



Mwangi (Suing as Representative of Esther Nyambura Mwangi) v Nairobi City County & 2 others; Mwangi (Applicant) (Environment and Land Appeal E039 of 2021) [2023] KEELC 17860 (KLR) (22 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17860 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E039 OF 2021**

**JA MOGENI, J
MAY 22, 2023**

BETWEEN

ANNE WARINGA MWANGI (SUING AS REPRESENTATIVE OF ESTHER NYAMBURA MWANGI) APPELLANT

AND

NAIROBI CITY COUNTY 1ST RESPONDENT

PHYLIS WAMBUI KINGORI 2ND RESPONDENT

KENYA COMMERCIAL BANK LIMITED 3RD RESPONDENT

AND

ANNE WARINGA MWANGI APPLICANT

RULING

1. Before this Court for determination is a Notice of Motion Application dated 02/02/2023 brought under section 1, 1A, 1B, 3, 3A & 63 (e) of the *Civil Procedure Act*, Order 9 Rule 9, Order 42 Rule 6 (6) & Order 51 of the *Civil Procedure Rules 2010* and all enabling provisions of the law. The Applicant is seeking for the following orders: -
 1. Spent.
 2. This Honourable Court be pleased to grant leave to the firm of S. N. Otinga Advocates to come on record for the Appellant in the place of Olao & Rai advocates.
 3. This Honourable Court be pleased to issue a temporary injunction restraining the 2nd Respondent whether by herself and/or her agents from selling, transferring, charging and/or



dealing with the suit property Nairobi/Block 110/155 in any manner pending the hearing and determination of this application.

4. This Honourable Court be pleased to issue a temporary injunction restraining the 2nd Respondent whether by herself and/or her agents from selling, transferring, charging and/or dealing with the suit property Nairobi/Block 110/155 in any manner pending the hearing and determination of the appeal herein.
5. Costs of this application be provided for.
2. The Application is supported on the grounds as stated in paragraph (a) – (m) on the face of the Application, the annexed Affidavit sworn by Anne Waringa Mwangi on 2/02/2023. I do not need to reproduce them.
3. The Application is opposed by way the 2nd Respondent by way of grounds of opposition dated 6/02/2023 and filed on the even date. The opposition is on the following grounds: -
 1. That the entire application is res judicata and similar to an earlier one dismissed before another court of this division.
 2. That the applicant lacks locus standi and is a stranger to this proceedings having smuggled herself in without the due and mandatory legal process of joinder and/or substitution of parties.
 3. That the prayers sought cannot issue as the execution sought to be stayed has since been carried out and this cause closed, indeed the environment and land court is functus officio.
 4. That the prayers are meant to illegally set aside and interfere with the judgment and decree in Civil Suit No 4 of 2013.
 5. That the judgment and decree in Civil Suit No 4 of 2013 were never appealed against and/or set aside and remain in force to date.
 6. That indeed the issue at hand has since been conclusively dealt with in MISC. Appl. No 75 of 2012, as such jurisdiction lies elsewhere, and not with this court.
 7. That pursuant to all the foregoing, it is crystal clear that the application is dead on arrival and an abuse of court process, only ripe for dismissal with costs.
 8. The 2nd respondent prays that the application be dismissed with costs.
4. When the Application came up before this Court for determination on 21/02/2023, the Court granted the 2nd Respondent leave of 7 days to file her replying affidavit. As at 28/02/2023, the 2nd Respondent had not filed her response to the impugned application. The Replying Affidavit on record filed is dated 14/03/2022 which is a typo since it was filed on the CTS on 31/03/2023.
5. The application was canvassed by way of written submissions. The Appellant filed her submissions dated 29/03/2023 on 30/03/2023 and the 2nd Respondent filed her submissions dated 24/03/202 on 31/03/2023.
6. The Court has considered the Applicants' Application as filed, the 2nd Respondent's ground of opposition thereto as well as the rival submissions by the respective parties. The Court is of the opinion that the following issues arise for determination herein:
 - a. Whether the application is properly defended.



- b. Whether the firm of S. N. Otinga Advocates should be granted leave to come on record for the Appellant in the place of Olao & Rai advocates.
- c. Whether the Appellant has met the threshold for grant of temporary injunction pending appeal.

Whether the application is properly defended.

