



**IN THE HIGH COURT OF KENYA**

**REPUBLIC OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
Civil Case 508 of 2007**

**CHARLES NZAU NDETO THE ADMINISTRATOR OF  
THE ESTATE OF THE LATE REUBEN MUTUA.....PLAINTIFF**

**VERSUS**

**EURO BANK LIMITED (IN LIQUIDATION).....DEFENDANT**

**RULING**

I have before me an application by the plaintiff expressed to be brought under the provisions of Order XXXIX Rules 1, 2, and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for one primary order, save for costs, that

***“a temporary injunction do issue restraining the defendant whether by itself, its servants and/or employees from selling or offering for sale whether by public auction or private treaty, transferring, charging, leasing, pledging or in any other way alienating or disposing of the property L. R. No.209/10482/75 pending the hearing and determination of this suit.”***

The main grounds for the application as expressed on the face of the application are as follows:-

- (i) That the defendant has not served the mandatory Statutory Notice under the Transfer of Property Act on the Estate of the late Reuben Mutua since he passed away on 17.7.2000.**
- (ii) That the charge dated 20.5.1998 is not valid in Law as the money secured thereunder was never disbursed to the chargors but to a Third Party Matex Commercial Supplies Limited.**
- (iii) That the late Reuben Mutua was not a Guarantor or surety to Matex Commercial Supplies Limited.**
- (iv) That the charge instrument dated 20.5.1998 lacks the essential mandatory Advocates Certificate required under Section 69 (4) of the Transfer of Property Act to enable the defendant exercise its Statutory Power of Sale.**
- (v) That the defendant is purporting to exercise a Statutory Power of Sale on monies advanced to Matex Commercial Supplies Limited in August, 2000 and August, 2001 after the death of the late Reuben Mutua and without the creation and Registration of Further charges over the property LR No.209/10482/75.**
- (vi) That the defendant has never complied with Section 66 of the Law of Succession Act or Sections 52 and 53 of the Transfer of Property Act to have an Administrator appointed for the**

## **Estate of the late Reuben Mutua.**

The application is supported by an affidavit sworn by the plaintiff. That affidavit elaborates the above grounds. The application is opposed and there is a replying affidavit sworn by Mohamud Ahmed Mohamud. The affidavit has numerous annexures including copies of a certificate of Title of the suit property, pleadings in HCCC No.82 of 2006 between **Matex Commercial Supplies Ltd and the defendant**, a Ruling of Warsame J in the said case and correspondence exchanged.

I have considered the application, the affidavits filed both for and in opposition to the application, the submissions of counsel and the authorities cited to me. Having done so, I take the following view of the matter. I caution myself that I am not hearing this case. I am not therefore required to determine with conclusiveness the rights and duties of the parties. At this stage, the applicant should show that he has a prima facie case with a probability of success at the trial. He must also show that he would suffer an irreparable injury which would not be adequately compensated by way of damages if the injunction is not granted. Where the court is in doubt the application is to be considered on a balance of convenience. Those principles were set out in the precedent setting case of **Giella – vs – Cassman Brown and Co. Ltd [1973] EA 358**. I will consider the plaintiff's application on the basis of those principles.

The applicant has come to court as the Administrator of the Estate of the late Reuben Mutua. However, does he have locus standi? The Certificate of Title exhibited by the defendant indicates that the suit property is still in the name of the deceased and Mary Syombua Ndeto as joint tenants. The defendant argues that the estate of the late Reuben Mutua has no interest in the suit property since upon the death of Reuben Mutua, the surviving owner became the sole and exclusive owner by operation of the Law. In support of that proposition, counsel for the defendant referred me to Halsbury's Laws of England 4<sup>th</sup> Edition Reissue Volume 39 (2) paragraph 195 at page 1439. The Learned Author states that ***"the death of one joint tenant creates no vacancy in the seism or possession. His interest is extinguished. If there were only two joint tenants, the survivor is now seised or possessed of the whole."***

Counsel for the plaintiff is of a different view. He argues that the position here is different, as the Registration of Titles Act under which the suit title is registered does not permit the interpretation given by the defendant. I must confess I did not follow counsel's argument. The common Law position relating to joint tenancies has been applied by our courts over a long time. Rawal J applied it in **Jerusha Nyakerario Obare – vs – Samuel Omoni Obare: HCCC No.267 of 2006 (UR)**. She stated at page 2 of her decision as follows:-

***"I do accept the contention of the plaintiff and find that the suit property became the property of the plaintiff on demise of her husband with whom she owned the property in joint tenancy."***

I must therefore reject the plaintiff's argument that joint tenancy means something else. In my view, the non-survivorship of interest in a joint tenancy on the demise of one of them is the most distinctive feature of joint tenancy. The late Reuben Mutua died on 17.7.2000. As the tenancy was joint, his interest was extinguished on his death. The suit property was not and is not an asset of the estate of the late Reuben Mutua and is not available for distribution to the surviving heirs.

Having taken that view of the matter, I find that the plaintiff has not shown a prima facie case with a probability of success at the trial. I need not therefore consider the other conditions for the grant of an interlocutory injunction.

Before concluding this matter, I cannot resist making reference to HCCC No.82 of 2006. That suit has been instituted by Matex Commercial Supplies Ltd and Mary S. Ndetto against the defendant. Mary S. Ndetto is the surviving tenant in respect of the suit property. The said Mary S. Ndetto and Matex Commercial Supplies Limited in an application filed in the said suit sought inter alia a temporary injunction pending the hearing of the suit. That application was heard by Warsame J. In his reserved ruling delivered on 15.3.2007 the Learned Judge found that the plaintiffs therein had received financial facilities from the defendant and had sought accommodation but failed to honour the same with the result that the debt to the defendant was outstanding. The injunction application was dismissed with costs. So,

the surviving tenant failed to obtain an injunction before Warsame J. It appears to me that even if the late Reuben Mutua had been alive and joined Mary S. Ndetto in her application before the Learned Judge, it would have made no difference. It is worse now that Mutua's interest in the suit property did not survive him.

In the premises, I must dismiss this application. It is accordingly dismissed with costs. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2007.**

**F. AZANGALALA**

**JUDGE**

**Read in the presence of:**

Issa for the plaintiff and Otieno for the defendant.

**F. AZANGALALA**

**JUDGE**

**23/11/07**