



Southshore Logistics Ltd v Kanyotu & 3 others (Environment and Land Appeal E024 of 2022) [2023] KEELC 18445 (KLR) (29 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18445 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT AND LAND APPEAL E024 OF 2022**

**YM ANGIMA, J
JUNE 29, 2023**

BETWEEN

SOUTHSHORE LOGISTICS LTD PLAINTIFF

AND

MARY WANJIKU KANYOTU 1ST DEFENDANT

MARGARET NYAKINYUA MURIGU 2ND DEFENDANT

JANE GATHINI MURAYA 3RD DEFENDANT

LAND REGISTRAR NYANDARUA 4TH DEFENDANT

RULING

A. Introduction

1. By a plaint dated November 8, 2022 the Plaintiff sought the following reliefs against the Defendants:
 - a. A permanent injunction restraining the Defendants, their servants, agents, employees or anybody acting on their behalf or for them from dealing, entering and/or interfering with the Plaintiff's ownership, physical possession, occupation, user and enjoyment of all those parcels of land known as Land Nyandarua/Mbuyu/9317, 9318, 9320, 9321, 9322, 9323, 9324 & 9325.
 - b. A permanent injunction restraining the Defendants their servants, agents, employees or anybody acting on their behalf or for them from registering any caveat, inhibition, restriction or any form of encumbrances against the suit properties Nyandarua/Mbuyu/9317, 9318, 9320, 9321, 9322, 9323, 9324 & 9325.



- c. An order of mandamus ordering the 4th Defendant to remove/deregister the restrictions registered against the suit properties Nyandarua/Mbuyu/9317, 9318, 9320, 9321, 9322, 9323, 9324 & 9325.
 - d. General damages; and
 - e. Costs of this suit.
2. The Plaintiff pleaded that on or about May 24, 2004 it purchased Title No Nyandarua/Mbuyu/4 (Parcel 4) from the late James Kanyotu (the deceased) for a sum of Kshs 10 million whereupon it took possession thereof and continued in possession to date. The Plaintiff further pleaded that later on it subdivided Parcel 4 into Title Nos Nyandarua/Mbuyu 9317, 9318, 9319, 9320, 9321, 9322, 9323, 9324 & 9325 (the suit properties) which were all registered in its name.
 3. The Plaintiff pleaded that it recently discovered that the 4th Defendant had wrongfully registered cautions against the suit properties at the instance of the 1st – 3rd Defendants who were administrators of the estate of the deceased on the basis of legal proceedings to which it was not a party. It was contended that the registration of the said restrictions was a violation of the Plaintiff's constitutional right to own property and intended to harass and intimidate the Plaintiff. The Plaintiff further considered the Defendants' actions to constitute interference with its ownership possession and enjoyment of the suit properties hence the suit.

B. The Plaintiff's Application

4. Simultaneously with the filing of the suit, the Plaintiff filed a notice of motion dated November 8, 2022 based upon Sections 1A, 1B & 3A of the *Civil Procedure Act* (Cap. 21), Order 40 of the *Civil Procedure Rules, 2010* and all other enabling provisions of the law seeking the following orders:
 - a. Spent;
 - b. Spent;
 - c. That pending the hearing and determination of the suit herein a temporary injunction do issue restraining the Defendants/Respondents their servants. agents. employees or anybody acting on their behalf or for them from dealing with. registering caveats. inhibition or restriction entering and/or interfering with the Plaintiff's ownership, physical possessions, occupation, user and enjoyment of all those parcels of land known as Land Nyandarua/Mbuyu 9317, 9318, 9319, 9320, 9321, 9322, 9323, 9324 & 9325.
 - d. Spent;
 - e. That pending the hearing and determination of the suit herein an order of Mandamus do issue directing the 4th Defendant/Respondent to lift/remove the restrictions registered against the suit properties Nyandarua/Mbuyu 9317, 9318, 9319, 9320, 9321, 9322, 9323, 9324 & 9325.
5. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn on November 7, 2022 by Daniel Macau Ndonga who was a director of the Plaintiff. The grounds in the motion and supporting affidavit were exactly the same grounds set out in the plaint. It was contended that the 1st – 3rd Defendants were wrongfully claiming that the suit properties were part of the estate of the deceased whereas they were not since he had disposed of the same during his lifetime. The Plaintiff further contended that unless the orders sought were granted it stood to suffer irreparable loss and damage.