7. The application before the Court was defended by the 2nd Respondent by way of grounds of opposition. The Court granted the 2nd Respondent leave of 7 days to file her replying affidavit on 21/02/2023 and by 28/02/2023 when the 7 days leave lapsed, the 2nd Respondent had not filed her response to the impugned application.
8. The legal provision on ways of opposing an application is Order 51 rule 14 of the [Civil Procedure Rules](#) which provides that;

“Any respondent who wishes to oppose any application may file any one or a combination of the following documents —

 - a. A notice preliminary objection: and/or;
 - b. Replying affidavit; and/or
 - c. A statement of grounds of opposition;”
9. I have considered the court of appeal authority relied upon by the applicant in Civil Appeal No 95 of 2016 in the case of [Daniel Kibet Mutai & 9 others v Attorney General](#) [2019] eKLR where the court cited with authority the case of [Peter O. Nyakundi & 68 others v Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another](#) [2016] eKLR which stated:

“As stated earlier the Respondents did not file any Replying Affidavit to challenge and/or controvert the sworn averment by the Petitioners that they were victims of the post-election violence. Ground of Opposition which were filed are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath.
10. Further in the case of [Kennedy Otieno Odiyo & 12 others v Kenya Electricity Generating Company Limited](#) [2010] eKLR the court held as follows: -

“The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the applicant in its supporting affidavit. Thus what was deponed to was not countered nor rebutted by the respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant’s supporting affidavit, means that the respondents have no claim against the applicant”.
11. From the authorities I have cited above, grounds of opposition are to be deemed as general averments and do not deny or respond to issues in an application. A preliminary objection and grounds of opposition though means of opposing an application, they are not to be used when one intends to deny allegations in an application. In my view a replying affidavit would best serve to deny issues raised in an application. It has been held that where a replying affidavit is not filed then in essence the averments in



an application are deemed as uncontroverted and unchallenged. In considering the mode of opposition opted to by the respondents and the averments therein I find that the issues in the application are not rebutted and the application stands unopposed.

12. However, though having held as such, the application by the applicant should not be deemed as having been allowed. This court has a duty to consider the application and proceed to determine it on its merits.

Whether the firm of S. N. Otinga Advocates should be granted leave to come on record for the Appellant in the place of Olao & Rai advocates.

13. On the issue whether the firm of S.N Otinga Advocates should be granted leave to come on record for the Appellant, Order 9 Rule 9 of the [Civil Procedure Rules](#) provides as follows: -

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

- a. upon an application with notice to all the parties; or
- b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

14. The firm of S.N Otinga Advocate has sought for leave to come on record. It is not in doubt that the said Advocates came on record after the delivery of Judgment and needed to seek leave of Court as per the provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#). They are seeking leave to come on record for the Appellant. They received instruction from the Applicant herein who is the administrator of the Estate of the Appellant.

15. The provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#) make it mandatory that change of Advocates after judgment has been entered must be through an order of the court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate. The reasoning behind the provision was well articulated in the case of [S. K. Tarwadi v Veronica Muehlmann](#) [2019] eKLR where the judge observed as follows:

“...In my view, the essence of the Order 9 Rule 9 of the [CPR](#) was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him....”

16. From the application filed in Court, there is no indication that the firm of S.N Otinga Advocates served the firm of Olao & Rai Advocates with its Application dated 2/02/2023. No mention has been made of any attempts to obtain consent of the said firm which was declined. There is further no affidavit of service of the application upon the further advocates. The Respondent/Applicant has not met the threshold as set out in Order 9 Rule 9 of the [Civil Procedure Rules](#), 2010. This is sufficient reason not to grant the said prayer however, it is clear that there were issues occasioned by the firm of Olao & Rai Advocates that led to the Appellant being issued with a notice to show cause why the appeal should not be dismissed for want of prosecution. The applicant herein explained the same in her Replying Affidavit dated 16/02/2023 in response to the Notice to Show Cause. The Applicant stated that her efforts to contact the former advocates was futile and that is why she proceeded to instruct a new advocate. This Court is of the opinion that the said issues should not jeopardize what is before the Court.



17. The Court is called upon to determine the question of leave. The Law Firm of S.N. Advocates, have sought for leave. The provisions of Order 9, allows the Court to grant leave when a consent is filed and Rule 10, allows the said prayer seeking leave to be brought together with other prayers. The prayer for leave for the said Law Firm has not been disputed nor contested thus the Law Firm of S.N. Advocates, is properly on record.
18. Having granted the leave and given that the Rules allow the said prayer to be brought together with other prayers, the Court finds and holds that the said Advocates are properly on record.

Whether the Appellant has met the threshold for grant of temporary injunction pending appeal.

19. This court's jurisdiction to grant a temporary injunction pending hearing and determination of an appeal lies with Order 42 Rule 6 (6) of the *Civil Procedure Rules*. This provision of law grants the court with discretionary powers to grant orders on such terms as it deems fit as long as the procedure for filing an appeal from subordinate court has been complied with. It provides thus: -

“Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from subordinate Court or tribunal has been complied with.”

