



Oyugi & another (Suing as the Administrators of the estate of Hezekiah Nelson Oyugi) v Blue Waters Hotel Limited & another (Environment & Land Case E002 of 2022) [2022] KEELC 15012 (KLR) (24 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15012 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE E002 OF 2022
A OMBWAYO, J
NOVEMBER 24, 2022**

BETWEEN

**JOB OKUNA OYUGI 1ST PLAINTIFF
DOUGLAS ODHIAMBO OYUGI 2ND PLAINTIFF
SUING AS THE ADMINISTRATORS OF THE ESTATE OF HEZEKIAH NELSON
OYUGI**

AND

**BLUE WATERS HOTEL LIMITED 1ST DEFENDANT
GUARANTY TRUST BANK (KENYA) LIMITED 2ND DEFENDANT**

RULING

Brief facts

1. The Plaintiffs/ Applicants herein filed a Chamber Summons Application dated February 1, 2022 and filed on February 3, 2022 seeking for the following orders:
 1. That this Application be certified urgent and service of this Application be dispensed with in the first instance.
 2. That this court be pleased to grant a temporary injunction restraining the Respondents whether by themselves, their agents and/or servants from auctioning Kisumu Municipality 13/16 pending the hearing and determination of this suit.
 3. That costs of this Application be provided for.
 4. That this Honourable Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.



2. The Application was based on grounds that the late Hezekiah Nelson Oyugi was the registered owner of Kisumu Municipality 13/16 and the 1st Defendant was the beneficiary of an illegal transfer from the estate of the late Hezekiah Nelson Oyugi. That the transfer from the estate of the late Hezekiah Nelson Oyugi was procured without a confirmation of grant or a court order and the 2nd Defendant intends to auction the property pursuant to a defective charge over the suit property. It is averred that the 2nd Defendant through its agents, have advertised the suit property for public auction and unless restrained, they will proceed to sell the property occasioning irreparable damage to the Plaintiffs and the estate of Hezekiah Nelson Oyugi.
3. The Application was Supported by the Affidavit of Douglas Odhiambo Oyugi sworn on February 1, 2022 and filed on February 3, 2022 where he deposed and stated that he is the Administrator of the estate of the late Hezekiah Nelson Oyugi and that pursuant to Succession Cause No 1581 of 1992, the Plaintiffs were appointed Administrators of the Estate and received Grant of Letters of Administration dated February 1, 1994.
4. He stated that the claim arises from an illegal transfer of the Estate's property registered as Kisumu Municipality Block 13/16 as the property formed one of the properties in the Estate's schedule of titles. That the Estate was granted orders in Miscellaneous Application No 119 of 1993 permitting the sale of four properties namely; Nakuru Municipality Block/12/30, LR 209/11123, LR 209/10824 and LR Kisumu/12/236 for upkeep and maintenance of some of the defendants.
5. It is the Plaintiffs' case that he came across a newspaper article claiming that the 2nd Defendant was in the process of auctioning the suit property and as a result of the newspaper article, he discovered that the property had been transferred from the estate to the 1st Defendant and charged to the 2nd Defendant. That there has been no confirmation of the Estate's grant and no court orders have been obtained permitting the sale of the property.
6. He further stated that any signature or transactable document transferring the property from the estate was procured fraudulently and if the auction proceeds, the estate stands to suffer irreparably. That the 2nd Defendant and its agents intend and will dispose off the property unless restrained by this court.
7. This matter was placed before me whereby I directed the Defendants to reply and parties to file and exchange written submissions.
8. I have perused the file and do confirm that the 1st Defendant failed to file its submissions. The 2nd Defendant filed its submissions on April 5, 2022 where Josephine Gachuru the Legal Officer of the 2nd Defendant deposed and stated that the instant Application is brought in bad faith with the sole intent of scuttling the exercise of 2nd Defendant's statutory remedy of sale as charge which right has long crystallized and is therefore tantamount to abuse of court process.
9. She stated that the timing of the Application and the extremely guarded averments and Supporting evidence presented in support of the Application evince a litigant in cahoots with a defaulting borrower on a joint mission to use the court process to meet ulterior ends and the Application should therefore be dismissed. That no single shred of evidence has been presented to this court that the suit property which is registered in the name of the 1st Defendant and charged to the 2nd Defendant was at any time part of the free estate available for distribution of the estate of the late Hezekiah Nelson Oyugi.
10. It is the 2nd Defendant's case that the 1st Defendant has been in open occupation and use of the suit property for the past 15 years while undertaking construction of a multi-storey building and not a single dwelling was mounted on its ownership by any person. That the 2nd Defendant dealt with the



