



**Rugut v Rugut; Ngeny (Interested Party) (Civil Suit 16 of 2021)
[2023] KEHC 17691 (KLR) (24 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17691 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL SUIT 16 OF 2021
RN NYAKUNDI, J
MAY 24, 2023**

BETWEEN

MARY JERONO RUGUT APPLICANT

AND

DANIEL KIPKEMBOI RUGUT RESPONDENT

AND

ROSE JEPCHUMBA NGENY INTERESTED PARTY

RULING

1. The applicant approached this court vide a Notice of motion application dated 10th November 2021 seeking the following orders;
 - a) Spent.
 - b) Spent.
 - c) Upon grant of prayer 2, the Honourable Court be pleased to review, set aside, vacate and/or dispense with its orders issued on 2nd June 2021 in respect of the parcel of land known as Pioneer/Ngeria Block 1 (EATEC)/10090.
 - d) Costs be provided for.
 - e) Any further order(s) that this Honourable Court may deem just and expedient to grant in the interest of justice.
2. The application is premised on the grounds set out therein and the contents of the annexed affidavit of Rose Jepchumba Ngeny.



3. The brief facts underlying the application are that this honourable court issued interlocutory orders on 2nd June 2021 to the effect that the respondent was restrained from selling or interfering in any way with the land parcels known as Eldoret Municipality Block 9/1652, Ngeria Block 1 (EATEC)/222, Pioneer/Ngeria Block 1 (EATEC)/10090, land parcel known as Block 15 Plot No. 109 in Nandi Chepkumia in the names of Benjamin Sigira Magicho pending the hearing and determination of the suit.
4. The applicant/interested party proceeded to file the present application seeking to have said orders varied or set aside.

Applicant's Case

5. The applicant contends that she is a *bonafide* purchaser for value of the parcel of land known as Pioneer/Ngeria Block 1 (EATEC)/10090 and as such the same is not available for consideration as matrimonial property. Further, that the orders issued on 2nd June 2021 were granted without participation or input from the applicant and as such she prays that the orders sought are granted as they shall not be prejudicial to the respondent.
6. She maintained that she conducted due diligence and confirmed that the parcel of land belonged to Samuel Kibet Limo although registered with the registered trustees of Moi University Pension Scheme. She urged that the current orders have restrained any further transaction on the suit parcel as evidenced by the search obtained from the land's office and that the ownership and/or relationship as between the Applicant and the Respondent prior to my purchase of the suit parcel of land cannot therefore be a reason to deny her the opportunity to enjoy the fruits of her investment.

Respondent's Case

7. Learned counsel for the respondent submitted that they application as opposed as the the interested party has not demonstrated any interest over the land parcel known as Pioneer/Ngeria Block 1 (EATEC)/10090 as the vendor from whom she claims to have purchased the parcel from, Samuel Limo Kibet does not have any registered and demonstrable interest over the said parcel. That despite acknowledging that the parcel is not in the name of the purported vendor from whom she alleges to have purchased the parcel from, the interested party has not provided any evidence that the purported vendor is one of the registered trustees of Moi University Pension Scheme.
8. Learned counsel cited the case of *Ochola Kamili Holding Limited vs Guardian Bank Limited* (2018) eKLR on the circumstances under which an interlocutory injunction may be set aside. Further, counsel relied on the case of *Leah Nyambura Mburu v Barclays Bank of 5 Kenya Ltd* (2012) eKLR on the power of the court to discharge, set aside or vary interlocutory orders. Counsel submitted that it is in the interest of justice that the interlocutory injunction order be upheld rather than set-aside or vacated. Further, counsel prayed that prayer 3 of the instant motion be disallowed with costs.

Analysis & Determination

10. The following issue emerges for determination;

Whether the orders of 2nd June 2021 should be set aside

10. The applicant seeks to set aside an interlocutory injunction. The germane principles on interlocutory injunctions were stated by the Court of Appeal in East Africa in the case of *Giella v Cassman Brown & Co. Ltd* (1973) EA as follows:
 - a) The Applicant must first establish a *prima facie* case with a probability of success.



- b) The Applicant must then demonstrate that he, she or it stands to suffer irreparable loss that cannot be adequately compensated through damages.
- c) Where there is doubt on the above, then the balance of convenience should tilt in favour of the Applicant.
11. The trial court considered these principles in granting the interlocutory injunction and found it fit to issue the same. The purpose of the injunction was to preserve the subject parcel and as the matter is yet to be concluded, setting aside said orders would render the suit an academic exercise.
12. In answering the question of whether the granting of review of injunction initially issued by this court will cause irreparable harm to the Applicant interested party the following considerations have been taken into account. First and foremost the application dated 4th May 2021 as initiated by Mary Jerono Rugut was duly served as demonstrated by the record dated 25th May 2021. The session judge then was satisfied that proper service was effected against the respondent Daniel Kipkemboi Rugut. The granting of injunction was essentially to preserve the disputed properties pending the hearing and determination of the suit. This order is crystal clear from the proceedings presided over by Githinji J. I must indicate further that the material available to court at the hearing of the application dated 10th November 2021 is at cross- purposes as to the real original owner of the disputed parcel of land referenced Pioneer/Ngeria/Block 1 (EATEC)/ 10090. In the first instance Mary Jerono Rugut lodged a registered caution by the Land Registrar Uasin Gishu registry on 7th November 2018 claiming beneficial interest. That caution is yet to be lifted by Mary Jerono Rugut. The purpose of such an injunction is to improve the chances of the court being able to do justice over the subject matter after determination of the merits of the claim at the trial. The search certificate being relied upon the interested party Rose Jepchumba Ngeny may not on the face of it produce a just result as to the historical entries of the impugned parcel of land. What the interested party is asking this court to do is to delve into the merits of this litigation where affidavit evidence are by themselves in conflict with each other on the basic facts. That alone is a serious issue to be tried at the right forum. The evidence on tangible or beneficial interest are deposited by both parties in this proceedings. It is difficult to make conclusive findings in such circumstances
13. The applicant has not provided this court with any evidence that she is the proprietor of the property or that she has title to the land. She has failed to prove any nexus between herself and the ownership of the property. A sale agreement is not proof of title and further, she annexed a certificate of search which clearly shows that the land belongs to the registered trustees of Moi University Pension Scheme. It is my considered view that the balance of convenience lies in preserving the subject parcel of land pending the determination of the suit. Whether the parcel is part of the matrimonial property is an issue to be determined in the main suit and as such, it should be preserved in the circumstances.
14. In the premises, the application is dismissed with costs to the respondent.

DELIVERED VIA MAIL DATED AND SIGNED AT ELDORET ON THIS 24TH DAY OF MAY 2023.

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R. NYAKUNDI

JUDGE

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