



Sailoji & another (Acting on behalf of the Estate of Kashu Ole Sailoji) v Keriasek & 11 others (Land Case E025 of 2024) [2024] KEELC 13916 (KLR) (19 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13916 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
LAND CASE E025 OF 2024
CG MBOGO, J
DECEMBER 19, 2024**

BETWEEN

**KIPANKARA OLE SAILOJI 1ST PLAINTIFF
MICHAEL LEYIOMA SAILOJI 2ND PLAINTIFF
ACTING ON BEHALF OF THE ESTATE OF KASHU OLE SAILOJI**

AND

**JOHN LASIAMON KERIASEK 1ST DEFENDANT
POLOLET KERIASEK 2ND DEFENDANT
NTEKEREI KERIASEK 3RD DEFENDANT
NKOOMPA KERIASEK 4TH DEFENDANT
LEMAIDUK KERIASEK 5TH DEFENDANT
KILELU KERIASEK 6TH DEFENDANT
NJUE KERIASEK 7TH DEFENDANT
MUSANKA KERIASEK 8TH DEFENDANT
OTIYIOI KERIASEK 9TH DEFENDANT
MAITEI KERIASEK 10TH DEFENDANT
PERESHA OLE SOPIA 11TH DEFENDANT
PAPIYO OLE SOPIA 12TH DEFENDANT**



RULING

1. Before this court for determination is the notice of motion dated 30th September, 2024 filed by the plaintiffs/ applicants, and it is expressed to be brought under Article 40 of *the Constitution* of Kenya, Sections 1A, 1B, 3, 3A and 63 (c) and (e) of the *Civil Procedure Act*, Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders: -
 - a. Spent.
 - b. Spent.
 - c. That pending the hearing and determination of this suit there be a temporary order of injunction restraining the defendants/ respondents either by themselves, their agents, servants or proxies from any further encroachment, ploughing, planting, construction, alienation or dealing in any manner with the land parcel Natok/ Olchoro/ 38.
 - d. That the costs of the application be provided for.
2. The application is premised on the grounds inter alia that the plaintiffs/ applicants are the legal representatives of the estate of the late Kashu Ole Sailoji who died on 18th January, 2012. The application is further supported by the affidavit of the 1st plaintiff/ applicant sworn on even date. The 1st plaintiff/ applicant deposed that together with the 2nd plaintiff/ applicant, they are the sons of the late Kashu Ole Sailoji as well as the legal representatives of his estate. He deposed that his father was and is the registered proprietor of land known as Narok/ Olchoro/ 38 which is the suit property having been issued with a title deed on 17th December, 1980.
3. The 1st plaintiff/ applicant further deposed that they have lived on the suit property peacefully with all their siblings without any interruption from any party. He deposed that on 25th September, 2024, the defendants/ respondents without any colour of right, trespassed into a portion of the suit property, and destroyed the erected fence, fell some trees and forcefully ploughed the section with the intention of planting crops. Further, it was deposed that their efforts to stop the encroachment were met with resistance and threats of dire consequences in total disregard to the estate's rights and interests in the property.
4. The 1st plaintiff/ applicant deposed that by dint of Sections 25 and 26 of the *Land Registration Act*, the estate of their late father has exclusive right to the suit property to the exclusion of encroachers and trespassers. He deposed that they have a prima facie case with high probability of success, and that they also stand to suffer irreparably if the orders sought are not granted as well as the property being wasted.
5. The 1st to 10th defendants/ respondents filed their response to the application vide the replying affidavit of the 1st defendant/ respondent sworn on 25th October, 2024. The 1st defendant/ respondent deposed that the issues raised by the plaintiffs/ applicants fall within the jurisdiction of the land registrar and the court's jurisdiction is appellate as per Section 18 (2) of the *Land Registration Act*.
6. The 1st defendant/ respondent deposed that the 1st to 10th defendants/ respondents are the sons of the late Meitamei Ole Keriasek (deceased) who was the proprietor of CisMara/Olchorro/ 1819. He deposed that parcel no. 1819 formed part and parcel of Cis-Mara/ Ochorro/12 which was initially registered in the names of Ole Sailoji Adjudication Group. That contrary to the averments by the plaintiffs/ applicants, they have encroached on their portion as per the survey report, and that in fact, they reside on their respective portions of land which they have since subdivided into other portions.