C. The 2nd Defendant's Response

6. The 2nd Defendant filed a replying affidavit sworn on October 16, 2022 in opposition to the Plaintiff's said application. She stated Parcel 4 was at all material times the property of the deceased as confirmed by a certificate of official search issued on June 2, 2020. It was further stated that Parcel 4 was the subject of Nairobi High court Succession Cause No 1239 of 2008: - In the matter of the estate of James Kanyotu (deceased) (the Succession Cause) whereby it was the subject of distribution in a certificate of partial confirmation of grant.
7. It was contended that the transfer of Parcel 4 from the name of the deceased to the Plaintiff was illegal and fraudulent. It was contended that upon discovery of the fraudulent transfer the administrators of the estate of the deceased sought an interim order in the succession cause to preserve the same which order was granted on July 29, 2022 and registered against the suit properties. It was therefore contended that the Plaintiff had failed to satisfy the legal principles for the grant of the orders sought and the court was urged to dismiss the application.

D. 3rd Defendant's Response

8. The 3rd Defendant filed a replying affidavit sworn on December 7, 2022 in opposition to the application. She asserted that at all material times Parcel 4 was the property of the deceased and she denied that it was ever sold to the Plaintiff. It was further stated that the said Parcel was distributed in the Succession Cause vide a partial certificate of partial confirmation of grant dated November 21, 2019.
9. It was contended that the transfer of the suit property to the Plaintiff was done fraudulently and illegally. It was disputed that the Plaintiff was unaware of the Succession Cause since a certificate of search dated September 15, 2022 exhibited by the plaintiff clearly indicated the cause number in which the interim orders were issued for preservation of Parcel 4. It was further disputed that the Plaintiff was in physical possession of the suit properties and it was asserted that the suit properties constituted undeveloped land under the supervision of the administrators of the estate of the deceased. Consequently, it was contended that the Plaintiff had failed to meet the requirements for the grant of the orders sought hence the court was urged to dismiss the application.

E. The 4th Defendant's Response

10. The 4th Defendant filed a replying affidavit sworn by W.N. Muguro on January 27, 2023 in opposition to the application. It was asserted that the 4th Defendant only received and registered a court order made in the Succession Cause for preservation of Parcel 4 and since the same had already been sub-divided the order was registered against all the resultant sub-divisions. The 4th Defendant contended that he acted only in accordance with the court order hence the court was urged to dismiss the application as lacking in merit.

F. The Plaintiff's Further Affidavit

11. The Plaintiff filed a further affidavit sworn on January 23, 2023 in response to the replying affidavits filed by the 2nd, 3rd and 4th Defendants. The Plaintiff denied any fraud or illegality in its acquisition of parcel 4. The Plaintiff further stated that it was able to transfer Parcel 4 because it was handed the original title deed by the deceased hence the same ought not to have been included as part of the estate of the deceased in the Succession Cause. The court was consequently urged to allow the application.



G. The 3rd Defendant's Supplementary Affidavit

12. The 3rd Defendant filed a supplementary affidavit sworn on March 10, 2023 in reply to the Plaintiff's further affidavit of January 23, 2023. It was stated that in a report filed by the Land Registrar in the succession cause it was disclosed that the Plaintiff obtained a transfer of Parcel 4 on the basis of the certificate of partial confirmation of grant issued in the succession cause and a purported transfer by the administrators of the estate.
13. The 3rd Defendant further stated that her signature on the transfer form and application for Land Control Board consent were forgeries. It was further contended that her personal documents such as national Identity card and copy of KRA PIN certificate were illegally obtained and used without her authority in effecting the said transfer. She exhibited a copy of a letter dated March 9, 2023 to the Directorate of Criminal Investigations (DCI) lodging her complaint in that regard for criminal investigations.

H. Directions on Submissions

14. When the application was listed for directions, it was directed that the same shall be canvassed through written submission. Consequently, the parties were granted timelines within which to file and exchange their written submissions. The record shows that the Plaintiff's submissions were filed on April 19, 2023, the 2nd Defendant's on May 3, 2023, whereas the 3rd Defendant's submissions were also filed on May 3, 2023. The 4th Defendant did not file any submissions since the A.G. indicated that he would rely entirely upon the contents of his replying affidavit.

I. Issues for Determination

15. The court has perused the Plaintiff's notice of motion dated November 8, 2022, the various replying affidavits in opposition thereto as well as the further and supplementary affidavits on record. The court has also considered the material and submissions on record. The court is of the opinion that the following issues arise for determination herein:
 - a. Whether the Plaintiff is entitled to the interim injunction sought.
 - b. Whether the Plaintiff is entitled to the order of mandamus sought at the interim stage.
 - c. Who shall bear costs of the application.

