



REPUBLIC OF KENYA



**Wanjiku (Suing as the Legal Rep of the Estate of Mwathi Kaguora) v
Hanif Construction Co. Limited & another (Environment & Land Case
E397 of 2022) [2023] KEELC 19336 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19336 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E397 OF 2022**

**AA OMOLLO, J
JULY 27, 2023**

BETWEEN

**JAMES MWATHI WANJIKU PLAINTIFF
SUING AS THE LEGAL REP OF THE ESTATE OF MWATHI KAGUORA**

AND

**HANIF CONSTRUCTION CO. LIMITED 1ST DEFENDANT
RAMANI INTERNATIONAL LIMITED 2ND DEFENDANT**

RULING

1. The Plaintiff filed a notice of motion dated November 23, 2022 seeking for the orders that;
 - a. Spent
 - b. Spent
 - c. That a permanent injunctive Order be issued restraining the Defendants by themselves or their against, servants, employees or any other person acting through their instructions from trespassing, intermeddling erecting and/or constructing any building, alienating, illegally constructing or in any way interfering with the Plaintiffs/Applicants quiet enjoyment and possession of all that property known as LR No 209/3271/69 pending the hearing of the main suit.
 - d. That an order compelling the Defendants to remove the illegally erected storey building on LR No 209/3271/69 and restore the land to its original vacant state by removing all the illegal construction materials thereon.



- e. An order for the Defendant to vacate the land and remove any structure erected thereon pending the hearing and determination of this Application and the main suit.
 - f. The Officer Commanding Station (OCS) Pangani Police station ensure compliance with the orders of the Honourable Court.
 - g. That the costs of this Application be provided for.
2. The Application was supported by an affidavit sworn by James Mwathi Wanjiku on November 23, 2022 stating that the Defendants have through its servants, agents and/or employees willfully, illegally and unlawfully trespassed on the Plaintiff's aforementioned land and erected a residential commercial building and as a result the Applicants have been unable to undertake commercial activities on the properties thus incurring loss of income.
 3. The Applicant stated that Mwathi Kaguora and Jane Waithera Mbugua (both deceased) were tenants in common and proprietors of LR No 209/3271/69 situate in Pangani, Nairobi in the ratio of 60% and 40% respectively having obtained a leasehold for 54 years from January 1, 1950. He added that the succession of both Estates (Mwathi Kaguora and Jane Waithera Mbugua) is ongoing and the beneficiaries have not sanctioned the selling or transfer of the said property. Unless orders sought herein are granted the same is likely to be acquired fraudulently and illegally transferred to unknown individuals.
 4. The Defendants opposed the application through a replying Affidavit sworn on March 23, 2023 by Hassan Mohamud Mohamed contending that the Applicant is forum shopping through filing of multiple suits and applications with the same parties over the same subject matter; that the instant application and suit filed was already filed by the application dated May 9, 2022 in ELCC/E166/2022: James Mwathi Wanjiku V Hanif Construction Company Limited And Raman International Limited hence the same is res judicata.
 5. The Defendants deposed that the Applicant lacks locus standi to institute the suit as the legal representative of the estate of Jane Waithera Mbugua because of lack of evidence. Further, that the suit property is not listed in the schedule in the certificate of confirmation of grant annexed with regard to the Estate of the late Hannah Nyokabi Mwathi where the applicant is one of the personal representatives, therefore lacks any legal limbs to stand.
 6. The Defendants contended that there has been no distribution of the estates of the proprietors of the subject property as alleged by the Applicant and that the Applicant's assertion that the succession causes are ongoing cannot be believed as there is no evidence to it and the court can only deliberate on the material that has been presented before it.
 7. The Defendant stated that the subject property has been listed in the schedule of the confirmation of grant of the late Mwathi Kaguora whereas under (c) of the schedule is the 40% of the subject property which bears I R Number 8261 -Nairobi that was to be registered under the name of Jane Waithera Mbugua and 60% of the subject property owned by her, with Mwathi Kaguora as joint tenants devolved to Jane Waithera Mbugua under the doctrine of survivorship by joint tenancy since Mwathi Kaguora died before her.
 8. The Defendant further contended that the construction approvals were issued to Jane Waithera Mbugua, the rightful proprietor of the suit property, during her lifetime and that beneficiaries of her Estate are aware that she sold the suit property to the him but passed on before the transfer could be effected.



9. The Interested party who alleged to have been granted Letters of Administration intestate of all the estate of Jane Waithira Mbugua (deceased) also opposed the Applicant's motion vide replying affidavit sworn on April 19, 2023. He stated that Jane Waithira Mbugua (deceased) and Mwathi Kaguora-deceased owned the suit property as tenants in common in the ratio of 40% for Jane Waithira Mbugua and 60% to Jane Waithira Mbugua and Mwathi Kaguora as joint tenants. That Mwathi Kaguora having predeceased Jane Waithira Mbugua the property devolved to her under the doctrine of survivorship in joint tenancy rendering her the absolute ownership of the suit property. He contended that the right of survivorship means that when Mwathi Kaguora died, his interest in the land passed on to the surviving joint tenant, Jane Waithira Mbugua and that the joint tenancy cannot pass under will or intestacy of a joint tenant so long as there is a surviving joint tenant in line with the right of survivorship.
10. The Interested party further stated that the suit property is not part of Hannah Nyokabi Mwathi's estate neither is it listed in the Certificate of Confirmation of Grant to be among the distributable properties in the said estate. That this divests the Applicant of locus standi to institute a suit for claim over the property either on his own behalf or on behalf of the beneficiaries of Jane Waithira Mbugua-deceased.

