



Ndolo (Suing as an administrator of the Estate of the Late David Mwau Ndolo) v Nuni General Trading Company Limited; Ndolo & 3 others (Intended Interested Party) (Environment & Land Case E221 of 2022) [2022] KEELC 15648 (KLR) (20 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15648 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E221 OF 2022
LN MBUGUA, J
DECEMBER 20, 2022**

BETWEEN

JOSEPH NGUI MWAU NDOLO (SUING AS AN ADMINISTRATOR OF THE ESTATE OF THE LATE DAVID MWAU NDOLO) PLAINTIFF

AND

NUNI GENERAL TRADING COMPANY LIMITED DEFENDANT

AND

BONIFACE KITUKU MWAU INTENDED INTERESTED PARTY

LUMUMBA MWAU NDOLO INTENDED INTERESTED PARTY

PATRICK MUTINDA JAMHURI INTENDED INTERESTED PARTY

PAULINE MWENDO INTENDED INTERESTED PARTY

RULING

1. There are 2 applications for determination before this court, one dated June 29, 2022 filed by the plaintiff seeking injunctive orders against the defendant, and another one dated October 8, 2022 filed by proposed interested parties. At this juncture, I must point out that I am handling a related matter the same being EA 77 OF 2022 where issues relating to the properties of David Mwau Ndolo (deceased) have been raised. Having taken cognizance of the said case, the court will proceed to determine the application of October 8, 2022 first.

The application dated 8th October 2022

2. This application was filed by proposed interested parties who claim to be the administrators and beneficiaries of the Estate of the late David Mwau Ndolo and that they will assist the court to



adequately hear and determine issues raised herein. They have filed supporting affidavits. They deponed that on several occasions, they sat as a family to discuss the lease that was issued to the defendant and agreed on its terms and the lease was signed by the administrators of the estate of David Mwau Ndolo while the beneficiaries signed a consent of beneficiaries. They averred that they also resolved and agreed that the defendant demolishes the old structures that were on the suit property and construct an ultra-modern building on the property. They annexed copies of family resolutions dated December 8, 2021 and January 4, 2022.

3. They aver that in a surprising turn of events, the plaintiff made a report to the director of criminal investigations that the subject lease had been forged but the allegation was found to be false after investigations. They also deposed that the defendant has made rent payments in advance for a period of 2 years and the money was distributed to all beneficiaries.
4. No responses were filed in respect of this application.
5. In *Marigat Group Ranch & 3 others v Wesley Chepkoiment & 19 others* [2014] eKLR, the court stated that;

“For purposes of one who wants to be enjoined as an interested party, I think, that such person needs to fit himself into the catch words "whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit..."”.
6. This court has already taken cognizance of another matter before me ELA 77 of 2022 where I found that the administrators of the estate of one David Mwau include the proposed interested parties. It follows that these parties are necessary to assist the court in determining the dispute at hand.
7. The application dated October 8, 2022 is therefore allowed with no orders as to costs.

The 2nd application dated 29th June 2022.

8. The plaintiff seeks a temporary injunction restraining the defendant through its officers, agents, servants, employees, directors or in any other manner howsoever or through whomsoever from trespassing into, taking possession of, demolishing, constructing, subleasing, transferring or in any other manner howsoever dealing with the suit property known as Title Number LR No.31/11/33 Eastleigh or any part therefore pending hearing and determination of the suit.
9. The application is based on grounds on its face and on the Plaintiff's supporting affidavit sworn on June 16, 2022. He describes himself as the biological 1st born son of the late David Mwau Ndolo who was the lawful owner of the land known as LR No.36/11/33/Eastleigh. He avers that his father having died intestate, the High Court at Machakos in Succession Cause No.32 of 2019 issued him and his 3 other siblings letters of administration on October 15, 2019 which were confirmed vide a certificate of confirmation of grant issued on October 18, 2020.
10. He contended that on or about October 20, 2019, the defendant, purporting to be a long-term lessee over the suit property presented to the lands office in Nairobi a purported lease dated October 18, 2019 and the same was registered on November 27, 2019. He pointed out that the lease is fraudulent since it is purported to be drawn by Ochieng, Achach & Keino Advocates yet it is not, for the reason that he did not sign it and for being purportedly registered before appointment of administrators of the estate of David Mwau Ndolo.
11. He deponed that upon learning about the forgery, he contacted Mr. Daniel Achach of Ochieng, Achach and Keino Advocates who was representing the family of the late David Mwau Ndolo at