- 1st Defendant as the absolute bonafide owner of the property being the registered owner in possession, occupation and use of the property.
11. She stated that the commencement of the present suit began when the 2nd Defendant is about to exercise its remedy of sale as charge therefore grounds that the 2nd Defendant's contention that the Plaintiffs are in cahoots with the 1st Defendant to defeat its remedy. That there is a series of Letters of Offer of diverse dates that the 2nd Defendant advanced and restructured various facilities to the 1st Defendant for various purposes.
 12. That the 2nd Defendant advanced Kshs 220,000,000/= loan in 2014 and restructured subsequently vide the Letters of Restructure and in 2014 after execution of the first Letter of Offer, the 1st Defendant executed legal charge dated July 24, 2014 over the suit property in favour of the 2nd Defendant and the charge was duly noted as encumbrance on the title on August 6, 2014. The loan was disbursed to the 1st Defendant and the terms subsequently restructured.
 13. It was stated that at the time of the creation of the charge, the property was registered in the name of Blue Waters Hotel Limited under a Certificate of Lease issued on August 9, 2010 and no prima facie evidence exists in the Plaintiffs' Supporting Affidavit to impugn the 1st Defendant's title. The 2nd Defendant further stated that it undertook due diligence on the suit property to confirm that the 1st Defendant was indeed the bona fide owner before accepting it as part of the collateral for the loan facilities advanced to the 1st Defendant.
 14. She further stated that the 2nd Defendant requested and obtained a copy of the title which confirmed that the property was registered in the name of the 1st Defendant and upon conducting a search at the Kisumu Lands Registry, the Registrar confirmed that the suit property was registered in the name of the 1st Defendant. That the 2nd Defendant commissioned a valuation of the property to ascertain the location, development status and value of the property and the valuer reported that the property was situated at Milimani area within Kisumu City, 130 meters from the shores of Lake Victoria and it was being developed with construction of a multistorey building.
 15. That in compliance with the terms of the Certificate of Lease, the 2nd Defendant made sure that the 1st Defendant had consent of the Lessor to charge the property which consent was issued vide a letter dated July 28, 2014. She stated that nothing existed in the register or physically on the property to indicate it was part of the estate of the late Hezekiah Nelson Oyugi as contended.
 16. It is averred that in breach of the terms of the Offer Letters and Charge, the 1st Defendant defaulted in repaying the loan as agreed in 2018 and consequently several statutory notices were served upon the 1st Defendant and in preparation of the sale, the 2nd Defendant commissioned a valuation of the property through Messrs Accurate Valuers Ltd who confirmed vide a report issued on May 18, 2018 that the property had been developed with a multistorey building having been erected on the property.
 17. It was the 2nd Defendant's case that upon issuance of the 40 days' Notice to Sell, the 1st Defendant moved to court to stop the planned sale in Kisumu HC Commercial Suit No 79 of 2018 Blue Waters Ltd & 2 Others vs Guaranty Trust Bank Kenya Limited seeking injunctive relief. That the 1st Defendant filed a notice of Motion Application for interlocutory Injunction together with the suit and the said Application was dismissed on July 28, 2022 and a subsequent Application for stay of the sale pending Appeal against the Ruling dismissing the injunction was dismissed on October 23, 2020.
 18. That the 1st Defendant then filed an Appeal together with an Application for injunction under Rule 5 (2) (b) of the Court of Appeal Rules in Nairobi Civil Application No 128 of 2020 and an Injunction was issued by the Court of Appeal on condition that the 1st Defendant settles a sum of



Kshs 25,000,000/= within 45 days from December 17, 2020. The 1st Defendant failed to honour the conditions upon which the injunction was issued by failing to settle the Kshs 25,000,000/= within 45 days from December 17, 2020.