7. The 1st defendant/ respondent further deposed that they have not invaded, encroached, cut down trees or forcefully ploughed any part of the land as alleged, and that the photos annexed are fictitious and do not relate to the suit ground. Further, he deposed that the plaintiffs/ applicants have filed the suit to intimidate them as they share no boundary since there is a road that separates the parcels of land. He deposed that the plaintiffs/ applicants have not disclosed to this court that they had litigated over the same matter in ELC Case No. 38 of 2019 where the plaintiffs' suit was dismissed, and that it is as a direct consequence of that suit that the site visit was done.
8. The 1st defendant/ respondent deposed that during the time the suit was pending in court, the land registrar and the district surveyor upon conducting ground visits concluded that the access roads cutting through parcel no. 38 and parcel no. 12 was the boundary line, and that it was the point of reference when all parcels in the adjudication were demarked. That in a recent survey conducted by the district surveyor on his parcel no. 1819, it was concluded that the plaintiff had encroached on his parcel of land by 1.82 hectares.
9. The 1st defendant/ respondent deposed that the application has not met the threshold for granting injunction orders as the plaintiffs/ applicants have their land interest catered for, and that they are only aiming at dragging this court to rubberstamp an illegality.
10. The plaintiffs/ applicants filed a supplementary affidavit sworn on 4th December, 2024 by the 1st plaintiff/ applicant in response thereto. He deposed that according to Olchoro Adjudication Section map, an access road was created between the suit parcel and parcel no. 12 to give access to both parcels. Later, parcel no. 12 was subdivided giving rise to parcels no. 1819, 1820, 1826 and 1827 which are occupied by the defendants/ respondents. Further, he deposed that a meeting was planned for the concerned members to open an access road on 23rd January, 2018, and 10th February, 2018, vide minute 1, the members appreciated that there were beacons on the boundaries of the suit property, although the meeting was held in exclusion of the estate of the late Ole Sailoji. The 1st plaintiff/ applicant further relayed the history leading to the filing of the instant application and he deposed that in a report dated 9th November, 2021, it was found that there is a 6.67 metres road that passes through parcel no. 12.
11. The 1st plaintiff/ applicant deposed that the defendants/ respondents have relied on the report to claim that the dispute between the parties herein is a boundary dispute and that the court has no jurisdiction. He contended that they were not parties to the surveyor's report dated 11th September, 2024 which determined that the suit property had encroached on parcel no. 1819, as there was no summons issued to them to take part in the process. He deposed that in a meeting held on 20th September, 2024, the assistant chief stated that the agenda of the meeting was the implementation of the surveyor's report date 11th September, 2024, and that in their closing remarks, they went ahead to illegally advise the defendants/ respondents to take occupation of the portion forming the suit property.
12. He maintained that their claim has never been in respect to a boundary dispute but the creation of a reserve/access road in accordance to map of Olchoro Adjudication Section.
13. The application was canvassed by way of written submissions. The plaintiffs/ applicants filed their written submissions dated 31st October, 2024 where they raised two issues for determination as listed below: -
 1. Whether the plaintiffs/applicants have met the threshold to warrant grant of temporary injunction.
 2. Whether the orders sought for should be allowed.



14. On the first issue, the plaintiffs/ applicants submitted that their late father died on 18th January, 2012, and that he was the registered proprietor of the suit property as provided through the annexures. They relied on the cases of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 and *Mrao v First American Bank of Kenya Limited & 2 Others* [2003] eKLR. They further submitted that the certificate of title is prima facie evidence that their late father is the owner of the suit property. They went on to submit that the certificate of title has not been impeached by any court of law or authority and that the suit property belongs to their late father.
15. The plaintiffs/ applicants further submitted that by virtue of being the beneficiaries and representatives of the estate of their late father, they have legal and beneficiary rights to the suit property. As to whether they stand to suffer irreparable injury, the plaintiffs/ applicants submitted that they have demonstrated loss as a result of encroachment and destruction that the defendants/ respondents have so far done. That if they are not restrained, they risk losing part of the suit property which is yet to undergo legal distribution.
16. They further submitted that where any doubt exists as to their rights, the court in determining whether an injunction should be granted takes into consideration the balance of convenience to the parties as it was held in the case of *Paul Gitonga Wanjau v Gathuthi Tea Factory Ltd & 2 Others* [2016] eKLR.
17. On the second issue, the plaintiffs/ applicants submitted that having established that they have met the threshold to warrant an award of temporary injunction and they urged the court to grant the orders sought as well as costs.
18. The 1st to 10th defendants/ respondents file their response written submissions dated 25th October, 2024 where they raised three issues for determination as listed below: -
 - a. Whether the plaintiff/applicant has a prima facie case against the defendants/respondents.
 - b. Whether the plaintiff/applicant would suffer irreparable loss.
 - c. Whether the balance of convenience tilts in favour of preserving the suit property.
19. On the first issue, the 1st to 10th defendants/respondents submitted that application is premature as the dispute between the parties involves a boundary, and that there is need to ascertain whether the portion of land alleged to have been encroached falls within parcel 38 or 1819 before the court considers granting the orders. Further, they submitted that the plaintiffs/ applicants have not established a prima facie case and are undeserving protection by the court. They relied on the case of *Mrao Limited vs First American Bank of Kenya Limited & 2 Others* [2003] eKLR.
20. On the second issue, the 1st to 10th defendants/ respondents submitted that the suit property and the portion under which the alleged offensive activities are being carried out if any, does not fall within their common shared boundary, and that as such, the injunctive orders issued, if any, will be in vacuum as they are not the perpetrators of the acts complained of. To buttress on this submission, the 1st to 10th defendants relied on the case of *Vivo Energy Kenya Limited v Maloba Petrol Station & 3 Others*, Court of Appeal, Civil Appeal No. 21 of 2014 [2015] eKLR.
21. On the third issue, the 1st to 10th defendants/ respondents submitted that on the face of it, the plaintiffs/ applicants' contention may sound tenable, but it is worthy to note that it was incumbent upon the plaintiffs/applicants to carry out survey, with a view to authenticate the boundary limits to abate encroachment on neighbouring properties. They submitted that the balance of convenience does not tilt in favour of the plaintiffs/ applicants, and they relied on the case of *Naftali Ruthi Kinyua vs Patrick Thuitha Gachure & Another* [2015] eKLR.