20. Principles for grant of temporary injunction pending appeal are now well settled. In the case of *Patricia Njeri & 3 others v National Museum of Kenya* [2004] eKLR, the court stated as follows:

- a. an order of injunction pending appeal is a discretionary which will be exercised against an applicant whose appeal is frivolous.
- b. the discretion should be refused where it would inflict greater hardship that it would avoid.
- c. the applicant must show that to refuse the injunction would render the appeal nugatory.
- d. the court should also be guided by the principles in *Giella v Cassman Brown* [1973] EA 358.”

21. Similarly, in the case of *Madbupaper International Limited v Kerr* [1985] eKLR, the court held that it would be wrong to grant a temporary injunction pending appeal where the appeal is frivolous or where the injunction would inflict greater injustice than it would avoid.

22. In the case of *Kenya Commercial Bank Limited v Nicholas Ombija* [2009] eKLR, the court held that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court.

23. In this case, the Appellant is praying that this Court do issue a temporary injunction against the 2nd Respondent from dealing with the suit property Nairobi/Block 110/155 pending determination of the appeal. It was her case that the deceased was the registered owner of the suit property known as Nairobi Block 110/155. On 20/02/2013, the 1st Respondent herein instituted a suit against the deceased as the Defendant in the magistrate's court, Civil Suit No 4 of 2013: City Council of Nairobi v Esther Nyambura Mwangi in an attempt to recover rates arrears.



24. Moreover, the Applicant has been advised that the said suit before the magistrate's court which was filed and heard ex-parte against a party who had died over ten years before the filing is a nullity *ab initio*. That Upon knowledge of the suit, she moved to the trial court to set aside the judgment, decree and all consequential orders arising therefrom. In her ruling delivered on 3/06/2021, the learned magistrate, Hon. M. W. Njagi, declined to set aside the proceedings and dismissed her application necessitating the filing of the appeal herein.
25. She further stated that the 2nd Respondent is the alleged purchaser of the suit property by way of public auction and that she has since executed the decree and the suit property is now registered in her name.
26. It is her contention that the Applicant herein is reasonably apprehensive that there is a great likelihood of the suit property being sold, transferred, charged and/or otherwise dealt with in a manner detrimental to the rights of the estate of the deceased.
27. The Applicant argued that the estate of the deceased stands to suffer irreparable loss and damage occasioned by a suit which is a nullity as the appeal will be overtaken by events and rendered nugatory if the 2nd Respondent is not restrained from further dealings in the suit property and further that it is crystal clear on the face of the record that the appeal is not frivolous, it has raised weighty issues touching on the jurisdiction of the magistrate court and the validity of the suit before it.
28. My understanding of Order 42 Rule 6 (6) of the [Civil Procedure Rules](#) is that this court sitting as an appellate court against the decisions of the lower court can grant an injunction against the decisions of the lower court. The Appellant filed a memorandum of appeal on 11/06/2021. The appeal is from the lower court's ruling delivered on 3/06/2021. From the evidence before me, I note that the Applicant attached the ruling of the lower court on the supporting affidavit filed with the application. She also filed the pleadings that led to the impugned ruling of the lower court. In the premises, the Applicant has demonstrated that she has an arguable appeal. The question of irreparable injury is a matter of evidence. The Applicant has argued that the 2nd Respondent has already executed the decree and the suit property is registered in her name. Further, that the estate of the deceased stands to suffer irreparable loss and damage occasioned by a suit which is a nullity as the appeal will be overtaken by events and rendered nugatory if the 2nd Respondent is not restrained from further dealings in the suit property. This Court is satisfied that the Applicant stands to suffer irreparable injury if the temporary injunction sought is not granted.
29. On the question as to which party in whose favour the balance of convenience if I had doubt, would tilt in favor of the Appellant in order to safeguard the current status quo of the subject matter of this appeal pending hearing and determination.
30. In the premises, it is my finding that the Appellant has met the threshold as per Order 42 Rule 6 (6) of the [Civil Procedure Rules](#). Consequently, I find and hold that the Appellant is entitled to the order sought.
31. With regard to the prayer for costs, although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. However, since the Appeal is yet to be heard the court is of the opinion that costs should be in the cause.



Disposal Orders

32. The upshot of the foregoing is that the application has merit and therefore succeeds. Accordingly, the Court makes the following orders for disposal of the application:

- a. The Application dated 2/02/2023 be and is hereby allowed in terms of prayer (2), (3) and (4) thereof.
- b. That the firm of S.N Otinga Advocates are on record for the Appellant in place of Olao & Rai Advocates.
- c. The costs of the application shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 22ND DAY OF MAY, 2023.

MOGENI J

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the virtual presence of: -

Mr Otinga for the Appellant/Applicant

Mr Ngugi for the 2nd Respondent

No appearance for the 1st Respondent and 3rd Respondent