19. That consequently, the 2nd Defendant issued upon the 1st Defendant a courtesy Notice together with the 45 days Redemption Notice cum Notification of Sale on August 12, 2021. The 1st Defendant failed to redeem their property within 45 days and the property was advertised for sale by public auction in the Daily Nation publication of August 16, 2021. The Plaintiffs did not challenge the planned auction as advertised on August 16, 2021 in a newspaper of national circulation nor did they lay a claim over the property.
20. It was alleged that in 2018 when the recovery process began, the Plaintiffs did not lodge any claim to the property and the 1st Defendant also advertised the property on August 30, 2021 in the Daily Nation Newspaper and the Plaintiffs did not challenge the planned auction as advertised. That the 2nd Defendant has every reason to believe that the current suit has been brought by the Plaintiffs in cahoots with the 1st Defendant after the first Defendant reached a cul de sac in seeking to stop the 2nd Defendant from exercising its statutory power of sale.
21. It was also alleged that no reason has been advanced by the Plaintiffs as to why they did not seek to ascertain who had developed the property from 2014 yet they were already appointed as Administrators in 1992 as allege. That the property is situated a prime location and has been under development since 2014 without any qualms from any person. The Plaintiffs have failed to produce evidence on the on the newspaper advertisement which they claim to have stumbled upon advertising the property for sale.
22. It was averred that the 2nd Defendant undertook a great deal of due diligence before accepting the property as security for the loan advanced to the 1st Defendant and the 1st Defendant is indebted to the 2nd Defendant to the tune of Kshs 391,297,348.70 as at August 9, 2021 which sum continues to accrue interest at contractual rates until settlement in full.
23. That the Plaintiffs have failed to explain why they have never safeguarded the property if at all it forms part of the Estate of the late Hezekiah Nelson Oyugi and have failed to demonstrate that they are likely to suffer irreparable harm that cannot be compensated in damages unless the orders sought are granted. It was also alleged that the suit property is not registered in the name of the Estate of Hezekiah Nelson Oyugi and since the reliefs sought are based on equity, this court in exercise of its equitable discretion should not aid an evidently indolent and conniving litigant.
24. It was further stated that a balance of convenience tilts in favour of allowing the 2nd Defendant to proceed with the sale having battled with the registered proprietor since 2014 and the sum owing under the charge over the property remaining in arrears with the interest accruing.
25. The 2nd Defendant prayed that the Application be dismissed with costs to the 2nd Defendant to pave way for the 2nd Defendant.

Plaintiffs' Submissions

26. The Plaintiffs filed their submissions on April 11, 2022 where the following issues were raised for determination:



a. Whether immovable property forming part of the estate of the deceased's estate can be transferred without a confirmation of grant.

27. It was stated that the suit property forms part of the estate of the deceased as the grant as not been confirmed to date and the Plaintiffs relied in the case of the [*Estate of Paul M' Maria \(Deceased\) Succession Cause No 547 of 2009 eKLR*](#) and the provisions of section 55 of the [*Law of Succession Act*](#).
28. It was submitted that all transactions following the incurably void purchase of the property from the deceased by the 1st Defendant are void including the charge created by the 1st Defendant in favour of the 2nd Defendant. That the court order obtained in Miscellaneous Application No 119 of 1993 in the matter of the Estate of Hezekiah Oyugi Ogango by the Administrators of the deceased's estate limited the number of properties that could be sold for the maintenance of the beneficiaries and the suit property did form one of the parcels of land that was to be sold for purposes of maintenance of the beneficiaries.

b. Whether the Plaintiffs have met the conditions for granting interlocutory injunctions