22. The plaintiffs/applicants filed their supplementary submissions dated 15th December, 2024. In their submissions, the plaintiffs/applicants buttressed the issues argued in their supplementary affidavit and the annexures in support thereof. In maintaining that the dispute does not involve a boundary but encroachment, the plaintiffs/ applicants relied on the case of *Owiti v Aridi & Another* (Environment and Land Appeal E48 of 2022) [2024] KEELC 610 (KLR) (8 February 2024).
23. The 11th and 12th defendants/ respondents did not file their response to the application. As it is, the application is unopposed by the said 11th and 12th defendants/ respondents. However, there is need for this court to satisfy itself whether the orders sought should be granted. Be that as it may, I have considered the application, the replies thereof and the written submissions filed by the plaintiffs/ applicants and the 1st-10th defendants/ respondents herein. In my view, the issue for determination is whether the plaintiffs/ applicants have met the threshold for grant of injunction orders pending the hearing and determination of the main suit.
24. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the case of *Giella versus Cassman Brown* (1973) EA 358. This position has been largely pronounced in numerous decisions and more particularly in the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* [CA No.77 of 2012](#) [2014] eKLR where the Court of Appeal held that;
- “in an interlocutory injunction application the applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour. These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.
25. As a result, the plaintiffs/ applicants ought to first establish a prima facie case. In *Mrao Limited versus First American Bank of Kenya Limited* [2003] eKLR, the court stated as follows: -
- “... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
26. The plaintiffs/ applicants contended that they are the legal representatives of the estate of their late father who is the registered owner of the suit property, and in support thereof, they annexed a copy of the certificate of title for Narok/ Olchoro/ 38 issued on 17th December, 1980 in the name of KASHU Ole Sailoji. They also annexed a copy of Limited Grant Ad Litem in support of their averments. On the other hand, the 1st to 10th defendants/ respondents refuted the claims made by the plaintiffs/ applicants, and instead contended that it is the plaintiffs/ applicants who have encroached into their late father’s land. From the averments raised by the respective parties, either party is blaming the other for alleged encroachment of the portion of their properties. Notably, is the contention by the plaintiffs/ applicants that they were not part of the survey exercise conducted by the district surveyor on 11th September, 2024, which raises questions as to the credibility of the report. The 1st to 10th defendants/ respondents in paragraph 20 of their written submissions indirectly or so admitted to the claims made by the plaintiffs/ applicants to the extent that they saw it fit that the plaintiffs/ applicants ought to carry out survey with a view to authenticate the boundary limits. Could it be an admission of fact by the 1st to 10th defendants/ respondents? Having stated the above, I am satisfied that the plaintiffs/ applicants have established a prima facie case.



27. Secondly, the plaintiffs/ applicants have to demonstrate that irreparable injury will be occasioned if an order of temporary injunction is not granted. In the case of Pius Kipchirchir Kogo versus Frank Kimeli Tenai [2018] eKLR, irreparable injury was described as follows: -

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

28. In support of their averments, the plaintiffs/ applicants contended that the defendants/ respondents encroached on a portion of the suit property, fell down tress and ploughed the section with the intention of planting crops. They maintained that there is risk of losing the property which is yet to undergo succession proceedings. They annexed photographs depicting images of the activities. On the other hand, the 1st to 10th defendants distanced themselves from this claim, and asserted that if there was any loss or damage, it was not at their instant. On this issue, I am satisfied that there is likelihood of damage and irreparable loss on the part of the plaintiffs/ applicants, which needs temporary protection by this court.

29. Having analyzed the application, it is my view that the balance of convenience lies in favour of the plaintiffs/ applicants as the inconvenience caused will be greater if the orders are not granted as opposed to the defendants/ respondents.

30. Let me say this, the court acknowledges that the access road is in dispute and whether or not it is part of the plaintiffs/ applicants portion of land or the defendants/ respondents, is an issue to be determined in the main suit. However, there is need to preserve the suit property to enable the parties fully adjudicate their claims. It is thus convenient that the orders of injunction are issued.

31. Arising from the above, I find merit in the notice of motion dated 30th September, 2024, and I hereby grant the following orders: -

i. That pending the hearing and determination of this suit, a temporary order of injunction is hereby issued restraining the defendants/ respondents either by themselves, their agents, servants or proxies from any further encroachment, ploughing, planting, construction, alienation or dealing in any manner with the land parcel Natok/ Olchoro/ 38.

ii. Costs to be in the cause.

Orders accordingly.

conclusions

DATED, SIGNED & DELIVERED VIA EMAIL on this 19TH day of DECEMBER, 2024.

HON. MBOGO C.G.

JUDGE

19/12/2024.

In the presence of: -

Mr. Meyoki Pere – C.A

