/02/1971, when at the time of the alleged purchase the suit land was not registered in the names of John Kithinji for him to have capacity to sell. It was clear from the green card that the land was first registered to the Settlement Fund Trustees in 1983 and as such, the agreement relied on by the Plaintiff in support of the suit was unenforceable for being null and void ab initio. He annexed as MKC 2 a copy of the green card certified on 17/03/2022.

4. Further, that the Plaintiff alleged that the suit land belonged to Kiptalam Arap Cherunya when clearly from the green card annexed at no time was the land registered in the name of Kiptalam Arap Cherunya for it to be available for distribution under his Estate. The applicant's suit was tainted with dishonesty, misrepresentation and was obviously an attempt to mislead the court to grant the orders sought, particularly, the averments at paragraph 6 of the Complaint and its particulars to the extent that the Applicant forged the signatures of the original owners when clearly, the owners signed the transfer forms and give consent for the transfer of the land to the applicant. Further, neither the owner of the signatures nor the administrators had complained that their signatures had been forged. As such, the Plaintiff did not have locus standi to raise the complaints he raised. He annexed and marked MKC 3 a copy of the transfer forms.
5. Further, if ever a suit was to be maintained it ought to have been brought by the Estate of John Kithinji or Helena Kithinji as the administrator of the Estate of John Kithinji Kirimania. He annexed as MKC 4 a copy of the Kenya Gazette notice suit on behalf of John Kithinji.
6. He deposed further that, the suit was made in utmost bad faith and was calculated to mislead their honorable court from the real facts as alleged. In the particulars of fraud, they were not pleaded with specificity. The suit did not raise any triable issues. It was a sham without a chance of success. It was in the interest of justice and the overriding objective of the court and public policy that it be struck out as being untenable. It was a non-starter and had no legal basis to be sustained.
7. The application was opposed through a Replying Affidavit sworn by one Sammy K. Cherunya on 24/05/2024. He deposed that the application was incurably defective and amounted to an abuse of the process of the court. It was merely a waste of the court's precious time by engaging in vexatious and frivolous applications. The Defendant was his brother while the deceased was their father who died on 14/04/2013. He annexed a copy of the certificate of death and marked it as SKC 1. The deceased bought the land from John Kithinji in 1977 for valuable consideration and paid the full price. He marked as SKC2-4 copies of the agreement, dated 12/02/1977 and letters dated 26/02/1982 and 14/12/1982.
8. He deposed further that succession proceedings over the estate of the deceased were still pending in the High Court in Eldoret where the suit property had been duly listed, among others, in the inventory. He annexed and marked SKC 5 a copy of Form P&A indicating the property as one. Further, that during the pendency of the succession proceedings the defendant fraudulently transferred the suit property in his favor in total disregard of the interests of the beneficiaries. He annexed and marked as SKC 6 and 7 copies of the green card and the title in issue. He went on to depose that the transfer was ill-motivated and calculated at disinheriting the beneficiaries of the deceased hence commencing the proceedings herein.
9. He had sought stay of proceedings in the Succession Cause pending the determination of the instant matter. He annexed as SKC 8 a copy of the application dated 16/11/2023. Further, the status of the former owner of the suit land John Kithinji was squarely within the applicant's knowledge. He annexed as SKC 9 and 10 copies of the Gazette Notice No. 150 of 1983 and dated 25/03/1983 showing the death of John Kithinji on 20/10/1982 and a letter dated 15/07/1986. Further, the transfer regarding the subject matter herein was effected 38 years after the death of the owner, that is to say, in 2020,