29. The Plaintiffs stated in their submissions that the conditions for granting injunctions are well settled in the case of [*Giella vs Cassman Brown Co Ltd 1973 EA 358*](#) and on whether the Plaintiffs have established a prima facie case, it was stated that the Plaintiffs have annexed a copy of the court order which is proof that the Letters of Administration were issued to them and the grant is yet to be confirmed and this therefore proves that the suit property was illegally and unlawfully transferred to the 1st Defendant without the knowledge of the Plaintiffs. The Plaintiffs relied in the case of [*Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others \(2003\) e KLR*](#).
30. On whether there is irreparable injury that cannot be compensated by an award of damages, it was submitted that the court should strike a balance between the interest of the 2nd Defendant and that of the Plaintiffs and the 2nd Defendant's only interest to recover the amounts advanced to the 1st Defendant. That it necessary for the court to preserve the property due to the fact that there is evidence on record that the 2nd Defendant has expressed their intention to auction it by advertising it for sale. Reliance was placed in the case [*CMC Holdings Ltd & Another vs Jaguar Land Rover Exports Ltd \(2013\) eKLR*](#) where the court held that 'the measures are intended to preserve assets or evidence which are likely to be wasted if conservatory orders are not issued'.
31. On whether this matter should be determined on a balance of convenience, it was stated that the Plaintiffs have submitted evidence to show that the property in question formed part of the estate of the deceased and its transfer or distribution is not possible and therefore the balance of convenience tilts in favour of granting the orders sought by the Plaintiffs.
32. The Plaintiffs prayed that the Application be allowed as prayed.

1st Defendant's Submissions

33. The 1st Defendant failed to file its submissions as directed by the court.

2nd Defendant's Submissions

34. The 2nd Defendant filed its Submissions on April 20, 2022 where the following issues were raised for determination;



a. Whether a prima facie case has been established by the Applicants to warrant granting an Injunction.

35. It was stated that an interlocutory injunction can only be granted where the Applicant establishes a prima facie case with probability of success was defined in the case of *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others (2003) eKLR*. It was submitted that no evidence has been adduced to show that the suit property was at any time registered in the name of the deceased.
36. It was also submitted that no single annexure has been attached to the Supporting Affidavit of the 2nd Plaintiff in support of the Application. Reliance was placed in the case of *Justus Mong'umbu Omiti vs Independent Electoral and Boundaries Commission & Another (2018) eKLR*.
37. The 2nd Defendant further submitted that there is no evidence of fraud against the 1st Defendant's title charged to the 2nd Defendant as section 26 of the *Land Registration Act* requires that fraud need to be proved since the Plaintiffs have alleged that the 1st Defendant is not the absolute owner of the suit property. The 2nd Defendant relied in the case of *Teleposta Pension Scheme Registered Trustees vs Intercontinental Importers and Exporters Limited & 4 Others (2016) eKLR*.
38. It is the 2nd Defendant's submission that this court should safeguard the interest not only of the 1st Defendant but also of the 2nd Defendant as the registered charge whose interest is equally recognized and safeguarded under section 26 (1) of the *Land Registration Act*. That the 2nd Defendant conducted all the necessary due diligence before disbursing the funds.
39. It was stated that the main relief sought seeks to specifically stop the 2nd Defendant from auctioning the suit property. There is no prayer seeking to stop the 1st Defendant from continuing with its occupation, use, enjoyment and development of the property. That the Plaintiffs are essentially seeking to stop the auction of the property by the 2nd Respondent but they are subconsciously aware that the 1st Defendant's title is unimpeachable.
40. It was also stated that failure of the 1st Defendant to file any opposition to the grounds the 2nd Defendant's submission that the present Application is a joint effort by the Plaintiffs and the 1st Defendant to scuttle the 2nd Defendant's remedy of sale after the 1st Defendant hit a cul de sac in injuncting the 2nd Defendant from selling the suit property. Reliance was placed in the case *Jared Benson Kangwana & 2 Others vs Director of Public Prosecutions & 3 Others; Monarch Insurance Company Limited & 2 Others (Interested Parties) (2022) eKLR*.

b. Whether irreparable harm would be occasioned if the orders sought are not granted.

41. It was submitted that the Plaintiffs have failed to demonstrate that they will suffer irreparable harm that cannot be compensated by way of damages should the orders sought be denied. The 2nd Defendant relied in the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 Others (2016) eKLR* and stated that the Plaintiffs have not demonstrated what harm they will suffer if the suit property is sold and has not averred to any sentimental attachment to the property.
42. It was stated that there is no suggestion that the 2nd Defendant will not be in a position to meet such damages as may be ordered if the property is eventually sold and the sale is declared unlawful.



c. Whether a balance of convenience tilts in favour of granting prayers sought.

