



Mbogo & another (Suing as the Personal Representatives of the Estate of Francis Mbogo Ndambirii) v Family Bank Limited & another (Miscellaneous Application E022 of 2024) [2025] KEELC 3692 (KLR) (8 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3692 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
MISCELLANEOUS APPLICATION E022 OF 2024**

JM MUTUNGI, J

MAY 8, 2025

BETWEEN

PETER MWANGI MBOGO & LYDIA WAKUTHII MBOGO (SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF FRANCIS MBOGO NDAMBIRII) APPLICANT

AND

**FAMILY BANK LIMITED 1ST RESPONDENT
VIEWLINE AUCTIONEERS 2ND RESPONDENT**

RULING

1. Before this Court are two applications: The Applicants’ Notice of Motion dated 11th October 2024, seeking injunctive relief against the sale of certain properties, inter alia Ngariama/Ngiriambu/3996 Kutus/Township/112 and Kianyaga Trading Centre/69 (suit land), belonging to the estate of the late Francis Mbogo Ndambiri, and the Respondents’ application dated 28th October 2024, seeking to set aside the injunctive orders earlier granted by this Court.
2. The Applicants, who are the Administrators of the deceased’s estate, claim that the 1st Respondent unlawfully instructed the 2nd Respondent to sell the suit land belonging to the estate. This they aver was done without proper statutory notice being issued and in violation of the ongoing succession process in Kerugoya High Court Succession No. 26 of 2018. They argue that the Respondents’ actions have deprived the estate of the deceased of its right to redemption, which they intend to pursue upon the confirmation of the grant. They further assert that if the auction proceeds, it will adversely affect the estate since the suit land is included in the succession cause as an asset of the deceased estate.
3. The 1st Respondent upon being issued with the Applicants application and ex parte order, filed an application seeking to set aside the ex parte orders granted on 14th October 2024. The 1st Respondent



- asserts that the public auction took place earlier on the same day, and thus the injunctive orders were issued after the event and are therefore moot. The 1st Respondent further argues that all the necessary statutory notices were duly served and that the sale was validly conducted in accordance with the [Land Act](#). The 1st Respondent maintained that the Applicants had not demonstrated any legal or equitable basis for the orders issued ex parte, and that the Court should discharge or vary those orders accordingly.
4. The 1st Respondent also filed a Replying Affidavit dated 14th December 2024, in opposition to the Applicants' Notice of Motion dated 11th October 2024. In the Replying Affidavit, the 1st Respondent stated that it had extended several loan facilities to the deceased borrower, and that the properties in question were charged as collateral for these loans. The 1st Respondent asserted that all necessary statutory notices under the [Land Act](#) were properly served upon the estate administrators. It stated that despite the service of the statutory notices, the Applicants failed to rectify the default. The 1st Respondent maintained that the auction conducted on 14th October 2024, was executed lawfully due to the chargor's default and in accordance with the statutory process. Additionally, it noted that the estate had made no payments or proposals to settle the outstanding debt, which at that time exceeded Kshs 22 million.
 5. In further support of its position, the 1st Respondent filed a Further Affidavit sworn on 19th December 2024. In that Affidavit, the 1st Respondent noted inconsistencies in the Applicants' evidence concerning service of Court orders. It pointed out that the Applicants had sworn two conflicting Affidavits of Service – one dated 22nd October 2024 and another dated 31st October 2024 – each indicating different times of service on the Respondents, casting doubt on the credibility of the Applicants' assertion that the court orders were served before the auction. The 1st Respondent also maintained that the requisite notices had been served in compliance with the law.
 6. The Respondent also filed a Notice of Preliminary Objection on the following grounds:-
 1. That the instant application is a non-starter since the same has not been anchored on any pleading to give it validity contrary to Section 19 of the [Civil Procedure Act](#) and Order 3 Rule 1 and 2 of the Civil Procedure Rules, 2010.
 2. That indeed, the instant application is made in vacuum and is not anchored on a substantive suit seeking permanent injunctive orders to provide a foundation for the grant of the orders sought in the application.
 3. That the application herein is incompetent, misconceived, misinformed, an abuse of the process of this Court and is for dismissal with costs.
 7. By consent, the parties agreed that the Applicant's primary application, dated 11th October 2024 be heard together with the Respondents' application dated 28th October 2024. This Court, on 14th November 2024, directed that both applications be heard by way of written submissions.
 8. The Applicants, in their submissions dated 7th February 2025, argued that the statutory notices relied upon by the 1st Respondent were invalid as they predated their appointment as Administrators of the estate. They also submitted that service of the injunctive orders were effected before the auction. They asserted that their application, although filed as a miscellaneous cause, was in furtherance of protecting estate property and urged the Court to apply Article 159(2)(d) of [the Constitution](#) of Kenya to uphold substantive justice.
 9. The Respondents, in their written submissions dated 25th February 2025, argued that the application was incompetent for not being anchored on a substantive suit. They maintained that the loan amount was unpaid and statutory notices had been properly issued. They further contended that the



Applicants had not satisfied the threshold for grant of injunctive relief and urged for the dismissal of the Applicants application and discharge of the exparte order.

10. I have considered both applications, the responses and the parties' written submissions. The main issues for determination are:

1. Whether the application by the Applicant dated 11th October 2024 was competent?
2. Whether the Applicant is entitled to the injunctive relief sought in the application?