- long after the death. He annexed as SKC 11 a copy of the Transfer Form for the suit land. Further, the records at the Land's office showed that the transfer was fraudulent. He annexed as SKC 12 a copy of the letter dated 23/02/2021 from the Ministry of Lands and Physical Planning, stating as much.
10. He stated further, the actions of the Defendant had derailed the Estate of the deceased from being distributed. He had brought the proceedings on behalf of the deceased in his capacity as the legal representative of the Estate. The Estate of John Kithinji had no claim whatsoever to the suit property. The beneficiaries of the deceased, including the applicant, had been in actual and physical occupation of the suit land since 1977 to date. He marked as SKC 3 a copy of a valuation report dating back to 2017. The applicant's title was the one in issue in the instant proceedings having demonstrated the purchaser's interest in the suit property hence the claim that the issue of the legal representative of the Estate of John Kithinji was the one herein was unfounded.
 11. He deposed further that the Defendant had instituted Kitale ELC No. 5 of 2020, where he sought a declaration that he held the suit property in trust but hurriedly withdrew the same upon the Respondent and her colleagues filing a Defense. He annexed as SKC-14 a copy of the Plaintiff. He swore further that he instituted the instant proceedings in his capacity as the legal representative of the estate of his late father to protect the interests of the beneficiaries of the Estate and not on behalf of the Estate of John Kithinji. Further, he had since moved this Court by an application dated 24/05/2024 seeking the joinder of the legal representative of the Estate of John Kithinji to clear any doubt. He annexed a copy of the application and marked it SKC 15.
 12. His further deposition was that the defendant was attempting to cover grave and glaring irregularities committed by frustrating the expeditious trial of the instant matter. The application was misconceived, full of falsehoods, filed in bad faith and an abuse of the process of the court. He prayed that it be dismissed.
 13. The applicant filed a Further Affidavit in response to the Replying Affidavit. It was sworn on 28/06/2024. He stated that the Defendant's deposition that he was a brother to the Respondent and that their father died on 14/04/2013 were non-issues and of no probative value. He repeated that the agreement allegedly entered into by their father and John Kithinji was unenforceable and void ab initio. He deposed further to exemplify the illegality of the contract that the first registration of the land was in 1983 under the Settlement Fund Trustees and then in 2017, it was registered in favour of John Kithinji, yet the agreement of the sale was in 1977 when the vendor as a party had capacity to pass interest over the land. Further, the inclusion of the property as forming part of the late father's Estate was ill-advised by the petitioners and he had all long objected to the property being part of the Estate since it belonged to him. In further response, he said he had always indicated that the Respondent had always indicated that they would bequeath him the property as a beneficiary of the Estate of their father to which he objected since the property was his and not available for distribution to the beneficiaries of their father's Estate.
 14. The property was not subject to the intestate proceedings of the deceased father since it never belonged to him. At paragraph 10 he insisted that it was John Kithinji who transferred the suit property to him. That the allegation of the death of John Kithinji was fiction because the Respondent had not annexed a copy of his certificate of death. That the alleged John Kithinji in the Gazette Notice was a different person at they were referring to a different individual.
 15. He deposed further that neither John Kithinji nor his family had any objection towards the transfer of the suit land to his name. Also, the deposition that Respondent and other beneficiaries of the deceased had been in actual possession of the property since 1977 was misleading. He referred to Annexure MKC 3 of the Replying Affidavit where the surveyor, on the last page, indicated his finding that the



parties were not in occupation. The respondent had misunderstood the issues in Kitale ELC No. 5 of 2020 since he did not seek a declaration that the suit land was held in trust. On the contrary, he sought that the suit land be excluded from the Estate of the late Kiptalam Cherunya as the land did not belong to him. Further, the only declaration he sought in that suit was that the suit land therein, being Trans Nzoia Mito Mbili/1 was held in his trust. The claim was abandoned by withdrawing the suit to enable the conclusion of the Succession Cause in respect of his father's estate.

