



REPUBLIC OF KENYA



**Kosgey v Too & 2 others (Environment & Land Case E004 of 2023)
[2025] KEELC 2896 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 2896 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E004 OF 2023**

CK YANO, J

MARCH 27, 2025

BETWEEN

SAMWEL KOSGEY PLAINTIFF

AND

ENOS KIPCHIRCHIR TOO 1ST DEFENDANT

SHEM KIPRONO TOO 2ND DEFENDANT

WILSON KIPKURGAT TOO 3RD DEFENDANT

RULING

1. The application for determination is the Notice of motion dated 14th January, 2025 by the Plaintiff/Applicant seeking the following orders:-
 1. Spent
 2. That pending the hearing and determination of this application, there be interim injunction restraining the Defendants/Respondents whether by themselves, their agents' servants and/or agents from gaining forceful entry, causing destruction, cultivation or any manner of activity dealing on or carrying out any activity on the plaintiff's land measuring on all that property known as Moiben/Moiben Block2 (Segero) 379.
 3. That pending the hearing and determination of this suit, there be interim injunction restraining the Defendants/Respondents whether by themselves, their agents, servants and/or assigns from gaining forceful entry, causing destruction, cultivation or any manner of activity dealing on or carrying out any activity on the plaintiff's land measuring on all that property known as Moiben/Moiben Block2 (Segero) 379.
 4. That in the alternative this honourable court be pleased to grant an order of status quo obtaining as at the time of this application and/or the time of filing suit.



5. Costs of this application be provided for.
2. The application is brought under Order 40 rule 1 of the *Civil Procedure Rules*, sections 1A, 1B, 3, 3A and 63 of the *Civil Procedure Act* and all other enabling provisions of the law and is based on the following grounds: -
 - a. That the Defendants/Respondents have irregularly obtained a title deed of land comprised in Moiben/Moiben Block2 (Segero) 379.
 - b. That the title to land parcel Moiben/Moiben Block2 (Segero) 379 has been extinguished by adverse possession.
 - c. That the applicant/plaintiff is in occupation of the parcel since 2004 when he first entered the land and has been in occupation for a period of over 17 years.
 - d. The sons of the 2nd Defendant have threatened to cause violence on the suit land and there is likely to be breach of peace.
 - e. It is in the interest of justice that this application be allowed.
3. The application is supported by the affidavit of Samuel Kosgei, the Applicant sworn on 14th January, 2025, wherein he averred that on 2nd January, 2025, he carried out cultivation as he has always been doing and the sons to the 2nd Respondent threatened to cause mayhem. The applicant states that he reported the matter to the area chief who advised that since the matter is in court, the applicant should proceed to obtain orders of injunction to preserve the status quo pending the hearing and determination of the suit.
4. That applicant has deponed that he has been in possession of the suit land since the year 2004 when he took possession and cultivated the land, put up a house, pit latrine, granary, perimeter fence, planted trees and dug a borehole. The applicant has annexed copies of photographs marked “SK1” and “SK 2”. That the said land is registered in the names of the Respondents herein who are the successors of the estate of Kiptoo Arap Ngososei.
5. The Applicant averred that the late Kiptoo Arap Ngososei had sold a portion of the said land to one Julius K. Korir in 1996 and delivered vacant possession. That Kiptoo Arap Ngososei or his sons who are the Respondents herein have never been in possession ever since. That the Respondents took out letters of administration for the estate of the deceased and registered the land in their names, but have never taken up possession.
6. The Applicant has deponed that the 2 acres that he occupies is being claimed by the Respondents who claim to have inherited the same from their late father. That the cultivation season has commenced and there is real danger that there is likely to be a breach of peace. That the matter has in the past been reported to the Police who referred the matter to court. That in light of the above, it has now become necessary for the injunction to issue against the Respondents. The applicant has also exhibited a copy of search for the subject parcel of land marked “SK 3” and urged the court to grant the orders sought.
7. The Respondents opposed the application through a Replying affidavit dated 22nd January, 2025 sworn by Shem Kiprono Too, the 2nd Respondent herein. The Respondents averred that they are the Administrators of the estate of Philip Kiptoo Ngososei alias Kiptoo Arap Ngososei who was the registered owner of the suit land. That the Respondents are now registered on transmission in respect of the resultant portions of the said land for transmission to the beneficiaries. The Respondents have annexed copies of the Grant of letters of administration intestate and certificate of confirmation of Grant in Eldoret High Court Succession Cause No. 3 of 2018 marked “SK1” and SK2” respectively.



