



**Kimeto (Suing as the Legal Representative of the Estate of Daniel Kikwai Chepkwony
alias Kikwai Arap Chepkwony - Deceased) v Korir & 4 others (Environment
& Land Case 3 of 2020) [2023] KEELC 116 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 116 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 3 OF 2020
MC OUNDO, J
JANUARY 19, 2023**

BETWEEN

**ALEXANDER KIPNGETICH KIMETO (SUING AS THE LEGAL
REPRESENTATIVE OF THE ESTATE OF DANIEL KIKWAI CHEPKWONY
ALIAS KIKWAI ARAP CHEPKWONY - DECEASED) APPLICANT**

AND

**CHARLES KORIR 1ST RESPONDENT
LEONARD LANGAT 2ND RESPONDENT
ELIJAH KIMETO 3RD RESPONDENT
ALICE KIMETO 4TH RESPONDENT
DENNIS KORIR 5TH RESPONDENT**

RULING

1. Vide an application by way of notice of motion dated January 16, 2020 brought under the provisions of Section 3, and 63(e) of the *Civil Procedure Act* and Order 40 Rule 1, 2, 3(3) and 4 and Order 51 Rule 1 of the *Civil Procedure Rules*, and all enabling provisions of the law, the applicant seeks for interim injunctive orders against the defendants/respondents injuncting them by themselves, their, servants, employees agents, personal representatives and/or any person acting for them and/or on their behalf from entering upon, trespassing onto and destroying crops, cultivating, digging, grazing their cattle on, fencing, disposing off, selling, transferring, and/or in any manner whatsoever intermeddling with and/or an alienating that parcel of land known as title no Kericho/Ndarawetta/1048 or any portion thereof pending the hearing and determination of this suit.
2. The applicant also sought that the cost of the application be borne by the respondents/defendants.



3. The application was premised on the grounds on the face of it and supported by an affidavit sworn by the plaintiff/applicant, on the January 16, 2020.
4. The applicant's complaint is to the effect that the 1st and 2nd respondents with the support of the 3rd, 4th and 5th respondents, have trespassed onto the suit parcel of land and have proceeded to destroy the fence, cultivate and graze their cattle thereon wherein they have destroyed the trees, crops and vegetation, on the allegation that they had purchased the suit land. That the suit land is registered in the name of Daniel Kikwai Chepkwony Alias Kikwai Arap Chepkwony (deceased) who died intestate and no person entitled to take up letters of administration to the estate of the deceased had done so that the deceased's estate has yet to be distributed. That the respondents' actions amounted to intermeddling with the deceased's estate. That unless restrained the respondents would in turn dispose off the suit property to the detriment of the deceased's estate whose beneficiaries will be rendered destitute.
5. Upon consideration of the application, the court held that the matter was not urgent as the acts complained of started happening in April 2019 meaning that the activities complained of had been going on for quite some time without the applicants taking action. The court then directed for the application to be served and a date for hearing inter-parties be taken at court registry.
6. Upon service of the application and a hearing notice served upon the respondents herein, the firm of M/s Kadet & Company Advocates entered their memorandum of appearance dated February 4, 2020 and filed on the February 5, 2020 on which day M/s Chepkirui holding brief for Mr Kadet counsel for the respondents sought for time to respond to the application. The matter was then scheduled for mention for the March 12, 2020.
7. On the said date, Counsel for the applicant informed the court that they had been served with a Replying Affidavit of the 2nd and 3rd respondents dated February 5, 2020. He then sought leave to file their response. A further mention date was taken for the April 29, 2020 and the court having noted that the said Replying Affidavit had not been placed on the court file, sought for and received the same, both having been sworn and filed in court on the February 5, 2020.
8. The said replying affidavits were to the effect that the allegations contained in the applicant's application were based on rumors and innuendos. That indeed the suit land had not been sold but that the 3rd respondent being a beneficiary of the deceased's estate had invited the 1st and 2nd respondents on a joint venture to cultivate on the suit land and thereafter share the proceeds. That nobody had sold, trespassed and/or intermeddled with the deceased's estate. That the issuance of an injunction as sought would cause injustice to the beneficiaries of the deceased's estate.
9. The applicant filed their supplementary affidavit sworn on the July 2, 2020 reiterating the averments in his supporting affidavit further stating that the 2nd and 3rd respondents had committed perjury when they deponed that they were engaging in a joint venture of cultivation on the suit property and that had not purchased the suit property wherein in effect the applicant had managed to secure the sale agreements from the office of the Chief Sibaiyan location dated January 2019 and February 16, 2019 respectively between the 3rd respondent and the 1st and 2nd respondents. The said agreements were in a bundle of documents marked as AKK1 together with photographs of the 1st respondent cultivating on the suit land.
10. The matter was not prosecuted for some time due to the effects of the covid-19 pandemic. On the June 9, 2022, however the Court directed that the application be disposed of by way of written submissions to which only the applicant compiled and although the matter as it stands unopposed thereto, I shall look into its merits wherein I shall summarize the applicant's submissions dated July 7, 2022 as follows;