- the time and Mr. Achach informed him that neither him nor his law firm had presented any lease for registration and that whatever had been presented was at best a forgery.
12. He deponed that Mr. Achach wrote to the Lands registry, Nairobi informing them of the forgery and asking them to immediately expunge the lease document from the file and also made a report to the Director of criminal investigations.
 13. He deponed that on November 17, 2021, the defendant alleging to be the lessee of the suit property invaded and vandalized the property demanding vacant possession and forcefully evicted all the tenants who were occupying it, exposing the estate of David Mwau Ndolo to the risk of losing the suit property.
 14. The application was opposed by the defendant by way of the replying affidavit sworn on September 28, 2022 by its director Hussein Ibrahim Nuni, who deponed that the certificate of confirmation of grant issued on November 24, 2022 provided that the suit property is to be held in trust by the Applicant and Lumumba Mwau Ndolo in trust for the entire 1st household of the estate of the deceased.
 15. He averred that in 2005, the respondent approached the estate of the deceased through Bernard Katumo Mwau, a beneficiary, and expressed its interest to lease the suit property and following ensuing discussions, all the beneficiaries agreed to lease the suit property to the respondent. That through letters dated March 2, 2015, the defendant's then Advocates, Sagana Biriq Advocates proposed terms of the intended lease to the beneficiaries of the estate of David Ndolo Mwau through their lawyers Messrs. Ochieng, Achach & Keino Advocates which was accepted through the letter dated March 6, 2015 but at the time, the beneficiaries of the estate of the deceased had not taken out letters of administration.
 16. He averred that the parties then executed a lease agreement and through a letter dated April 28, 2014, Sagana Biriq Advocates representing the Respondent forwarded the beneficiaries' advocate a cheque of ksh.500,000/= as part payment of the advance annual rent under the proposed lease agreement. The beneficiaries' advocates gave an undertaking to have the lease registered once the grant was confirmed. In furtherance of the lease, the beneficiaries' Advocates had issued a termination notice dated March 31, 2015 to all the tenants on the suit property signifying the intention to terminate their tenancy by 1st June 2015.
 17. He deponed that on November 22, 2015, Davis Mwau a beneficiary of the Deceased's estate wrote to the beneficiaries' Advocates on behalf of the family of the deceased's estate informing them that they had unanimously resolved and agreed to hand over the suit premises to the respondent as the landlord, pending succession proceedings and registration of the lease. Through a letter dated November 30, 2015 from Ochieng Achach and Kaino Advocates to Sagana Biriq Advocates, the Respondent was handed over the suit premises to manage the same as landlord subject to collection and remitting of rent.
 18. Mr. Hussein also deponed that the respondent's Advocates followed up on the progress in obtaining letters of administration of the estate of the deceased and when they were finally issued, there was execution of a fresh lease dated October 18, 2019 and registered on November 27, 2019. It was a term of the lease that the Respondent was to pay agreed monthly rent of ksh.200, 000/= per month which amounts to ksh. 6,480,000/- for a period of 2 years from December 1, 2019 to November 30, 2021.
 19. He deponed that the beneficiaries of the deceased's estate wrote to the respondent proposing payment of rent to them and forwarded their bank account details and the respondent made payments to them as directed. He pointed out that the plaintiff was among the beneficiaries who received the sums under the lease and has never complained or returned the sums yet he failed to disclose that fact.