8. The Respondents averred that all the beneficiaries of the estate of the deceased have been in possession and occupation and utilizing the said parcel of land measuring 6.515 hectares (16 acres) exclusively. That when the Respondents herein instituted the succession proceedings over the estate, one Julius K. Korir began intermeddling with the estate of the deceased and attempted to trespass into the suit land, and when the attempted trespass failed, Julius K. Korir filed a suit against the estate of the deceased at the chief magistrate's Environment and Land court at Eldoret being ELC No. 147 of 2022 which was dismissed. Copies of the plaint and court order marked "SK 3 (a) and "b" have been annexed. That the said Julius K. Korir preferred an appeal against the said decision being ELC Appeal No. E020 of 2023 which is now pending for hearing and determination. A copy of the Memorandum of Appeal marked "SK 4" has been annexed.
9. It is the Respondents contention that the Applicant has been sponsored by or is colluding with Julius K. Korir with the Sole intention of misleading this Honourable court without disclosing multiple suits filed over the same issues/subject matter being the suit parcel of land. That the said Julius K. Korir is now trying to use unknown persons to claim interest in the suit land in that there is another suit pending before this court being ELC E005/2023 (O.S) - *Thomas Sawe v Enos Kipchirchir Too, Shem Kiprono Too and Wilson Kipkurgat Too*. A copy of the Originating summons marked "SK5" has been annexed. That the issues for determination in these suits are same, save for the difference in the names of the parties and are intended to achieve the same results.
10. The Respondents reiterated that no beneficiary of the estate of Philip Kiptoo Ngososei alias Kiptoo Arap Ngososei has delivered vacant possession of the suit land to the Applicant and that the beneficiaries are currently in possession and occupation of the said parcel of land. That the photographs attached to the supporting affidavit of the Applicant do not depict the actual position of the land as there are no erected structures thereon. The Respondent's added that they are advised by their Advocate on record that the said photographs do not meet the threshold set out in section 106 of the *Evidence Act* hence the same are not admissible before this court. That the instant application has been actuated by the Applicant's malicious intention to abuse the process of court whereas the suit already has a date for hearing in March. That the application is a disguise for them to start utilizing the land in order to intimidate and frustrate the beneficiaries of the estate of the deceased. The Respondents urged the court to dismiss the application with costs.
11. The application was canvassed by way of written submissions. The Applicant's submissions are dated 10th February, 2025 while the Respondents' submissions are dated 14th February, 2025. I have read and considered the said submissions and I need not reproduce the same in this ruling.
12. I have considered the application, the response thereto as well as the submissions of the parties and the authorities relied on. The only issue for determination is whether the injunctive order should issue. The order sought is an equitable relief granted at the discretion of the court. Further, the court will warn itself that at this stage, it is not dealing with the disputed facts to finality but only determining whether the applicant is deserving of the injunctive order. The court will also take into account that injunctive orders are issued whenever the suit property is in danger of disposition or alienation or it is in danger of being wasted or damaged.
13. The now famous case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 set the following conditions for the grant of a temporary injunction: -
 - "First, 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 in the balance of convenience.”

14. The application herein has been brought inter alia under Order 40 Rule 1 of the [Civil Procedure Rules 2010](#) which provides 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 by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks until the disposal of the suit or until further orders”.

15. In this case, it is not in dispute that the Respondents are now registered as proprietors of the suit land by transmission. This was pursuant to succession cause proceedings in Eldoret High Court Succession Cause No. 3 of 2018. According to the certificate of confirmation of Grant annexed to the Replying Affidavit marked “SK2”, the Respondents herein as administrators of the estate of the late Philip Kiptoo Ngososei alias Kiptoo Arap Ngososei, are holding the suit property and the resultant subdivisions on their on behalf and on behalf of the other beneficiaries named therein. While the Applicant’s case is that he has acquired 2 acres out of the suit property by way of adverse possession, the Applicant at the same time seems to suggest that he was in possession and occupation of a portion that was sold by the late Kiptoo Arap Ngososei to one Julius K. Korir in the year 1996. I note however that annexures SK3(a) and (b) indicate that the said Julius K. Korir filed Eldoret CMC Case No. 147 of 2022 against the Respondent herein which was dismissed and the said Julius K. Korir preferred an appeal in this court being ELCA No. E020 of 2023 which is said to be still pending. Apart from stating that the late Kiptoo Arap Ngososei had sold a portion of the suit land to the said Julius K. Korir in 1996, the Applicant has not been candid on how he entered the land or his relationship, if any, with the said Julius K. Korir. Further, the Applicant has not proved that the suit property is in danger of being wasted, damaged or alienated as required under Order 40 Rule 1 of the Civil Procedure Rules. Besides the registration of the property in the names of the Respondents through transmission, there is no evidence to show an infringement of the Applicant’s right, if any. The Applicant merely stated that the cultivation season has commenced and there is real danger that there is likely to be a breach of peace. In my view, those are mere allegations. Whereas the applicant stated that the matter has in the past been reported to the Police, there was no evidence to support that allegation. Further, the court has noted that this matter was before court on 5th December, 2024 when it was fixed for hearing of the main suit on 27th March, 2025. It would appear that the application herein was meant to scuttle the hearing of the suit.
16. Having looked at the facts that have emerged in this case and the evidence adduced by way of affidavits, it is the view of this court that the applicant has not established a prima facie case with a probability of success against the Respondents. As regards irreparable damage, I take the view that any damage suffered by the applicant, if any, can be quantified in damages. Furthermore, the applicant can still be



registered as owner of 2 acres of the suit land that he is claiming if upon determination of the suit he is found to have acquired the same by adverse possession.

17. The upshot is that the Applicant has not met threshold for grant of temporary injunction sought in the Notice of motion dated 14th January, 2025. This court therefore finds that the said application is devoid of merit and the same is hereby dismissed with costs to the Respondents.

18. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 27TH DAY OF MARCH, 2025 VIDE MICROSOFT TEAMS.

HON. C. K. YANO

ELC, JUDGE

In the presence of;

Ms. Rotich holding brief for Mr. Maritim for Plaintiff/Applicant.

Ms. Cheruiyot holding brief for Tum for Defendants/Respondents.

Court Assistant - Laban