11. It is not disputed that the application by the Applicants herein was filed as a miscellaneous application, without a plaint, originating summons or petition. Order 3 Rule 1 of the Civil Procedure Rules provides that:

“Every suit shall be instituted by presenting a plaint to the Court or in such other manner as may be prescribed”

12. On the basis of jurisprudence, inter alia in the Case of *Proto Energy Limited v Hasbi Energy Limited* [2019] KEHC 12311(KLR) and in the case of *Chacha & Another v Orbit Chemicals Industries Limited & Another* [2024] KEELC 3278 (KLR), the Courts have been emphatic that a Notice of Motion could not be used to originate substantive proceedings, especially where injunctive relief was sought.

13. In *Proto Energy Limited v Hasbi Energy Limited* (supra) the Court stated as follows: -

“Order 3 Rule (i) (ii) of the Civil Procedure Rules provides that every suit shall be instituted by way of a Plaint. As a general rule a suit can only be instituted by way of a Plaint, Petition or an Originating summons. A Notice of Motion is not legally recognized as an originating process. A Notice of Motion can only be filed within a properly instituted suit. The Applicants failed to file any originating process in this matter. I find that the attempt to institute this suit by way of a notice of Motion renders the entire suit defective.”

14. In the Case of *Chacha & Another v Orbit Chemicals Industries Limited & Another* (supra) the court held as follows:-

“My reading of the foregoing provisions connotes that the only person who can apply for or seek to procure an order of temporary injunction is the person who has originated or commenced the suit. In this regard, if the Applicants are keen to procure and obtain any Temporary Relief or intervention in the nature of a temporary injunction, then it behoves the Applicants to file a suit whereby the same is seeking substantive orders against the Respondents. Only then can the Applicants file an application for a temporary injunction pending the determination of the suit. The orders of a temporary injunction or even a permanent injunction can only be anchored on some foundation. For clarity, the foundation would be a substantive suit filed by the Applicants and in respect of which the same has inter-alia sought for orders of permanent injunction or appropriate declaratory reliefs.”



15. In the Case of *Cresta Investments Limited v Gulf African Bank Limited & Another* [2020] KEHC 993 (KLR) Majanja, J held as follows:-

“Moreover, an application for injunction under Order 40 of the Civil Procedure Rules is predicated on a suit filed by the party seeking the injunction. An injunction without a substantive claim is a plea in vain and cannot lie in law or at all.”

16. The Court in the Case of *Mbugua & Another v Mbugua & 4 Others* [2024] KEHC 2403 (KLR) where the Applicants had initiated the suit by way of Miscellaneous application by a Notice of Motion, they cited with approval the Case of *Cresta Investments Ltd Case* (supra) and at paragraph 10 of its Ruling held thus:-

“It is also trite law that an application for injunction can only be issued where there is a substantive suit in place otherwise the injunction will be in vain and it cannot stand in Law.”

17. It is evident by the application the Applicant, is inviting this Court to make what would constitute final orders in so far as this Court is concerned though the reliefs sought are coached as temporary or interim reliefs. The Applicants seek injunctive orders pending the conclusion of Kerugoya HC Succession Cause No. 26 of 2018 where they aver the land the subject matter is included as part of the assets of the deceased estate. This Court has no control or any role in what the High Court does in the succession Cause and if the Succession Cause had such relevance, it is unclear why the present application was not made before that Court. The Succession Cause could even take years to be concluded. In such event would be that the 1st Respondent would remain unsettled?
18. Under Order 40 Rules 1 and 2 of the *Civil Procedure Rules*, temporary injunctions and/or interlocutory orders may only be made in pending suits and there is no provision for such orders to be made in an application not anchored in a suit. The rationale is that the injunction is given as a temporary relief pending the hearing and final determination of the suit to either confirm the injunction and/or have the same discharged. In the instant matter once the application is determined by the Court, there would be nothing left pending for the Court to determine at a later date.
19. The Applicants Miscellaneous Notice of Motion was predicated under Section 1A, 1B, 3A and 63 of the *Civil Procedure Act* and invoked Order 40 Rules 1, 2 and 4 of the *Civil Procedure Rules* which relate to grant of temporary injunctive orders. The Applicant in his apparent response to the Respondents assertion that the Applicant’s application was defective as it was not founded on a substantive suit yet it sought temporary injunctive relief, the Applicant in his submissions argued that Miscellaneous applications ordinarily are filed in Court when the rights of parties are not in dispute. He contended that there was no denial that the estate of Francis Mbogo owed the 1st Respondent money that the estate intended to pay. He argued the debt was listed as a debt in the pending succession cause and the Applicants intended to pay and hence according to the Applicants there was no need of a substantive suit. The Applicants furnished no authority to support their assertion.
20. The *Civil Procedure Act* Section 3 makes it abundantly clear how a suit maybe instituted and provides that “Every suit shall be instituted in such manner as maybe prescribed by Rules.” As a general Rule under the Rules a suit may only be instituted by way of Complaint, Petition or by an Originating Summons. In the instant matter, the Applicants have sought substantive orders against the Respondents which in my view cannot be ventilated in a Miscellaneous application not supported by a substantive suit. It is therefore my finding and determination that the application is incompetent and misconceived. In the circumstances there is no proper suit before me to enable me to consider the merits of the application or



otherwise. I therefore come to the conclusion that the Applicants application (suit) is fatally defective and unsustainable.

21. The upshot is that the application constitutes an abuse of the Court and the same is hereby struck out with costs to the Respondents. The Interim Order issued herein on 11th October 2024 is hereby discharged.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 8TH DAY OF MAY 2025.

J. M. MUTUNGI

ELC - JUDGE