20. He also averred that the respondent lodged a caveat in late 2021 after learning that the long term leases were being offered to 3rd parties and that it has commenced construction on the suit property and has erected a storey building which is 5 floor high at the moment.
21. On October 12, 2022, the court gave direction for the applicant to file and serve his submissions by October 26, 2022, while the respondent was to file theirs by November 10, 2022, of which, documents filed outside the given timelines were to stand as expunged. There was no compliance on the part of the applicant whose submissions are dated November 7, 2022 and they are hereby disregarded.
22. The submissions of the respondent are dated October 31, 2022 which I have duly considered.
23. The applicant argues that the respondent is on the suit property courtesy of a forged lease dated October 18, 2019. The respondent on its part contends that the lease dated October 18, 2019 were sanctioned by the applicant and other beneficiaries of the estate of David Mwau Ndolo.
24. The principles which guide courts in the exercise of their discretion in deciding whether or not to grant a temporary injunction were enunciated in the case of *Giella v Cassman Brown & Co Ltd*, [1973] EA 358; whereby an applicant must establish a prima facie case with a probability of success; that he or she stands to suffer irreparable loss which cannot be adequately compensated through an award of damages if the orders sought are not granted, and if the court is in doubt, it will consider whether the balance of convenience tilts in favour of the applicant.
25. Has the Applicant established a prima facie case? I have seen the confirmed grant issued in the matter of Succession Cause No.32 of 2019 which relates to the estate of David Ndolo (deceased). The administrators of the Estate are; The plaintiff, Lumumba Mwau Ndolo, Mary Yula Mwau, and Beatrice Ndinda Mwau, where by the suit land was distributed to the Plaintiff and Lumumba Mwau Ndolo to hold in trust for the 1st household. The plaintiff filed this suit all by himself, without any evidence of involvement of his co-administrators particularly Lumumba Mwau.
26. From the averments made by the interested parties, it is quite apparent that the other beneficiaries to the suit land including Lumumba Mwau had sanctioned the transaction leading up to the subject lease.
27. The injunctive orders sought by the plaintiff is an equitable relief, and as rightly submitted by the respondent, he who seeks equity must do so with clean hands. The applicant contends that his brothers are gullible and prone to manipulation, that is why they worked in cahoot with the defendant. The question that comes to my mind is “why didn’t the plaintiff involve the other beneficiaries when he was filing this suit.
28. In the case of *In re Estate of Julius Ndubi Javan (Deceased)* [2018] eKLR, Gikonyo J succinctly stated thus in relation to the question of acting in good faith.

“Needless to state that, in any judicial proceeding, parties must make full disclosures to the court of all material facts to the case including succession cases. This general rule of law emphasizes utmost good faith (uberimae fidei) from parties who take out or are subject of the court proceedings. The said responsibility is part of justice itself. Accordingly, non-disclosure of material facts undermines justice and introduces festering waters into the pure streams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law”.
29. I find that the applicant has not approached this court with clean hands and he is guilty of material non-disclosures, and his explanation of branding his brothers as gullible is but hollow. It is instructive to note that the plaintiffs rights and interests over the suit property are intricately intertwined with



such rights and interests of the other beneficiaries and he cannot therefore position himself as having a superior claim.

30. In any event, the issues of forgeries being raised by the plaintiff do elicit arguments, hence at this interlocutory stage, the court is not inclined to deal with contested issues.

31. As per the scene visit report, it emerged that the respondent has possession of the suit land where he has put up a five storey building. In *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, the court had this to say in relation to a prima facie case;

“All that the court is to see is that on the face of the person applying for an injunction he has a right which has been or is threatened with violation.”

32. It is the considered view of this court that the Applicant has not established a prima facie case and I need not interrogate the other criterias. The application dated June 29, 2022 is hereby dismissed. The costs thereof shall abide the outcome of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Anam for Plaintiff

Court assistant: Eddel

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