



**In re Estate of Magochi Kanyonyo (Deceased) (Succession Cause
232 of 2015) [2023] KEHC 20792 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20792 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
SUCCESSION CAUSE 232 OF 2015
CW GITHUA, J
JULY 26, 2023**

**IN THE MATTER OF THE ESTATE OF MAGOCHI
KANYONYO (DECEASED)**

BETWEEN

BEATRICE MAKAA APPLICANT

AND

LUCY WANJIRU NJAMBUYA RESPONDENT

RULING

1. By an application dated September 16, 2019, the applicant, Beatrice Makaa, sought injunctive orders against the respondent Lucy Wanjiru Njambuya who is the administrator of the Estate of the late Magochi Kanyonyo seeking to have her restrained through her agents, servants or anybody claiming through or under her from building, constructing or alienating land parcel No LOC 20/Kambirwa/749 pending the hearing of the application interparties.
2. The application is premised on the grounds stated on its face and the scanty affidavit sworn by the applicant on September 16, 2019. The affidavit replicated the grounds anchoring the motion which primarily claim that the applicant has started construction of a permanent house in land known as LOC 20/Kambirwa/749 (the suit land) an asset in the deceased's estate which is yet to be distributed to the deceased's heirs; that by so doing, the applicant had delineated or allocated the land to herself; that this amounted to intermeddling and the applicant should be restrained from continuing with the said construction.
3. The application is opposed. The respondent filed a four paragraph replying affidavit dated October 25, 2019 in which she expressly denied that she was constructing a house on the suit land. She averred that the application was misconceived and bad in law.



4. By consent of the parties, the application was canvassed by way of written submissions. The Applicant filed her written submissions on September 19, 2022 while those of the respondent were filed on November 3, 2022.

5. I have duly considered the application and the brief rival written submissions filed on behalf of the parties by their learned counsel. I wish to point out at the outset that a reading of the application reveals that there is no substantive prayer sought in the motion except perhaps prayer 3 which seeks that costs of the application be borne by the respondent. Prayer 1 sought to have the application certified urgent while prayer 2 reads as follows;

”The Petitioner herein namely Lucy Wanjiru Njambuya her agents, servants and /or anybody claiming through or under her be restrained by way of interim injunction from building, constructing and or alienating, land parcel LOC 20/Kambirwa/749 pending the hearing of this application interparties”

6. It is however clear from the grounds and affidavit supporting the motion that the applicant intended to seek a temporary prohibitory injunction against the respondent pending distribution of the deceased’s estate. The wording of prayer 2 was apparently a drafting error. In the interest of dispensing substantive justice, I will disregard the wording in prayer 2 and proceed to determine the substantive issue raised in the application, which is, whether the applicant has demonstrated that she is deserving of orders of interlocutory injunction pending distribution of the deceased’s estate.

7. The principles that guide the grant of interlocutory injunctions were set out in the celebrated case of *Giella v Cassman Brown* [1973] EA 358 which were reiterated by the Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] when it stated as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- a. establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent.”

8. A prima facie case was defined in the case of *Mrao v First American Bank of Kenya Limited & 2 Others* [2003] eKLR as follows:

“So what is a prima facie case? I would say that in civil cases it is a case in 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.....a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”

9. The applicant claims that the respondent is intermeddling in the deceased’s estate by building a permanent house on the land comprising the deceased’s estate before its distribution. The applicant has



however not provided any details regarding the alleged construction say, for instance, when it started or how far it had gone. She has also not annexed to her supporting affidavit any evidence to substantiate her claim that indeed the applicant was building on the suit land.

10. As correctly submitted by Mr Mbuthia, learned counsel for the respondent, the law as encapsulated in Section 107 to Section 109 of the *Evidence Act* is that he who alleges the existence of certain facts has the burden of proving that those facts exist. In this case, the applicant has failed to avail any evidence to prove that the applicant was in fact building a house in the suit land when distribution of the deceased's estate was pending.
11. Given the foregoing, it is my finding that the applicant has failed to establish a prima facie case with a probability of success and she has therefore failed to meet the threshold for grant of an interlocutory injunction as sought. I am thus satisfied that the application lacks merit and it is hereby dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF JULY 2023.

C.W. GITHUA

JUDGE

In the presence of:

Mr. Mbuthia for the Respondent

No Appearance for the Applicant

Mr. Quinteen Court Assistant

