



**Kiplagat v Rutto (Environment & Land Case . E026 of 2022)
[2023] KEELC 15767 (KLR) (28 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15767 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE . E026 OF 2022
JM ONYANGO, J
FEBRUARY 28, 2023**

BETWEEN

STANLEY KIPLAGAT PLAINTIFF

AND

KIPROTICH DAVID RUTTO DEFENDANT

RULING

1. By a Notice of Motion dated 12th April, 2022, the Plaintiff/Applicant filed an application seeking the following orders:
 - a) Spent
 - b) That this Honourable court be pleased to issue a temporary injunction restraining the Defendant/Respondent, their agents, servants and any other person whomsoever acting under them from entering and interfering in any manner whatsoever with the land parcel known as LR Moi's Bridge/Sirikwa Block 1(ZIWA)27 pending the hearing and determination of this application.
 - c) That this Honourable court be pleased to issue a temporary injunction restraining the Defendant/Respondent, their agents, servants and any other person whomsoever acting under them from entering and interfering in any manner whatsoever with the land parcel known as LR Moi's Bridge/Sirikwa Block 1(ZIWA)27 pending the hearing and determination of the main suit.
 - d) That the costs of this application be provided for.
2. The application is based on the facts set out on the face of the Notice of Motion and the Supporting Affidavit of Stanley Kiplagat, the Applicant herein sworn on the 12th April, 2022. In the said affidavit



- he depones that he is the administrator of the estate of Kipsaina A. Muge as per the annexed copy of the Grant of Letters of Administration Ad Litem.
3. He depones that the Respondent has engaged in acts of wastage of the deceased's land as he purports to own a share thereof. It is his contention that the beneficiaries of the estate of the deceased have never given the Respondent any of the deceased's parcel of land yet the Respondent has trespassed on the deceased's land and he has been cultivating a portion thereof.
 4. The Applicant further avers that the Respondent is trying to use the police to have the Applicant's title cancelled and if that happens he shall suffer irreparable loss.
 5. The application is opposed by the Respondent through his Replying Affidavit sworn on the 20th April, 2022. He depones that the Applicant concealed from the court that he is not the biological son of Kipsaina Muge (deceased) nor is he a beneficiary of his estate. He accuses the Respondent of falsely stating under oath that he is the son of the deceased in order to obtain a Grant of Letters of Administration Ad Litem vide HC Succession Cause No. E041 of 2022.
 6. He depones that according to the chief's letter dated 11th September, 2014 which is annexed to the Affidavit and the pleadings in the succession cause, he is described as one of the children of Leah Jepkoech who was married to Tapkurgoi Kendagor Muge. He denies that he has sub-divided or intermeddled with the property of the deceased. He depones that the Applicant has failed to demonstrate that he has a *prima facie* case with a probability of success and he is therefore not entitled to the orders sought.
 7. In response to the Replying affidavit, the Applicant filed a Supplementary Affidavit sworn on 21st April, 2022. In the said affidavit he depones that Kipsaina Muge (Deceased) married one Tapkurgoi Kendagor Muge (now deceased) who in turn married Leah Jepkoech, the Applicant's biological mother. He further depones that on 27th May, 2011, the said Tapkurgoi Kendagor (deceased) appointed the Applicant as the heir of her property through a written will. He maintains that it is on the basis of the said will that he moved the High Court to obtain an Ad Litem grant.
 8. The application was canvassed by way of written submissions and both parties filed their submissions.

