



**Mwaura v Njuguna (Civil Case E003 of 2020)  
[2024] KEHC 11255 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11255 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL CASE E003 OF 2020  
HI ONG'UDI, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**GLADYS WANJIKU MWAURA ..... APPLICANT**

**AND**

**SAMUEL MWAURA NJUGUNA ..... RESPONDENT**

**RULING**

1. The Notice of motion application dated 11<sup>th</sup> January 2024 by the applicant herein prays for the following orders;
  - i. Spent.
  - ii. That pending hearing and determination of this suit, this honourable court be pleased to issue a temporary injunction restraining the respondent either by himself, his agents, servants and/or employees from collecting rent from the 5 units in the apartments comprised in land reference number 33249 situated at Free Area belonging to the applicant, and the 7 units belonging to the parties herein' children.
  - iii. That this honourable court be pleased to issue a permanent injunction restraining the respondent either by himself, his agents, servants and/or employees from collecting rent from the 5 units in the apartments comprised in land reference Number 33249 situated at Free Area belonging to the applicant, and the 7 units belonging to the parties children.
  - iv. Costs of this application be provided for.
2. The application is premised on the grounds on its face as well as the affidavit sworn on the even date by the applicant. She deposed that in the judgement dated 15<sup>th</sup> June 2023 the court directed that she gets 5 units in the apartments comprised in Land Reference Number 33249. The respondent was to get 6 units in the said land and their children each was to get a unit in the apartments in the said land.



3. She deposed further that she had been receiving rent from the said apartments for the past 25 years, which money had been going towards payment of school fees. She however, claims that the respondent had gone ahead to incite tenants to pay to an agent authorized by him. Also, that he was collecting rent from the units that were allocated to their children yet he does not remit any for payment of school fees or any other basic need.
4. She went on to depose that she reported the matter of the unauthorized payments to the respondent's agent to Free Area Police Station but no action had been taken and now she was unable to collect rent thus unable to pay school fees. Further, that the acts of the respondent had left her destitute, with no means of paying for the children's school fees and providing for their other basic needs. That in the event this court does not intervene, the children were at the risk of missing out on their education due to lack of school fees. She added that her application had been brought in good faith and orders sought would not prejudice the respondent.
5. In response to the application, the respondent filed an undated replying affidavit on 19<sup>th</sup> February 2024. He averred that the court distributed how rent would be shared in the judgment dated 15<sup>th</sup> June, 2023. That from July, 2023 to November, 2023 the applicant was taking all the rent income from the house including rent from his units and the units given to the children but did not account for the rent received.
6. He averred further that from December to date, he appointed an independent agent to collect the rent and he was ready to account for the same. He added that the children units should be distributed and each child to get their share directly not through the applicant whom they were opposed to. Also, that the court should allow an independent agent to collect rent and account to court from time to time.
7. He denied that the applicant had been paying school fees for their children since he had paid kshs.160,000/= as school fees for Georgina Wanjiru Mwaura who was the only child in school. Further, that Tiffany Muthoni was in primary school where the fees is catered for under the government capitation. He added that the rest of the children were all grown-ups and could receive and use their received money. It is his averment that the applicant was not sincere in her application and the same should be declined.
8. The application was canvassed by way of written submissions.

### **Applicant's submissions**

9. These were filed by Wanjiku Wamae Advocates and are dated 18<sup>th</sup> June 2024. Counsel identified three issues for determination by this court.
10. The first issue is whether this court should grant the applicant an order of temporary injunction. Counsel while relying on the decisions in *Giella v Cassman Brown* [1973] EA 358, *Nguruman Limited v Jan Bonde Nielsen & 2 Others* CA No. 77 of 2012 [2014] eKLR and *Mrao Ltd v First American Bank of Kenya Ltd* [2003] eKLR, submitted that the acts of the respondent against the court orders infringed on the applicant's rights to the properties.
11. Counsel further submitted that the applicant had established that irreparable injury would be occasioned to them if an order of temporary injunction is not granted. Further, that the applicant would suffer substantial loss by the loss of her livelihood entirely and their children will continue missing out on their education and lack of basic needs. He relied on the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR where the court defined irreparable injury as injury that cannot be adequately compensated for in damages and that there was no remedy that would protect the applicant from the effects of the injury.