16. At the time of withdrawal, the dispute in Trans Nzoia Mito Mbili/2 had been resolved since the title was granted to him. Thus, there was no need to litigate further on it. The plaintiff had a low-level basis to sustain a claim against him on behalf of John Kithinji. Lastly, if there is a forgery or transfer to him in dispute, then John Githinji was the only person who could raise a complaint hence the proposed joinder of John Kithinji to the suit could not cure the defect in the suit.
17. The application was disposed of by way of written submissions. The applicant filed his submissions dated 20/06/2024, which I have considered extensively. It is sad that the submissions were filed in respect to Kitale Chief Magistrate's Court Case No. 15 of 2023 hence the Court could not purport to infer that they were for the instant suit, although placed in the file. The Court will not bother to use and apply them in the instant Application because they would have only gone to the extent of trying to convince this Court to find in favour of the parties yet the Court has, notwithstanding their presence or otherwise, to analyse the merits of the case.
18. In any event, the Court of Appeal held, in Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR, as follows:

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”

Issue, Analysis And Determination

19. I have carefully analyzed the application and the law. The only issues that commend themselves to me for determination are whether the application is merited and who to bear the costs thereof.
20. The Defendant contends that the Plaintiff's suit is frivolous, scandalous, vexatious and does not disclose any reasonable action. He also raises the limb of lack of capacity on the part of the Plaintiff to institute the suit on behalf of John Kithinji. The Respondent argued otherwise.
21. Permit this Court to get straight away to the facts as deposed to by the parties, which go to the root of the application. These are borne by the contents of the Supporting Affidavit and the Further Affidavit on the one hand, and the Replying Affidavit on the other. I will compare them with the Plaintiff's pleadings - the Complaint and Verifying Affidavit.
22. The Plaintiff's pleadings, in particular, paragraphs 3 and 4 allege that the Plaintiff, together with his co-administrators had the duty to oversee the interests of all the beneficiaries of the Estate of the deceased father. I note from the Complaint and the Annexures that the Plaintiff together with his three siblings were granted Letters of Administration of the Estate of their late father on 30/08/2017 by the High Court in Eldoret. Thus, in so far as the suit on behalf of the Estate of their father is concerned, he has capacity. The only issue is that he was the only one of the four who sued. This can be cured by an amendment to add the three other co-administrators.