J. Analysis and Determination

a. Whether the Plaintiff is entitled to the interim injunction sought

16. The court has considered the material and submissions on this issue. It is apparent that the Plaintiff's application is based upon the plaint dated November 8, 2022. The Plaintiff's grievances are essentially twofold. First, that the Defendants had wrongfully registered restrictions against the suit properties. Second, that the 1st – 3rd Defendants were wrongfully claiming that Parcel 4 belonged to the estate of the deceased. The Plaintiff claimed to be in possession of the suit properties and there was no evidence on record to demonstrate that the 1st – 3rd Defendants had attempted to either dispossess the Plaintiff or to alienate, charge, lease or dispose of the suit properties.
17. All that the 1st – 3rd Defendants did was to claim that Parcel 4 was part and parcel of the estate of the deceased in consequence whereof they included it in the succession cause. As a result, they obtained an order for presentation of Parcel 4 pending the hearing and conclusion of that the succession cause.



The court is of the opinion that an administrator who claims that a certain property forms part and parcel of the estate of a deceased person cannot be restrained by an injunction in an Environment and Land Court case from making such claims. That is especially so where the administrator makes such a claim in a succession cause and obtains an interim order for preservation of such property pending the conclusion of that cause or until further orders. The court is further of the opinion that any party aggrieved by an interim order granted in a succession cause ought to challenge it in that cause.

18. There being no evidence to the effect that the 1st – 3rd Defendants intend, through unlawful means, to interfere with the Plaintiff's ownership, occupation or use or enjoyment of the suit properties, there is no basis upon which the court may grant an interim injunction. The Plaintiff is obligated to satisfy the court that it has a prima facie case with a probability of success at the trial and that in the absence of an injunction it shall suffer irreparable harm and injury which cannot be adequately compensated by an award of damages. Although the Plaintiff claims that Parcel 4 was not part of the estate of the deceased, it did not explain why it used the certificate of partial confirmation of grant to obtain registration thereof. In the premises, the court is far from satisfied that the Plaintiff has satisfied the first principle for the grant of an interim injunction as enunciated in the case of *Giella –vs- Cassman Brown & Co. Ltd* [1973] EA 358. In the event, it is not necessary to consider the second and third principles for the grant of an injunction.

b. Whether the Plaintiff is entitled to the order of mandamus sought at the interim stage

19. The Plaintiff has sought an order of mandamus for removal of the restriction registered by the 4th Defendant against the suit property pending the hearing and determination of the suit. This is a strange order to seek at the interim stage. An order of mandamus is normally of a final nature which can only be granted upon the hearing and conclusion of a suit. The court is unaware of the concept of an “interim” order of mandamus. A perusal of the plaint reveals that the order of mandamus is also one of the reliefs sought in the plaint. The Plaintiff must have reckoned that an order of mandamus is a final relief hence the reason why it was sought in the plaint.
20. It is evident that the encumbrance sought to be removed is not a restriction entered by the land registrar pursuant to Section 76 of the *Land Registration Act, 2012*. The record shows that the said ‘restriction’ is actually a court order issued by a court of competent jurisdiction in the succession cause. In the premises, the 4th Respondent would have no power to annul the said court order. The registrar can only properly act either on the basis of another order from the same or an order from a higher court. The ELC being a court of the same status as the High Court would have no jurisdiction to make an order of mandamus to nullify, cancel or quash the order made on 29.07.2022. the court is of the view that the proper way to deal that order is by either challenging it before the succession cause itself or before a higher court by way of appeal. The court is thus far from satisfied that the Plaintiff is entitled to the interim order sought before this court.

b. Who shall bear costs of the application

21. 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 *Husein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful parties should not be awarded costs of the application. Accordingly, the Defendants shall be awarded costs of the application.



K. Conclusion and Disposal Orders

22. The upshot of the foregoing is that the court finds no merit whatsoever in the Plaintiff’s application for interim orders. Accordingly, the court makes the following orders for disposal thereof:

- a. The Plaintiff’s notice of motion dated November 8, 2022 is hereby dismissed in its entirety with costs to the 1st – 4th Defendants.
- b. The suit shall be mentioned on September 27, 2023 for pretrial directions.

Orders accordingly.

RULING DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 29TH DAY OF JUNE, 2023.

In the presence of:

Mr. Tumu for the Plaintiff

Ms. Ndirangu holding brief for Ms. Kiarie for the 3rd Defendant

N/A for the 1st Defendant

N/A for the 2nd Defendant

N/A for the Attorney General for the 4th Defendant

C/A - Carol

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Y. M. ANGIMA

JUDGE