Applicants' submissions.

11. The applicants' submissions gives a brief history of the case to the effect that the suit parcel of land was registered to his late father Daniel Kikwai Chepkwony Alias Kikwai Arap Chepkwony (Deceased) died intestate on April 16, 1997. That no Letters of Administration had been procured and neither had the estate been distributed to its beneficiaries. That the applicant had procured Letters of Administration Ad Litem, which had been issued to him on December 2, 2019, wherein he had filed this suit to preserve the deceased's estate.
12. That the 1st and 2nd respondents had trespassed onto the suit land wherein they had proceeded to commit the atrocities herein above stated on the allegation that they had purchased the land from the 3rd 4th and 5th respondents. That despite warning from the chief Sibaiyan location to desist from the activities complained of, the 1st and 2nd respondents had failed to heed to the warning. That their continuous activity was likely to lead to the disposal, alienation and/or transfer of the entire suit to third parties to the detriment of the deceased's estate whose beneficiaries will be rendered destitute.
13. The applicant further submitted that the 2nd and 3rd respondent's replying affidavits, to the effect that they had not intermeddled with the deceased's estate, and neither had they bought and/or sold the same, but that they had entered into a joint venture to cultivate on the suit land, was a ploy to hoodwink the court. This was because the applicant had secured a letter from the chief Sibaiyan location together with copies of an agreement signed by the respondents ("AKK1") confirming that the 3rd, 4th and 5th respondents had indeed entered into an agreement for sale of portions of the suit properties to the 1st and 2nd respondents who had taken advantage of the prevailing conditions in the country owing to the covid 19 pandemic to plant tea on the suit as was evidenced in the photographs annexed as "AAK2".
14. The applicant relied on the decision in the case of *Nguruman Limited vs Jan Bonde Nielson & 2 others* [2014] eKLR to submit that each of the pillars therein had been established.
15. They further submitted that due to the intermeddling with the deceased's estate by the respondents, which was in contravention of Section 45 of the *Law of Succession Act*, they had suffered damages. Reliance was placed in the case of *Banis African Ventures Limited vs National Land Commission* [2021] eKLR.
16. It is now a settled practice under the new constitutional dispensation that filing of written submissions is the norm as written submissions serve the purpose of expedience and amounts to addressing the court on the evaluation of the evidence of each party and analysis of the law. It is therefore trite that a party who fails to file their submissions on an application as ordered by the court is deemed as a party who has failed to prosecute his application and/or defence as the case might be.
17. In the present instance the respondents have failed to file their written submissions as directed by the court and therefore the application stands undefended.

Determination.

18. The often cited case of *Giella -vs- Cassman Brown & Company Ltd* (1973) EA 358 is the leading authority on the conditions that an applicant needs to satisfy for the grant of an interlocutory injunction. An applicant needs, firstly to establish and demonstrate they have prima facie case with a probability of success, secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and third in case the Court is in any doubt in regard to the first two conditions, the Court may determine the matter by considering in whose favor the balance of convenience tilts.