Submissions

11. The Respondents had raised preliminary objection on the question of locus, res judicata and sub judice and the same was argued in court on April 25, 2023 and the court dismissed the same in a ruling given on the same day.
12. On irreparable loss, the Applicant's Advocate submitted that the Estate of Mwathi Kaguora is not fully distributed, no beneficiary sold the land and if the orders sought are not granted, the Estate will be denied their right. Further, they argued that on the balance of convenience, no prejudice will be suffered by the Respondents if the orders are granted.
13. The Respondents submitted that they rely on their replying affidavit filed in opposition and the response filed by the Interested party. They stated that the suit property was owned as set out in entry 12 on title produced before this court and that joint tenancy means the rights of the deceased automatically go to the surviving owner. Consequently, Mwathi having died before Jane, Jane received 100% ownership of the suit property. The Respondents' counsel further submitted that the building on the suit property is on the 12th Floor because of the interim orders that were issued stopping the construction and that the balance of convenience tilts in their favour.
14. Counsel for Plaintiff submitted that the suit property is included in the certificate of confirmation of grant of Estate of Mwathi Kaguora and that they have filed an objection to the confirmation of grant in the Estate of Jane Waithira. He submits that the Defendants have not shown how they entered onto the land as no sale agreement was produced.
15. The Applicant is seeking for permanent injunctive orders against the Respondents and an order to remove the erected structure on the suit property. This was premised on the grounds that the suit property was owned by Mwathi Kaguora and Jane Waithira Mbugua (both deceased) on tenancy in common in the ratio of 60% and 40% respectively and that the Respondents erected a residential commercial building and as a result the Estate of Mwathi Kaguora has been unable to undertake commercial activities on the properties thus incurring loss of income. This motion was vehemently opposed by the Respondents stating that Jane Waithira Mbugua and Mwathi Kaguora (both deceased) owned the suit property as tenants in common in the following share: 40% for Jane Waithira Mbugua and 60% to Jane Waithira Mbugua and Mwathi Kaguora as joint tenants and Mwathi Kaguora having



predeceased Jane Waithera Mbugua the property devolved to her under the doctrine survivorship in joint tenancy rendering her the absolute ownership of the property.

16. The principles governing issuance of mandatory and or permanent injunctive orders at an interlocutory stage are settled and they include; in clear cases and special circumstances. See the decision in *Shepherd Homes Limited Vs Sandabm* (1971) 1 CH 34 where Megarry J. Stated;

“it is plain that in most circumstances a mandatory injunction is likely, other things being equal to be more drastic in its effects than a prohibitory injunction. At the trial of the action the court will of course grant such injunctions as the justice of the case requires but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted even if it is sought in order to enforce a contractual obligation’

And in *Nation media Group & 2 others vs John Harun Mwau* (2014) eKLR where the court of Appeal stated:-

‘It is trite law that for an interlocutory mandatory injunction to issue an applicant must demonstrate existence of special circumstance. A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted.

Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.’

17. The question which begs the answer is whether this is clear case or there are obtaining special circumstances. In answering the question, I will merge it with analysis of whether or not the Applicant has made out a prima facie case for granting an order for temporary injunction.

18. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella Versus Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions among them, *Nguruman Limited versus Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that;

“in an interlocutory injunction application the Applicant has to satisfy the triple requirements to (a) establishes his case only at a prima facie level, (b) demonstrates irreparable injury if a temporary injunction is not granted and (c) ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.

19. The Applicant annexed a copy of title to the suit property with its ownership clearly indicated on entry 12 as follows;

“Transfer to Jane Waithera Mbugua and Mwathi Kaguora as tenants in common in the following shares:40% for Jane Waithera Mbugua and 60% to Jane Waithera Mbugua and Mwathi Kaguora as joint tenants.”

It is not contested that Mwathi Kaguora predeceased Jane Waithera Mbugua and that the tenancy was in common. For interpretation is whether the applicable law at the time provided that the interest in the joint tenancy passed on to the surviving tenant.



20. Thus it cannot be said that the case is clear as there requires interpretation on whether the interest of Mwathi Kaguora passed on to his estate or to the surviving co-tenant. Secondly, the Applicant was required to show that the Estate will suffer irreparable injury if an order of temporary and mandatory orders of injunction are not granted. In regard to what is meant by irreparable injury, the court in the case of *Pius Kipchirchir Kogo Vs Frank Kimeli Tenai* (2018) eKLR explained that;

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

21. The Applicant averred that the succession of both Estates (Mwathi Kaguora and Jane Waithera Mbugua) is ongoing and unless orders sought herein are granted the same is likely to be acquired fraudulently and illegally transferred to unknown individuals. The Respondents stated that the estate of Jane Waithera Mbugua is aware that the transfer of the suit property was effected. They further stated that construction of the impugned building is on the 12th floor.

22. By virtue of the occupation of the property is being contested with a building already on the 12th floor, it means that the orders of mandatory injunction being sought assume that the Respondents are required to remove the offending structure. In my view, granting such an order without special circumstance would be contrary to natural justice as the Respondents will be condemned unheard. The Applicant has pleaded on the share they are claiming which also means that their interest in the suit property is not whole and is ascertainable. Therefore, if the loss to be suffered can be compensated.

23. On the head of balance of convenience, it is my opinion that in weighing the cost of construction vis a vis stopping of construction of the building that is significantly progressed, the cost of stopping construction is higher. I am guided by the decision in *Amir Suleiman Vs Amboseli Resort Limited* [2004] eKLR where the court stated that in responding to prayers for interlocutory injunctive reliefs, courts should always opt for the lower rather than the higher risk of injustice.

24. In light of the foregoing I hold that the Applicant’s motion does not meet the threshold for the orders sought. It is hereby dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH JULY 2023

A. OMOLLO

JUDGE