Applicant's Submissions

9. Learned counsel Applicant submitted that the Applicant had obtained a Grant of Letters of Administration Ad Litem in order to preserve the estate of the deceased comprised in LR No. Moi's Bridge/Sirikwa Block 1(ZIWA)27. He submitted that the Respondent had unlawfully entered into and taken possession of the deceased's property yet he was neither a son nor a beneficiary of the estate of the deceased. It was his submission that the respondent was intermeddling with the estate of the deceased and unless he was restrained by an order of injunction, the Applicant would suffer irreparable damage.
10. He relied on the case of *Giella v Cassman Brown & Co Limited* (1973) E.A which laid down the principles for the grant of a temporary injunction. He submitted that the Applicant had established a *prima facie* case with a probability of success as he had demonstrated that he was a beneficiary of the estate of Kipsaina Muge (Deceased) through his mother Leah Jepkoech who was married to Tapkurgoi Kendagor under Nandi customary law. The said Tapkurgoi Kendagor was the wife of Kipsaina A. Muge. By virtue of the said relationship, Tapkurgoi Kendagor had appointed the Applicant as the heir of her property. He contended that since the Applicant had obtained an Ad Litem Grant in respect of the estate of the deceased, he should be allowed to administer the estate of the deceased. He was of the view that the Respondent was intermeddling with the estate of the deceased and if he was not restrained by way of injunction, the Applicant would suffer irreparable damage.



Respondent's Submissions

11. On his part, learned counsel for the Respondent submitted that the Applicant was undeserving of the orders sought as he had not come to equity with clean hands. It was his submission that the Applicant had lied under oath that he was the son of Kipsaina Muge (deceased). Secondly, he had obtained an Ad litem Grant in respect of the estate of the deceased from the High Court, yet he was aware that a Succession Cause had been filed in the lower court vide Eldoret CM Succession Cause No. E 94 of 2022 -In the matter of the Estate of Kipsaina A. Muge (Deceased) where the Applicant was not mentioned. A certificate of confirmation of Grant has been issued in the said case. He contended that the Applicant was trying to challenge the said succession cause by filing this application.
12. He therefore submitted that the Applicant had not demonstrated that he had a *prima facie* case with a probability of success.
13. On whether the Applicant had demonstrated that he would suffer irreparable damage, the Respondent averred that he had been in quiet and uninterrupted possession of the suit property measuring 3.0 acres and the Applicant had not demonstrated what loss he would suffer if the order of injunction was not granted.
14. He submitted that the balance of convenience tilted in favour of the Respondent as he was the legal owner of the suit property and he should thus be allowed to enjoy the same.

Issue for determination

15. The only issue for determination is whether the Applicant has satisfied the conditions for the grant of temporary injunction.

Analysis and Determination

16. In order to qualify for an order of injunction an applicant must meet the conditions set out in the case of *Giella v Cassman Brown & Company Limited* 1973 E.A 358 which are as follows:

“First, the applicant must show that he has 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 damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”
17. The first hurdle that the applicant must surmount it to demonstrate that he has a *prima facie* case with a probability of success.
18. In the case of *Mrao v First American Bank of Kenya Limited* [2003] eKLR Bosire JA (as he then was) stated as follows:

“A *prima facie* case is one 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”
19. In the instant case the Applicant has stated that he is the administrator of the estate of Kipsaina Muge (deceased) who was the registered owner of the suit property. To buttress his case, he has annexed copies of the Ad Litem Grant in Eldoret HC Succession Cause No. E41 of 2022 to his supporting affidavit. He also averred that he is the son of Kipsaina Muge (deceased). It is however apparent that there is



another succession cause filed by the beneficiaries of the deceased vide Eldoret CM Succession Cause no. E94 of 2022 where the grant has been confirmed and the Applicant does not feature as one of the beneficiaries of the estate of the deceased. The Applicant has not filed any objection in the said proceedings. In the circumstances, the Applicant has not established that he has a *prima facie* case with a probability of success.

20. On the issue of irreparable loss, the Applicant has not demonstrated that he will suffer irreparable loss if the order of injunction is not granted as he did not controvert the Applicant's assertion that it is the Respondent who is in possession of the suit property.
21. Given the above scenario, the balance of convenience tilts in favour of the Respondent. The question as to whether the Applicant is a son or beneficiary of the estate of Kipsaina Muge (deceased) can only be ascertained at a full hearing.
22. In view of the foregoing, the application lacks merit and it is hereby dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY VIA MS TEAMS PLATFORM AT ELDORET
THIS 28TH DAY OF FEBRUARY 2023.**

J. M. ONYANGO

JUDGE

In the presence of;

1. Mr. Keter for Mr. Bulbul for the Respondent
2. No appearance for the Applicant

Court Assistant: Mr. Oniala