12. The second issue is whether this court should grant the applicant the order of permanent injunction. Counsel submitted that this court had powers to grant the said order under Sections 1A, 3 & 3 A of the Civil Procedure Code, 2010 if it found that the right of a party had been fringed, violated and/or threatened. He cited that case of *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR which held that:

“A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected”.

13. Lastly, on who should bear the costs of the application, counsel submitted that the award of costs was discretionary under section 27 of the *Civil Procedure Act*. He urged the court to order the respondent to pay for the costs of the application.

### **Respondent’s Submissions**

14. These were filed by Muthanwa & Co. Advocates and are dated 13<sup>th</sup> August 2024. Counsel reiterated the contents of the respondent’s replying affidavit and submitted that the applicant rights would not be infringed as the respondent was ready to account for the rent he had collected.

15. Counsel submitted further that this was the wrong case to issue a permanent injunction since it was on a matrimonial property, which was shared and the said property would go to waste if such orders are granted. He urged the court to do justice by ordering for an independent agent to collect rent under an account and each party to bear its costs.

### **Analysis and Determination**

16. I have considered the application, the affidavits and the submissions by both parties. I opine that the main issue for determination is whether the application dated 11<sup>th</sup> January, 2024 is merited.

17. The principles upon which a temporary injunction may be granted were set out in the celebrated case of *Giella v Cassman Brown & Co* [1973] EA as follows:-

- i. The Applicant must establish a prima facie case with a probability of success.
- ii. The Applicant must show that he is likely to suffer irreparable loss or damage if the relief being sought is not granted.
- iii. In case of any doubt the balance of convenience should tilt in favour of the applicant.

18. Similarly in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2012] eKLR the court stated as follows:-

“The conditions for the grant of an interlocutory injunction are well settled in East Africa. 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 on the balance of convenience.”



19. The applicant has stated that in the judgement dated 15<sup>th</sup> June 2023 the court directed that she gets 5 units in the apartments comprised in Land Reference Number 33249. She alleges that the respondent had gone ahead to illegally collect rent from the said units and those allocated to the children yet he did not remit any for payment of school fees or any other basic needs. That the acts of the respondent had left her destitute, with no means of paying for the children's school fees and providing for their other basic needs.
20. The respondent on his part argued that from July, 2023 to November, 2023 the applicant was taking all the rent income from the house including rent from his units and the units given to the children as allocated by the court in its judgment of 15<sup>th</sup> June 2023 yet she did not account for the rent received. Further, that from December, 2023 to date, he appointed an independent agent to collect the rent and he was ready to account for the same.
21. The opening words in prayer (ii) are as follows:
- “That pending hearing and determination of this suit”.
- The said prayer is misplaced as there is no pending suit here. The matter was heard, decided and a judgment delivered on 15<sup>th</sup> June, 2023 by Chemitei J. The properties were distributed and the matter finalized. The prayer is therefore a non-starter.
22. The applicant also sought for a permanent injunction. In *Bandari Investments & Co. Ltd v Martin Chiponda & 139 others* [2022] eKLR the Court held as follows;
- “38. Whether the 1<sup>st</sup> and 18<sup>th</sup> Defendants are entitled to be granted the Permanent Injunction restraining the Plaintiff on the suit property. Unlike Temporary Injunction which are granted only to be in force for a specified time or until the issuance of further orders from Court, Permanent Injunction are rather different, in that they are perpetual and issued after a Suit has been heard and finally determined.
- Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Plaintiff in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the Civil Procedure Code, 2010 if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just seat, wait and watch under these given circumstances.”
23. The issue of permanent injunction if any should have been raised during the hearing of the main suit. What is pending before this court for it to issue any injunction? I do not find any issue pending. The trial court distributed all the properties as per the Judgment. Infact the issue the Applicant is raising was never discussed. The Units were distributed without mention of rent or rent collection. The ages of the children receiving the seven (7) units were never stated, in the judgment, same to the issue of payment of school fees.
24. All in all, I find the application dated 11<sup>th</sup> January, 2024 to have been wrongly filed before this court as there is already a Judgment in place.
25. I therefore dismiss the application with no order for costs.



**DELIVERED, DATED AND SIGNED VIRTUALLY THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2024 IN  
OPEN COURT AT NAKURU.**

**H. I. ONG'UDI**

**JUDGE**