19. In the present matter, there is no dispute that one Daniel Kikwai Chepkwony Alias Kikwai Arap Chepkwony (Deceased) was the registered proprietor of land parcel LR no Kericho/Ndarawetta/1048 the suit land herein. There is further no dispute that he died intestate on April 16, 1997 and thereafter no Letters of Administration had been procured by his beneficiaries. submissions
20. The court has been informed through the production of documentary and photographic evidence that the 3rd, 4th, and 5th respondents have proceeded to dispose of portions of the suit land through sale agreements to the 1st and 2nd respondents who have proceeded to trespass upon the suit land and to engage in the activities herein above complained of, which activities amount to intermeddling with the deceased's property.
21. Applying the above principles in the Giella case (supra) I shall frame my issues for determination therein. I have considered the present application and the documents adduced in evidence in support thereof. Looking at the facts of this case as submitted, the court has been moved under a certificate of urgency, by the applicant, to issue temporary injunction against the respondents. At this stage, the court is only required to determine whether the applicant is deserving of the orders sought.
22. The court is not required to determine the merit of the case, but by virtue of the fact that the applicant is seeking an injunction against the respondents restraining them themselves, their, servants, employees agents, personal representatives and/or any person acting for them and/or on their behalf from entering upon, trespassing onto and destroying crops, cultivating, digging, grazing their cattle on, fencing, disposing off, selling, transferring, and/or in any manner whatsoever intermeddling with and/or an alienating that parcel of land known as title no Kericho/Ndarawetta/1048 or any portion thereof pending the hearing and determination of this suit, more so since there is proof that the agreement on a limiting the same, i see no harm in allowing the said application.
23. I have balanced all the factors and circumstances in the instant suit, the applicant has clearly described the state of affairs existing which state of affair has not been denied by the respondents herein, walked through the replying affidavits of the 1st and 3rd respondents have deponed that the activities going on the suit land was for the benefit of the beneficiaries of the estate of the deceased.
24. The applicant now seeks for orders to preserve the suit land from further activities by the respondents that may be detrimental to estate of the deceased's proprietary rights in the suit land. I am therefore convinced that the applicant has established a prima facie case.
25. On the second issue as to whether the applicant would suffer irreparable harm if the injunction was not granted, I have considered the applicants' submissions and seen the attached copies of the sale agreement and photographs showing the activities going on in the suit property and I am convinced that if a check is not placed on the said activities, there is likelihood that the suit property would be alienated to third parties to the detriment of the deceased estate and it is normal for the applicant to be apprehensive that the estate would suffer irreparable harm if the injunction was not granted. The applicant has shown that their beneficial interest is therefore capable of being protected and/or preserved through an order of an interlocutory injunction.
26. I have no doubt that all said and done, that the balance of convenience in this matter tilts in favour of the applicant's application which is herein allowed with the following orders;
 - i. The 1st and 2nd Defendants/respondents shall by themselves, their, servants, employees agents, personal representatives and/or any person acting for them and/or on their behalf desist from entering upon, trespassing onto and destroying crops, cultivating, digging, grazing their cattle on, fencing, disposing off, selling, transferring, and/or in any manner



whatsoever intermeddling with and/or an alienating parcel of land known as title no Kericho/Ndarawetta/1048 or any portion thereof pending the hearing and determination of this suit.

- ii. This order does not apply to the beneficiaries of the estate of Daniel Kikwai Chepkwony Alias Kikwai Arap Chepkwony (Deceased) who are herein directed not alienate, dispose of, sell, transfer, or use LR no Kericho/Ndarawetta 1048 to the detriment of the deceased's estate, but shall preserve and utilize it in a manner that is beneficial to his estate.
- iii. The orders to be maintained by all parties until the matter is finally heard and determined.
- iv. The cost of the application dated January 16, 2020 shall be in the cause.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 19TH DAY OF JANUARY 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