23. That aside, the subject matter in this instant suit is Trans Nzoia/Mito Mbili/2, measuring approximately 29.5 hectares, which the Plaintiff avers had been acquired from John Kithinji, now deceased. Further, at paragraph 5, the Plaintiff pleaded that the property constituted part of the Estate of his father, and it was a subject of Eldoret Succession Cause No. 29 of 2014. At paragraph 6 he deposed that during the pendency of the succession proceedings the Defendant, with greed and ulterior motives, fraudulently attempted (successfully) to deprive all the legitimate beneficiaries of the deceased father their entitlement and therefore illegally and fraudulently transferred the suit property into his name, in the year 2020, yet the alleged seller had died on the 28/10/1982. He gave further the particulars of the Defendant's fraud regarding the transfer. He swore further that because of that their father's Estate had been denied the property. He prayed for various reliefs, including one that the acquisition of the land by the Defendant was fraudulent and unprocedural, illegal and null and void.
24. The thrust of the Defendant's application is in two limbs. One is that the plaintiff's suit does not disclose any reasonable cause of action against him. In that regard he contends that the Plaintiff's complaint is that the suit land was registered in the name of his brother, the Defendant, but fraudulently. To demonstrate that he annexed to the Replying Affidavit as SKC 9 a copy of the Kenya Gazette Notice No. 150 of 1983 issued on the 25/03/1983 showing that indeed one John Kithinji Kirimania had died, and his widow, one Helen Kithinji of Kenya Institute of Administration had applied for a Grant of Letters of Administration to his Estate. He also annexed as SKC 10 a copy of a letter from the District Officer, Cherangani addressed to Mrs. Kithinji of Kenya Institute of Administration in respect of Plot No. 2 Miti Mbili Settlement Scheme measuring approximately 70 acres. It advised the said Mrs. Kithinji to visit the Settlement Scheme with one Mr. Kiptalam Cherunya to transfer the Plot he had bought to him and she takes him to the Land Control Board.
25. The Applicant deposes, at Paragraph 18 (wherein he alleges that only John Kithinji was the one competent to complain about a forgery) that the said for reason of the fact that the Plaintiff had not annexed a copy of the Certificate of Death of John Kithinji to show that he died in 1982, the person referred to as John Kithinji Kirimania who died on 20/10/1982 was not the John Kithinji who allegedly appeared on 20/02/2020 before an Advocate known as John Bororio based in Kitale and identified himself through an Identity Card and signed the transfer forms (Annexure MKC 3 of the Supporting Affidavit) which then gave rise to the title deed evidenced by the copy of the green card (Annexure MKC 2 of the said Affidavit).
26. This is an absolutely absurd contention. This Court is puzzled, mesmerized, shocked and left in bewilderment by how two different John Kithinjis could happen to claim to own land parcel No. Trans Nzoia/Mito Mbili/S/Scheme/2, and then one deals in a sale of the land or part thereof between himself and Kiptalam Cherunya and he dies on 20/10/1982 leaving a widow, Helen Kithinji of Kenya Institute of Administration to deal with his Estate, and the other John Kithinji remains alive up to and including the 20/02/2020, sells the same parcel of land to the Defendant and signs a Transfer Form on the said date in favor of the Plaintiff.
27. From the above simple comparison, what a coincidence! What a miracle! Is the Court being treated to real abuse? Someone must be taking the Court for a ride and treating it as foolish and unintelligent. It cannot happen. Either the Plaintiff has sworn falsely to the facts he deposed to herein or the Defendant. There cannot be two John Kithinjis claiming the same land and dealing on it at two different periods, almost forty years apart. Either the owner is dead or alive, unless we are dealing with the "Walking Dead". These respective oaths by way of Affidavit need to be reported to the Office of the Directorate of Criminal Investigation for action, and I give a green light to any of the parties to pick it up from here.



28. As I proceed further I note that when the two annexures above are compared to annexure SKC 11, which is a copy of the transfer of land from one John Githinji to the defendant, dated 20/02/2020 (also marked as annexure MKC 3 to the Applicant's Supporting Affidavit in the application, and Annexure MKC 2 the green card, and SKC 6 the same green card, Annexure SKC 9 - the Kenya Gazette, Annexure SKC 14 which is a copy of the Plaintiff in Kitale ELC No. 5 of 2020 filed on 28/01/2020, only a month before the suit land herein was transferred to the Defendant yet the Plaintiff therein and now Defendant herein claimed to be the owner of the parcel of land (by describing himself therein at paragraph 6 as the "sole legal, bona fide, beneficial and/or equitable owner...", two critical facts emerge and they require this Court to hear evidence thereon in a full hearing. These are, whether indeed there is or is no fraud committed in regard to the ownership and transfer of the suit land to the Defendant. Two, whether indeed there can be two John Kithinji's, one dead and another alive dealing with the suit land as of 28/02/2020. How possible would that have been if one or two or both of these facts were true?
29. Needless to say, that since the suit land was a subject of the proceedings in Eldoret Succession Cause No. 29 of 2014. If indeed as it shows, the land was transferred to the Defendant during the pendency of the proceedings without an order from the Court, does one not have to smell a rat? Is it not demonstrative of dealing with the land by way of misrepresentation of fact and against the doctrines of *lis pendens* and *pendente lite*? How and why, other than for purposes of defeating the outcome of the Succession Proceedings, would the Defendant transfer the property six years after the institution of the succession proceedings which listed the property as one of those belonging to the Estate of the late Kiptalam Cherunya, as showed through Annexure No. SKC 5 of the Replying Affidavit sworn by the plaintiff? If the defendant was acting in good faith, should he not have applied first to the Court to determine whether or not the property belonged to the Estate before 'taking' it away to himself, least of all through a transfer form whose Transferor's existence or life on earth is suspect?
30. In my humble view, the Defendant/Applicant's conduct and dealing over the instant property during the pendency of the succession proceedings is questionable and should be stopped on its tracks forthwith. It is for those reasons that this Court orders, under Section 3A of the *Civil Procedure Act*, and in order to safeguard the interests of all parties including the Defendant himself, if he acted in good faith, that there be and is hereby issued an Order of Inhibition to be registered immediately on the land parcel known as Trans Nzoia/Mito Mbili/S/Scheme/2 until the determination of this suit.
31. Further, this Court did not understand how, if indeed it is true that the beneficiaries of the Estate of Kiptalam Cherunya, including the Defendant have been in occupation of the land, under the permission of the late father as a parent could lose the land to the Defendant. This is a matter for determination by the Court as to whether that is so. And if it is not for reason that the Defendant owned the land by way of transfer or purchase from John Kithinji, the Court would do well to inquire at the full trial whether the said John Kithinji still had a claim over land which the beneficiaries of the Estate of Kiptalam Cherunya had been occupying without his permission for over 38 years yet Sections 7 and 17 of the *Limitation of Actions Act* provide the extinguishing of an owner's title when he is dispossessed of his land for a continuous period of more than 12 years.
32. Turning to the second thrust of the Defendant's Application, he prayed that the suit be struck out for the reason that the Plaintiff did not have locus standi or capacity to institute the suit or for and on behalf of the estate of John Kithinji. On this issue, I have carefully analyzed the pleadings. I note that the plaintiff does not in any way purport to allege that he instituted the suit for and on behalf of the Estate of John Kithinji or John Kithinji himself as an individual. He pleaded that he brought the suit as a co-administrator of the Estate of Kiptalam Arap Cherunya as against to the Defendant. He avers



