



**Wanyoike & another (Suing as the legal representatives of the Estate of Paul Gatete)
v Gatete (Sued as the administrator of Estate of Ruth Wanjiku Gatete) (Environment
& Land Case E007 of 2022) [2022] KEELC 2586 (KLR) (21 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2586 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E007 OF 2022**

**LA OMOLLO, J
JULY 21, 2022**

BETWEEN

**ESTHER NYAMBURA WANYOIKE & DORCAS NJERI MAINA (SUING
AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF PAUL
GATETE) APPLICANT**

AND

**FAITH NYAMBURA GATETE (SUED AS THE ADMINISTRATOR OF ESTATE
OF RUTH WANJIKU GATETE) RESPONDENT**

RULING

Introduction

1. This ruling is in respect to the Plaintiffs'/Applicants' Notice of Motion application dated 15th February, 2022.
2. The application seeks the following orders:
 - i. Spent.
 - ii. Spent.
 - iii. That pending hearing and determination of this suit the Honourable Court be pleased to issue temporary injunction restraining the Defendant/Respondent either by herself, her agent, assigns, servants and/or persons claiming under her be restrained by way of temporary injunction from alienating, disposing, leasing and/or interfering with all parcels of land known as:
 - a. Nakuru Municipality Block 13/213



- b. Njoro/Ngata Block 1/262
 - c. Nakuru Municipality Block 29/546 (Ronda)
 - d. Njoro/Ngata Block 1/266
 - e. Kabazi/Munanda Block 2/479 (Maombiona)
 - f. Kabazi/Munanda Block 2/555 (Maombiona)
 - g. Kabazi/Munanda Block 2/554 (Maombiona)
 - h. Nakuru Municipality Block 29/546
 - i. Nakuru Municipality Block 10/43
 - j. Nakuru Municipality Block 2/438
 - k. Njoro/Ngata Block 1/261
- iv. That pending hearing and Determination of this suit the Honourable Court be pleased to compel the Defendant/Respondent to deposit all income from above mentioned properties in a joint account or in the alternative to court.
 - v. That pending hearing and determination of this suit there be a stay of all proceedings in relation to the above-mentioned parcels in Nakuru H.c.c Succession Cause No. 43 of 2019 In The Matter of The Estate of Ruth Wanjiku Gatete (deceased) and in Nakuru H.c Succession Cause No. E3 of 2020 In The Matter of The Estate of Paul Gatete Kiratu.
 - vi. That costs of this application be provided for.
3. The application is based on the grounds on its face and supported by the affidavit sworn on 9th February, 2022 by one Dorcas Njeri Maina.

Plaintiff/applicants' Contention.

- 4. The Plaintiff/Applicants' contends that he is an Administrator of the estate of Paul Gatete Kiratu having been issued with letters of administration ad litem on 26th February, 2021. He further contends that in the year 2000 his father faced financial challenges and was unable to pay loans with Kenya Commercial Bank (KCB) and subsequently KCB demanded Kshs. 2,736,367 and threatened to take legal action if he had not cleared the said amount.
- 5. It is the Plaintiff/Applicant's contention that his father made a proposal to sell some of his properties to offset the said loans.
- 6. The Plaintiff/Applicant further contends that his father found it difficult to find buyers for the said properties within the timelines that the creditors had set up and thus being worried that other properties might be auctioned, he transferred the said properties to his children and the Applicant's step mother Ruth Wanjiku Gatete.
- 7. She contends that her father was able to offset the debts by selling the remaining properties and that the said family members whom the properties were transferred to were to hold the properties in trust for him and other family members. She gave a list of the properties to whom they were transferred to for them to hold in trust for him and other family members.



8. She further contends that the Respondent has been intermeddling with the said properties by leasing them out without the authority of the other family members and/or the court.
9. The Plaintiff/Applicant contends that on 26th January, 2021 they filed for summons for revocation of grant issued to the Respondent in Nakuru H.c Succession Cause No. 43 of 2019 and on 31st November, 2021 Honourable Prof. J.M Ngugi gave directions that the Applicants do file and pursue an appropriate claim in this Honourable court.
10. She contends that the said properties were acquired jointly by her late father and mother and it would be of great injustice if they do not benefit from the same. She further contends that the Respondent intends to disinherit the beneficiaries of the estate of Paul Gatete by including properties that do not form free properties of Ruth Gatete.
11. She ends her deposition by stating that the Respondent may dispose and/or distribute the said properties if proceedings in Nakuru H.c Succession Cause No. 43 of 2019 are not stayed and urged the court to grant the orders sought.