43. It was submitted that more reason exists to dismiss the Application being that a balance of convenience tilts in favour of dismissing the Application since the 2nd Defendant is the registered as the charge over the suit property and the facility has fallen into arrears.

Analysis and Submissions

44. I have read the Application, the Affidavits therein and I am of the view that the main issue for determination is whether the Plaintiffs have met the conditions for granting interlocutory injunctions.
45. The Plaintiffs have alleged that the late Hezekiah Nelson Oyugi was the registered proprietor of land parcel number Kisumu Municipality 13/16 and their claim arises from an illegal transfer of the estate of the deceased. The Plaintiffs have further alleged that the estate of the deceased was granted orders which allowed the sale of three parcel of land as listed in the Affidavit of the 2nd Defendant's Legal Officer for upkeep and maintenance of some of the dependants. The 2nd Defendant opposed the Application and stated that the Application is brought in bad faith with an intention of scuttling the exercise of the 2nd Defendant statutory remedy of sale.
46. The court is guided by the principles established in the locus classicus case of *Giella v Cassman Brown & Company Limited* (1973) E A 358, where the court expressed itself as follows on the conditions that a party must satisfy for the court to grant an interlocutory injunction:

'First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.'

47. The Court of Appeal in *Nguruman Limited -vs- Jan Bonde Nielsen & 2 Others (2014) eKLR* expounded on the ingredients of a prima facie case when they stated as follows: -

'The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title. It is enough if he can show that he has a fair and bonafide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as it is otherwise put, on a preponderance of probabilities.'

48. This court has established that in as much as the Plaintiffs allege that the suit property was registered in the name of the deceased, they have failed to produce any evidence to prove the same. A copy of the order annexed from Miscellaneous Application No 119 of 1993 clearly shows that the suit property was not among the ones allowed to be sold for purposes of maintaining the dependants and no single evidence has been adduced by the Plaintiffs to show that the suit property is among the properties of the estate of the deceased. The Plaintiffs have also failed to disclose whether the three properties



were sold for purposes of maintaining the dependants. Grant of Letters of Administration Intestate dated February 1, 1994 also indicates the Plaintiffs were appointed as Administrators of the estate of the deceased but have not given reasons as to why the Grant of Letters of Administration has not been confirmed.

49. The 2nd Defendant annexed a copy of the certificate of official search which indicated that the suit property is registered in the name of the 1st Defendant and the title was issued in 2010. A copy of the certificate of title also indicates that the suit property belongs to the 1st Defendant and it is charged to the 2nd Defendant. It is evident that before charging the suit property to the 1st Defendant, the 2nd Defendant ensured that a consent was obtained from the Lessor as per the annexure marked JG-9.
50. It is clear from the evidence adduced that the 1st Defendant breached the terms of the letters of offer and charge by defaulting to repay the loan as required. The 2nd Defendant made efforts to recover the loan and upon issuing the 1st Defendant with a 40 days' notice to sell, the 2nd Defendant moved to court to stop the sale by seeking injunctive orders vide Kisumu High Court Commercial Case No 79 of 2018 and the said Application was dismissed. The 1st Defendant subsequently filed an Application for stay of sale pending Appeal which Application was dismissed.
51. The 1st Defendant further filed an Appeal together with an Application for injunction in Nairobi Civil Application No 128 of 2020 and an injunction was issued on condition that the 1st Defendant settles a sum of Kshs 25,000,000/= within 45 days and the 1st Defendant failed to honour the conditions issued by the court. The Plaintiffs have failed to demonstrate that they are likely to suffer irreparable harm that cannot be compensated by way of damages and I am also convinced that a balance of convenience tilts in favour of the 2nd Defendant as the 2nd Defendant conducted due diligence and established that the 1st Defendant is the registered proprietor of the suit property before charging the suit property. It is evident that the 1st Defendant is in breach of the terms of the Letters of Offers and charge and therefore the 2nd Defendant has the right to sale the suit property.
52. This court therefore finds that the Application lacks merit as the Plaintiffs have failed to prove their case on a balance of probabilities. In the upshot, this Application is hereby dismissed with costs to the 2nd Defendant.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 24TH DAY OF NOVEMBER 2022

A.O OMBWAYO

JUDGE