that the Estate claims a direct interest by way of being the beneficial owner of the suit land by virtue of it having belonged to the late father.

33. In my considered view, there is nowhere John Kithinji is mentioned as having committed the fraud or fraudulently taken away the suit land from the Estate of the late Kiptalam Cherunya. At best, he can only be joined as co-defendant or interested party at the appropriate time. As the pleadings stand, the claim is between the Plaintiff and the Defendant, and the Plaintiff has demonstrated by annexing a Grant of Letters of Administration issued on 30/08/2017 by the High Court sitting in Eldoret in Succession Cause No. 29 of 204. The second limb of argument is not merited.
34. The upshot is that the application is wholly unmeritorious. It is frivolous, misconceived, an abuse of the process of this court, and is aimed at stealing a match against the plaintiff besides misleading the Court. I dismiss it. This Court rarely would award costs in a matter instituted in good faith, as between family members or siblings. But the instant application was not one of those. Thus, I award costs to the Plaintiff.
35. Third last, given that from the pleadings and the annexures to the List of Documents show that the Plaintiff was Granted Letters of Administration alongside his three siblings in Eldoret Succession Cause No. 29 of 2014 and given that by law the personal representatives act as a unit and not severally, this Court orders that the Plaint be amended forthwith to include all the names of the Administrators of the Estate Kiptalam Cherunya (deceased), being Grace Cherunya, John Cherunya Kiptalam and James Kiplele Cherunya, as Plaintiffs.
36. An order of inhibition is hereby issued as ordered in paragraph 30 above.
37. Lastly, having dismissed the instant Application and bearing in mind that this Court gave directions on 14/06/2024 that it be heard first, the Court hereby directs that the application dated 24/05/2024 be mentioned on 02/12/2024 for further directions.
38. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA THE TEAMS PLATFORM THIS 21ST DAY OF NOVEMBER, 2024.

HON. DR. IUR F. NYAGAKA

JUDGE, ELC KITALE.

In the presence of:

Mr. Mukabane Advocate-----For the Defendant/applicant.

Kibii Advocate-----For the Plaintiff/ Respondent.