Respondent's Response.

12. In response to the application, the Defendant/Respondent filed a replying affidavit sworn on 15th March, 2022 by one Faith Nyambura Gatete where she deposes that the application is a non-starter and abuse of the court process.
13. She deposes that the Applicants herein are her step-sisters and contrary to the Applicant's assertion, all the loans taken by their late father were repaid in full during his lifetime and the charged properties discharged.
14. She further deposes that all the properties that were formally charged to the banks were only transferred to the late Ruth Wanjiku Gatete and their siblings after they were discharged as evidenced by the green cards annexed to the Applicant's Supporting Affidavit.
15. The Defendant/Respondent deposes that the late Ruth Wanjiku Gatete pre-deceased their father since she passed away on 25th November, 2006 while the late Paul Gatete Kiratu passed away on 16th November, 2018 about twelve (12) years after. She also deposes that if indeed the properties registered in the name of Ruth Wanjiku Gatete were to be held in trust for the family, nothing would have been easier than for their late father to cause the same to be registered in the name of another living family member after her demise.
16. Further, that if Ruth Wanjiku Gatete was to hold the properties in trust for the family, her death would have rendered her incapable of doing so and the late Paul Gatete Kiratu would have been forced to appoint another trustee. She deposed that the properties registered in the name of Ruth Wanjiku Gatete were not being held in trust for any family member but exclusively belonged to her and the same falls within the purview of Succession court.
17. She deposes that all the properties listed in the application herein are the subject of succession proceedings in Nakuru H.c Succession Cause No. 43 of 2019 In The Matter of The Estate of Ruth Wanjiku Gatete (deceased) which is in the confirmation stage which the proposed distribution takes into account that some of the properties were registered in the joint names of the late Ruth Wanjiku Gatete.
18. She also deposes that none of the properties listed in the application herein were acquired jointly between the late Paul Gatete Kiratu and their late mother.



19. She deposes that neither herself or her co-administrator intend to disinherit the beneficiaries of the estate of Paul Gatete Kiratu and that none of the properties herein or in the summons for confirmation of grant in the succession cause are registered in the name of the late Paul Gatete Kiratu and/or in the name of Beatrice.
20. The Defendant/Respondent deposes that the Plaintiff/Applicants have not demonstrated any form of fraudulent, unprocedural and/or illegal dealings with the properties and have also failed to demonstrate that the properties listed herein were transferred to the late Ruth Wanjiku Gatete to hold in trust for the other family members.
21. She also deposes that if the Plaintiff/Applicants contention is to hold true, the properties of their late mother Beatrice Muthoni Gatete to wit Nakuru /municipality Block 3/526 (shabab), Nakuru/ municipality Blcok 2/167 (freehold) and Plot No. 487 (munyeki) ought to be distributed to all the family members including herself and her siblings.
22. She deposes that the Plaintiff/Applicants failed to disclose that their late mother also received properties from the late Paul Gatete Kiratu and their unwillingness to have the same treated as property held in trust for the entire family confirms that the properties transferred to each of their late father's wives were gifted to them exclusively.
23. She further contends the main aim of the Plaintiff/Applicants is to benefit from the estates of both the late Beatrice Muthoni Gatete and the late Ruth Wanjiku Gatete while condemning herself and her siblings to only enjoying part of their late mother's estate.
24. She contends that the late Paul Gatete Kiratu gave properties to each of his wives and the properties ought to be distributed to the respective beneficiaries and the Application should pursue the distribution of their late mother's estate.
25. She ends her disposition by stating that the application herein has no legal basis and only serves to impede the just Administration of the Estate of the late Ruth Wanjiku Gatete as provided by law.

Issues For Determination.

26. The Defendant/Respondent filed her submissions dated 4th May, 2022 on the same day, gave a summary of the Plaintiff/Applicant's case, their case and identified the following issues for determination:
 - a. Whether the late Ruth Wanjiku Gatete (Deceased) was registered to hold the suit properties in trust for the Applicants.
 - b. Whether the Respondent fraudulently and maliciously included the suit properties as free property of Ruth Wanjiku Gatete (Deceased).
 - c. Whether the Applicants are entitled to the orders sought.
 - d. Who should bear the cost of this application?
27. On the first issue for determination, the Defendant/Respondent relied on Section 107 of the *Evidence Act*, the case of *Patrick Mathenge Gachui v Karumi Wambugu & Another* [2010] eKLR and submitted that the Applicants failed to prove trust to the required legal threshold.
28. She submits that the Applicants have not offered any plausible explanation why the late Paul Gatete Kiratu did not change the alleged trustee Ruth Wanjiku Gatete (Deceased) upon her demise in the year 2006 and/or retransfer the suit properties to himself in the year 2015 upon full payment of the debt.



29. On the second issue, the Defendant/Respondent relied on Section 3 of the *Law of Succession Act*, the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR and submitted that the Applicant failed to prove that the Respondent fraudulently and maliciously included the suit properties as part of the deceased's free property.
30. She also relied on Section 24 and 26 of the *Land Registration Act* and submitted that the evidence placed before this court by the applicant confirms that Ruth Wanjiku Gatete (Deceased) was and is still the registered owner of the suit properties herein save for the alleged trust which they have failed to prove to the registered legal standard.
31. On the third issue, the Defendant/Respondent relied on the case of *Ali Kitsao Katana v Kassim Mobammed Omar & 5 Others* [2018] eKLR which based its determination in the case of *Giella v Cassman Brown & Co. Limited* [1973] EA 358 and submitted that the Applicants failed to meet all the three conditions set out in the above case for an order of temporary injunction to issue in their favour.
32. The Defendant/Respondent urged the court to use its discretion and award them costs.
33. It is my considered view that the issues for determination at this stage are:
 - a. Whether the applicant has met the criteria for grant of orders of temporary injunction pending the hearing and determination of the suit.
 - b. Whether this court can issue an order compelling the Defendant/Respondent to deposit all income from the suit properties in a joint account and/ or in court.
 - c. Whether this court can issue an order for stay of proceedings in Nakuru High Court Succession Cause No. 43 of 2019.
 - d. Which party shall bear the cost of the application?

Analysis And Determination.

34. In making a determination in this matter, I have into consideration the Application, the affidavit in support of it, the replying Affidavit and submissions of the Defendant/ Respondent.
35. As at the date that this application was reserved for ruling, the Plaintiffs/Applicants had not filed their submissions and undertook to have the same filed within 7 days. As at the time of writing this ruling, the Plaintiff's submissions are not in the file.

A. Whether the Applicant has met the criteria for grant of orders of temporary injunction pending the hearing and determination of the suit.

36. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella v Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions. In *Nguruman Limited v Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR 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”.

37. Consequently, the Plaintiff ought to, first, establish a *prima facie* case. In *Mrao Ltd v First American Bank of Kenya Ltd* [2003] eKLR in which the Court of Appeal gave a determination on a *prima facie* case. The court stated 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 legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

38. In support of their application, the Plaintiffs have attached copies of green cards in respect of the suit properties. The green cards generally show that the properties were registered in the name of Paul Gatere Kiragu and transferred to Ruth Wanjiku Gatere.
39. Subsequently, the copies of green cards also show that restrictions have been registered in respect of them by Ikua and Co. Advocates on behalf of Faith Nyambura Gatete or by Faith Nyambura Gatete, on her own behalf.
40. Other entries in the various copies of the green cards show that restrictions lodged have been removed by Elizabeth Wangari and Co. Advocates and restrictions, again, lodged for the reason that the owner-Ruth Wanjiku Gatete is deceased.
41. I am unable to find any evidence of trust and/or mention of registration of trust in respect of the suit properties. Specifically, there is no evidence that Ruth Wanjiku Gatete is registered as holding the property in trust for a certain group of people.
42. The second principle for grant of orders of temporary injunction is that the Applicant has to demonstrate that irreparable injury will be occasioned to him/her if an order of temporary injunction is not granted. The judicial decision of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR provides an explanation for what is meant by irreparable injury and it states;

“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.”

43. The Plaintiffs/applicants have not demonstrated what injury will be occasioned to them in the event that orders of temporary injunction are not granted.
44. I am unable to make a finding on this point without submissions by the Plaintiff or deposition in the affidavit in support of the application.
45. Thirdly, an Applicant has to demonstrate that the balance of convenience tilts in his/her favour. In the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) EKLR which defined the concept of balance of convenience as:

“The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience



caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.

46. In the case of *Paul Gitonga Wanjau v Gathuthis Tea Factor Company Ltd & 2 others* [2016] eKLR, the court dealing with the issue of balance of convenience expressed itself thus;

“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

47. In *Amir Suleiman v Amboseli Resort Limited* [2004] eKLR, the learned Judge offered further explanation on what is meant by “balance of convenience” and stated

“The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”

48. Bearing this in mind, I am not convinced that there is a risk in not granting orders of temporary injunction. This is especially so because I note that the Learned Judge in the succession proceedings has referred the parties to this court to resolve the dispute in respect of the suit properties. Further, there are restrictions already registered in respect of the suit properties.

49. In *Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & Another* [2019] eKLR the court in deciding on an injunction application stated;

“circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the *Civil Procedure Rules* requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts...”

50. I am not convinced that if orders of temporary injunction are not granted in this suit, the properties in dispute might be in danger of being dealt in the manner set out in the application and/or apprehended by the Plaintiff/Applicant.



51. In view of the foregoing, I find that the Plaintiffs/ Applicants have not met the criteria for grant of orders of temporary injunction.

B. Whether this court can issue an order compelling the Defendant/Respondent to deposit all income from the suit properties in a joint account and/ or in court.

52. The jurisdiction of this court is set out in Article 162 (2) (b) read together with Section 13 of the [Environment and Land Court Act](#).

53. In [Co-operative Bank of Kenya Ltd and Patrick Kangethe Njuguna and five Others](#) [2017]eKLR, the Court of Appeal found that the jurisdiction of the Environment and Land Court to determine disputes connected to ‘use’ of land within the meaning of Article 162(2) (b) of the [Constitution](#) of Kenya, 2010 does not include mortgages, charges, collection of dues and rents and that these are within the civil jurisdiction of the High Court.

54. This prayer by the Plaintiffs/Applicants calls for taking accounts and is akin to seeking the help of the court in collecting dues and rents from the property. This is certainly not within the jurisdiction of this court and the prayer is declined.

C. Whether this court can issue an order for stay of proceedings in Nakuru High Court Succession Cause No. 43 of 2019

55. [Halsbury’s Law of England](#), 4th Edition. Vol. 37 pages 330 and 332, sheds light on stay of proceedings and states thus:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases...”

56. The plaintiffs/Applicants at paragraph 18 of the affidavit in support of the application depose that the Respondent may distribute the said properties if proceedings in Nakuru H.C Succession Cause No. 43 of 2019 are not stayed.

57. I note that at paragraph 15 of the affidavit in support of the application, the Plaintiffs/Applicants depose that they filed summons for revocation of grant issued to the Respondent in Nakuru High Court Succession Cause No. 43 of 2019 and that the Learned Judge seized of the matter gave directions that the applicants file an appropriate claim in this court.

58. The deduction from this is that the Learned Judge is well aware that when there exists a dispute relating to property forming part of the estate of a deceased person, that property is removed from the list of properties available for distribution pending the determination of the dispute by court having jurisdiction to do so; in this case the Environment and land Court.

59. [In Estate of Gerald Mwangi Mugo \(Deceased\)](#) [2019] eKLR, the Learned Judge states thus;

“In succession cases, stay of proceedings is strictly restricted but not prohibited. Instead of providing for stay of proceedings, special procedures have been designed by the [Law of Succession Act](#), for instance, rule 41(3) of the [Probate and Administration Rules](#) requires



the court to set aside property about which questions have arisen which cannot be or conveniently determined by the court for determination by the right court.

See the rule below:

41(3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the *Civil Procedure Rules* and may thereupon, subject to the proviso to section 71 (2) of the Act, proceed to confirm the grant.

Therefore, issuing a stay of proceedings in a succession cause should be with much caution, for such intervention will not only be an interference with the beneficiaries' right to conduct and conclude the litigation, but will also be an impediment to the exercise of court's power upon the estate property for purposes of active and due distribution and Administration of the Estate."

60. I must mention, for what it is worth, that this court cannot stay proceedings before the High Court or the Employment and Labour Relations Court and vice versa. These are courts of equal status and I am of the view that if it were necessary that proceedings be stayed, then the best forum for hearing that application would be the court before which the proceedings are on-going.
61. In view of the foregoing, I decline to issue orders of stay of proceedings in Nakuru High Court Succession Cause No. 43 of 2019.

D. Which party bears the cost of the application?

62. On the question of costs of the application, the general rule is that costs shall follow the event in accordance with the provisions of 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. This was the holding in *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287.

Disposition.

63. The Upshot of the foregoing is that the Notice of Motion Application dated 15th February, 2022 lacks merit and is dismissed with costs to the Defendant/Respondent.
64. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 21ST DAY OF JULY, 2022.

L. A. OMOLLO

JUDGE

In the presence of: -

Miss Wanjiru for Mr. Njoroge for the Plaintiff/Applicant

Mrs. Mukira for the Defendants/Respondents

Court Assistant; Ms. Jeniffer Chepkorir.

